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THE

WEEKLY REPORTER,

1897-98

(FORTY-SIXTH YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 25TH OF OCTOBER, 1897, TO THE 12TH OF AUGUST, 1898.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. XLVI.

EDITED BY
MARTIN JOSEPH BLAKE,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

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UNIVERSITY OF CALIFORNIA

PREFACE.

In the forty-sixth volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest this year contains, in the same form as last year, a summary of all the cases published from the 25th of October, 1897, to the end of August, 1898, in the WEEKLY REPORTER, and in the Law Reports, the Law Journal Reports, and the Law Times Reports, besides some of those given in the Irish Law Reports. In the body of the Digest, figures following the name of a case denote the page in the WEEKLY REPORTER at which it will be found. Where the name of a case has no figures attached, the case is not reported in this volume of the WEEKLY REPORTER; but the references to the case in other series of Reports will be found in the Tabular Index to the Names of Cases.

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1897—98.

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A TABLE

OF

THE NAMES OF CASES

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WITH REFERENCES TO THE CONTEMPORANEOUS REPORTS.

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NOTE.—In the following Table the cases are arranged in the Alphabetical order of the PLAINTIFFS' names; but for convenience of reference, with respect to cases having double titles—*e.g.*, *In re Smith*, *Brown* v. *Jones*—this Table gives the names of such cases under both titles.

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Whitwham v Piercy. *In re* Piercy	C.A.	503	176	[1898] 1 Ch. 565; 67 L. J. Ch. 297; 78 L. T. 277
——— v Watkin	CH. D. STI. J.	—	26	78 L. T. 188
Wickens, *Ex parte*	C.A.	385	18	[1898] 1 Q. B. 543; 67 L. J. Q. B. 397; 78 L. T. 213
Wilcock, *In re.* Kay v Dewhirst	CH. D. ROM. J.	153	175	[1898] 1 Ch. 95; 67 L. J. Ch. 154; 77 L. T. 679
Williams v Barmouth Council	C A.	—	97	77 L. T. 383
——— v Pinckney	C.A.	—	45	67 L. J. Ch. 34; 77 L. T. 700
Wingfield v Wingfield	P.D. & A D.	—	48	78 L. T. 568
Winstone, In Goods of	P.D. & A D.	—	142	[1898] P. 143; 61 L. J. P. 76; 78 L. T. 535
Woodham v London County Council	Q.B D.	—	115	[1898] 1 Q. B. 863; 67 L. J. Q. B. 707; 78 L. T. 553
Wood v Widnes (Mayor)	Q.B.D.	30	104	
———	C.A.	293	104	[1898] 1 Q. B. 463; 67 L. J. Q. B. 254; 77 L. T. 779
Woods and Lewis's Contract, *In re*	CH. D. ROM. J.	373	171	[1898] 1 Ch. 433; 78 L. T. 250
———	C.A.	643	171	[1898] 2 Ch. 211; 67 L. J. Ch. 475; 78 L. T. 665
Woolf v Hamilton	C.A.	—	63	[1898] 2 Q. B. 337
Wyatt, In Goods of	P.D. & A.D.	425	145	[1898] P. 15; 67 L. J. P. 7; 78 L. T. 80
Wycombe (Mayor) v Thames Conservators	Q.B.D.	—	149	78 L. T. 463
Wynne v Wynne	P D. & A.D.	560	47	[1898] P. 18; 67 L. J. P. 5; 78 L. T. 796
Yates v Armstrong	C.A.	—	124	77 L. T. 267
Young, *Ex parte.* Reg. v Burton	Q.B.D.	127	82	[1897] 2 Q. B. 468
——— v Adams	P.C.	—	121	[1898] A C. 469; 67 L J. P. C. 75; 78 L. T. 506
Zalinoff v Hammond	CH. D. STI. J.	—	8	[1898] 2 Ch. 92; 67 L J. Ch. 370; 78 L. T. 456

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Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — July 28.

J. & P. COATS (LIMITED) *v.* COMMISSIONERS OF INLAND REVENUE. (*a.*)

Inland revenue—Stamp duty—Exchange of shares in company for shares in other company—Conveyance or transfer on sale—Exchange—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 55, *Schedule.*

A transfer of shares in a company in exchange for shares in another company, held to be a conveyance or transfer on sale within the meaning of the Stamp Act, 1891.

Appeal from the judgment of a Divisional Court (Wills and Grantham, JJ.) on a special case stated by the Commissioners of Inland Revenue under section 13 of the Stamp Act, 1891.

The instrument upon which the commissioners were required to express their opinion was a transfer of shares in a limited company in exchange for shares in another limited company.

The circumstances were as follows:

J. & P. Coats (Limited) were a company incorporated for the purpose of carrying on the business of manufacturers of cotton, woollen, and other threads.

James Chadwick & Brother (Limited) were a company incorporated for the purpose of carrying on a similar business.

By an agreement to which the two companies and certain shareholders in the latter company were parties it was agreed that the said shareholders should use their best endeavours to procure all the shareholders in James Chadwick & Brother (Limited) to sell and dispose of their shares to J. & P. Coats (Limited) in exchange for shares in J. & P. Coats (Limited).

In furtherance of this agreement for the amalgamation of the two companies, Alfred Kaye, the proprietor of twenty-five shares in James Chadwick & Brother (Limited), executed the instrument in question, which was as follows: "I, Alfred Kaye, in exchange for eight fully paid ordinary shares of J. & P. Coats (Limited) allotted to me by them, and one fractional ordinary certificate delivered to me, do hereby transfer to the said J. & P. Coats (Limited) twenty-five ordinary shares of £10 each, numbered 42,612 to 42,636, inclusive, of and in the undertaking called James Chadwick & Brother (Limited), to hold unto the said J. & P. Coats (Limited), subject to the several conditions on which I held the same immediately before the execution hereof; and we, the said J. & P. Coats (Limited), do hereby agree to accept and take the said shares subject to the conditions aforesaid."

The question was whether the instrument was chargeable under the Stamp Act, 1891, with *ad valorem* stamp duty as a conveyance or transfer on sale, or whether it was only chargeable with a ten-shilling stamp as an exchange.

By section 55 (1) of the Stamp Act, 1891: "Where the consideration or any part of the consideration for a conveyance on sale consists of any stock or marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or security."

The commissioners were of opinion that the instrument was chargeable with *ad valorem* duty as a conveyance or transfer on sale, and they assessed the duty at £2 15s.

The Divisional Court affirmed the decision of the commissioners.

J. & P. Coats (Limited) appealed.

Cozens-Hardy, Q.C., and *Theobald,* for the appellants.

Sir R. E. Webster, A.G., and *Danckwerts,* for the Crown.

Lord ESHER, M.R.—I am quite clear that the decision in this case must be upheld. We have to deal with a conveyance of shares in a company. We must apply what was said in *John Foster & Son (Limited)* v. *Commissioners of Inland Revenue,* 42 W. R. 259, [1894] 1 Q. B. 516. There Lindley, L.J., said: "What is the consideration? The consideration for the transfer of this property is, I agree, not money, but it is stocks and securities"—that is also the consideration in the present case—"which for this purpose are to be regarded as equivalent to money by reason of section 71 of the Act," or, as we may now read it, by reason of section 55 of the present Act. That is his construction of the Act, that, if you convey property for a consideration and that consideration is shares, it is equivalent to a conveyance of the property for money. Now take the words of Kay, L.J., in that case: "It seems to me clearly to be, under the words of this statute, a conveyance on sale for a consideration, which, if not money, at least is money's worth." Then A. L. Smith, L.J., says: "The term 'conveyance on sale' includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser in consideration of any stock or marketable security." The transaction here can be described in exactly the same language as is used in that case. But somebody has tried artfully to make an instrument which shall not be within the language of that case. The consideration is put first, before the conveyance, and the words "in exchange for" are put instead of "in consideration of." But suppose it read thus: I do hereby transfer to J. & P. Coats twenty-five shares

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

of and in the undertaking called James Chadwick & Brother in consideration of eight fully-paid shares of J. & P. Coats allotted to me—that would be the exact thing described in those judgments. The other case of *Great Western Railway Co.* v. *Commissioners of Inland Revenue*, 42 W. R. 211, [1894] 1 Q. B. 507, is really to the same effect. I think that this is an artful attempt by the use of the words "in exchange for" to escape from the law laid down in those cases. In my opinion, therefore, this appeal must be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. The question is whether this document is a conveyance on sale within the meaning of the Stamp Act. It seems to me to fall entirely within the definition given by Lindley, L.J., in *John Foster & Son (Limited)* v. *Commissioners of Inland Revenue*. We have to consider what the substance of the transaction was, and the mere fact that the words "in exchange" are used cannot, I think, make any difference. In my judgment the substance of this transaction is a conveyance on sale within the meaning of the Act.

RIGBY, L.J.—I am of opinion that this is a case of conveyance on sale. Looking at the document itself, we see that it is undoubtedly a transfer—that is, a conveyance to J. & P. Coats (Limited) of shares in an undertaking called James Chadwick & Brother (Limited). The consideration is certain shares in J. & P. Coats (Limited) and the parties, instead of using the words "in consideration of" have ingeniously used the words "in exchange for." Suppose they had struck out the words "in exchange," and left it simply "for fully-paid shares," I venture to think that no one would have dreamt that it was not a conveyance on sale. But putting in those words cannot make a difference, otherwise it would be possible by the mere introduction of such words to make that an exchange, which without them would not be an exchange. The facts show that this was intended by the shareholders to be, and was in truth, a sale of shares. The point has been decided in other cases, but I should have been disposed to decide it in the same way if those cases had never existed.

Appeal dismissed.

Solicitors for the appellants, *Linklater & Co.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) June 1.

REG. v. THE GENERAL MEDICAL COUNCIL. (*a*.)

Dentist — Registration — Pupil — Declaration—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *ss.* 6, 7, 37.

A person who, at the date of the passing of the Dentists Act, 1878, *was articled as a pupil to a dental practitioner, and whose articles expired in October*, 1878, *held not to be entitled to be registered under section* 37 *of the Act, unless he complied with section* 7 *by sending to the registrar before the* 1*st of August*, 1879, *the information and declaration therein mentioned.*

Judgment of Hawkins *and* Wright, JJ. (45 W. R. 526), *affirmed.*

Appeal from a judgment of a Divisional Court (Hawkins and Wright, JJ.), discharging a rule for a *mandamus* to command the General Medical Council to place the name of Isidore Spero, the prosecutor, upon the Dentists' Register, reported 45 W. R. 526.

The prosecutor was at the date of the passing of the Dentists Act (22nd of July, 1878) articled as a pupil to a dental practitioner who was entitled to be registered under the Act. The prosecutor had paid a premium of £30 in consideration of receiving a complete dental education. His articles commenced in April, 1875, and expired in October, 1878. He did not produce or transmit to the registrar before the 1st of August, 1879, the declaration required by section 7 of the Dentists Act. Some years afterwards he applied to be registered, and the General Medical Council refused to place his name upon the register.

T. W. Chitty (*Bigham, Q.C.*, with him), for the prosecutor, in support of the appeal.

Muir Mackenzie, for the General Medical Council.

Lord ESHER, M.R.—The prosecutor in this case clearly comes within the words of section 37 of the Dentists Act; for he was at the time of the passing of the Act articled as a pupil and he had paid a premium to a dental practitioner entitled to be registered under the Act in consideration of receiving from him a complete dental education, and his articles expired before the 1st of January, 1880. The effect of his being within the section is that he is entitled to be registered under the Act as though he had been in *bonâ fide* practice before the passing of the Act. What would have been his position with regard to registration in that case? He would by section 6 have been a person entitled to be registered, and section 7 says that, where a person who is entitled to be registered does certain things, he shall be registered, subject to this proviso, that a person shall not be registered as having been at the passing of the Act engaged in the practice of dentistry unless he produces or transmits to the registrar before the 1st of August, 1879, information of his name and address, and a declaration signed by him in the form in the schedule to the Act or to the like effect. The prosecutor has never produced or transmitted any declaration at all. He therefore does not come within the first part of section 7 and he cannot be registered at all. The words of the Act are quite plain, and in my opinion the judgment of the Divisional Court is right.

A. L. SMITH, L.J—I also think that this judgment should be affirmed. The prosecutor was articled as a pupil to a dentist, and while the term of his articles was running the Dentists Act, 1878, was passed. By section 37 he became entitled on the expiration of his articles in October, 1878, to be registered under the Act as though he had been in *bonâ fide* practice before the passing of the Act. Section 6 states the qualifications for registration, one of them being that the applicant shall have been at the passing of the Act *bonâ fide* engaged in the practice of dentistry. Then section 7 says that a person shall not be registered as having been at the passing of the Act engaged in the practice of dentistry unless he sends in to the registrar before the 1st of August, 1879, a declaration in the prescribed form or to the like effect. It would have been quite possible for the prosecutor to send in a declaration moulded in the proper form between October, 1878, and the 1st of August, 1879, but he did not do so. The question how we ought to deal with a case in which the articles expired between the 1st of August, 1879, and the 1st of January, 1880, does not arise now. I am of opinion that the appeal should be dismissed.

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

CHITTY, L.J., concurred.

Appeal dismissed.

Solicitor for the prosecutor, *Bertram Jacobs.*

Solicitors for the defendants, *Farrer & Co.*

High Court of Justice.

Chan. Div. North, J. — June 25.

In re TIBBITS' SETTLED ESTATES. (*a.*)

Settled land—Appointment of trustees—Compound settlement—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* 1; *s.* 50, *sub-section* 3—*Settled Land Act,* 1890 (53 & 54 *Vict. c.* 69), *s.* 4, *sub-section* 1.

In order that a valid receipt for the purchase-moneys of land sold by tenants for life under the Settled Land Acts may be obtained, trustees for the purposes of the Acts must be appointed of all the deeds constituting a compound settlement.

Charles Tibbits, by his will in 1828, gave his real estate to his granddaughter, Mary Isabella Tibbits, for life, with remainder to her first and other sons successively in tail male. And he empowered her either before or after her marriage with any husband by deed or will to appoint to such husband for his life, to take effect immediately after her decease, a yearly rent-charge not exceeding £600 to be charged on the devised property with power to limit a term for securing the same. He also empowered her by deed or will to charge the property with portions for younger children to the extent of £10,000, and to limit a term for raising and securing them. The testator died in 1830.

Mary Isabella Tibbits exercised the power of charging the estate with portions for younger children, and limited a term of 1,000 years to trustees to secure the same, upon her first marriage to Viscount Hood, in 1837. Viscount Hood died on the 8th of March, 1846.

By a settlement made in 1849, upon her second marriage (to George Hall), she demised the property to trustees for ninety-nine years, if she should so long live, on trust out of the income to raise an annual sum of £1,500 for her benefit and then to pay the premiums on certain policies on her life which were thereby settled, and also charged the property with a rent-charge of £600 to George Hall. George Hall died on the 10th of September, 1854.

By a settlement made in 1858, upon her third marriage (with J. B. Maunsell), she appointed a rent-charge of £600 to J. B. Maunsell for life, and limited a term of 300 years to trustees to secure the same, and also demised the property to trustees for nine-nine years, if she should so long live, on trust to pay her £1,500 per annum, then to pay the premiums on certain policies, and subject thereto to allow J. B. Maunsell to receive the income during their joint lives. J. B. Maunsell afterwards assumed the name of Tibbits.

In 1866 the entail created by the will was barred, and the property was settled to such uses as J. B. Tibbits, Viscountess Hood, and Viscount Hood (her son by the first marriage) should appoint, and in default to the uses of the will.

By a settlement in 1871, on the marriage of Mary Blanche Hall (a daughter by the second marriage) J. B. Tibbits and Viscountess Hood demised part of the settled property to trustees for 100 years from the date of the marriage, if Viscountess Hood should so long live, upon trust to raise out of the income a yearly sum of £350 during the joint lives of Viscountess Hood and Mary Blanche Hall, and £200 during the joint lives of Viscountess Hood and E. S. Watson, in the event of Mary Blanche Hall leaving the said E. S. Watson and issue her surviving, such sums to be held on the trusts of a settlement of even date.

On the 6th of February, 1894, trustees for the purposes of the Settled Land Act were appointed (on the application of J. B. Tibbits and Viscountess Hood) of the will and of the re-settlement of the 3rd of December, 1882.

The present summons asked that the same trustees might be appointed trustees of all the instruments for the purposes of the Settled Land Act, or that in the alternative it might be declared that the existing trustees were capable of giving a discharge for the purchase-money arising from the exercise of their powers under the Settled Land Acts by the tenants for life.

Errington.—A valid discharge for the purchase-money cannot be given unless trustees are appointed for the purposes of the Act of the will and five deeds, which together constitute a compound settlement. *In re Meade's Settled Estate,* [1897] 1 Ir. Rep. 121, 45 W. R. Dig. 141, is exactly in point as to the charge of portions and the term to secure them. The other four deeds are covered by the Settled Land Act, 1890, s. 4, sub-section 1 (2).

Burnett.—The trustees, without any fresh appointment, can give a valid receipt for the purchase-money.

NORTH, J., followed *In re Meade's Settled Estate* as to the charge of portions, and thought that section 4, sub-section 1, of the Settled Land Act applied to the other four deeds. He accordingly appointed the trustees appointed in 1894 to be trustees for the purposes of the Acts of the compound settlement constituted by the will and the five deeds.

Solicitors, *Baker, Folder, & Upperton.*

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. — July 1, 27.

In re TURNBULL.
TURNBULL *v.* TURNBULL. (*a.*)

Insurance—Life policy—Trust for wife and children—Mode of payment—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Married Women's Property Act,* 1882 (45 & 46 *Vict. c.* 72), *ss.* 11, 22.

Section 11 *of the Married Women's Property Act,* 1882, *does not apply to a policy effected by a husband in favour of his wife and children before the commencement of that Act, even though the husband dies after that Act has come into operation. The moneys payable under a policy effected under the Married Women's Property Act,* 1870, *should, therefore, be paid to a trustee appointed in accordance with section* 10 *of that Act, and not to the legal personal representatives of the husband.*

In re Adams' Policy Trusts, 31 *W. R.* 810, 23 *Ch. D.* 525, *followed.*

In re Soutar's Policy Trusts, 32 *W. R.* 701, 26 *Ch. D.* 236, *discussed.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

This was a summons raising a question as to the mode of payment of policy-money secured by a policy effected by a husband for the benefit of his wife and children under section 10 of the Married Women's Property Act, 1870, where the husband dies after the commencement of the Married Women's Property Act, 1882.

The summons was taken out under the Married Women's Property Acts, 1870, 1882, and the Trustee Act, 1893, and asked (among other things) for a declaration that a policy dated the 10th of October, 1874, and effected by Wm. Turnbull, deceased, with the Prudential Assurance Co. "is now vested in the legal personal representatives of the said Wm. Turnbull, deceased, who are entitled to receive all moneys payable thereunder, and to give to the said assurance company effectual and sufficient discharge therefor, Or in the case that the judge shall be of opinion that the said policy of assurance is not now vested in the said legal personal representatives, with such power to give a discharge for the moneys payable thereunder as aforesaid, then that" under the provisions in the Acts on that behalf trustees might be appointed of the moneys payable under the policy. The policy in question was effected by Wm. Turnbull under the Married Women's Property Act, 1870, s. 10. It was declared to be for the benefit of his then wife Ann Turnbull and his children, and they were to be interested in the moneys thereby secured as therein mentioned. Two of the conditions endorsed on the policy were material. They ran as follow:

"The money payable under the policy shall not be paid before the expiration of three calendar months from the time when the death of the assured shall be proved to the satisfaction of the directors." "It shall be paid to a trustee appointed according to the Act of Parliament 33 & 34 Vict. c. 93, s. 10. It shall be paid to such trustee at the expiration of a month from the time when the satisfactory proof of the appointment shall be proved to the satisfaction of the directors, if the said three calendar months have then expired, otherwise at the end of the last mentioned period; but the directors may, if they think fit, pay to anyone beneficially entitled the amount to which he or she may be entitled."

Section 10 of the Act of 1870 provided that a policy of insurance effected by a married man for the benefit of his wife and children was to be deemed a trust for the benefit of his wife for her separate use and of his children, and so long as any object of the trust remained it was not to be subject to the control of the husband or his creditors or to form part of his estate. The section also provided for the appointment by the court of trustees of the policy moneys, and enacted that the receipt of such trustees should be a good discharge to the office.

Section 22 of the Married Women's Property Act, 1882, repealed the Act of 1870 subject to a proviso that such repeal should not affect any act done or right acquired while the previous Act was in force. Section 11 of the Act of 1882 provided that a policy of assurance effected by a man on his own life, and expressed to be for the benefit of his wife and children, was to create a trust in favour of the objects named, and so long as any object of the trust remained unperformed the moneys payable under the policy were not to form part of the estate. The section then gave the husband power to appoint trustees of the policy, and provided that in default of appointment it should vest in his legal personal representatives. It also provided that the receipt of a trustee duly appointed, or, in default of appointment, of the husband's legal personal representatives should be a good discharge to the office.

William Turnbull died in 1897, and the question now arose as to the mode in which the moneys secured by the policy were payable.

Ingle Joyce, for the summons.—I submit that the Married Women's Property Act, 1870, is only in force as to rights acquired prior to the passing of the Act of 1882, and that the view taken by Chitty, J., in *In re Adams' Policy Trusts*, 31 W. R. 810, 23 Ch. D. 525, is not correct. *In re Soutar's Policy Trusts*, 32 W. R. 701, 26 Ch. D. 236, is in my favour.

He referred to the Married Women's Property Act, 1870, s. 10, and the Married Women's Property Act, 1882, ss. 11 and 22.

P. Gregory, for the Prudential Assurance Co., supported the contention.

Cur. adv. vult.

July 27.—STIRLING, J. [after stating the facts and reading section 10 of the Act of 1870, continued:] Now, the effect of that section appears to be this, that the policy is not under any circumstances to be under the control of the husband or to form part of his estate. According to the language of the Act that extends not only to the policy-moneys but also to the policy itself; and it is plain that the husband has no power to appoint a trustee of the fund, nor, if a trustee were lawfully appointed, any power to assign the benefit thereof vested in such trustee. It is entirely out of his control. The right, therefore, of the *cestui que trustent* under this policy is that they are entirely emancipated from any control over the policy on the part of the husband. [His lordship read the 11th section of the Act of 1882, and continued:] That section is different. The language there is very remarkable. The policy immediately on being effected is to vest in the insured. That appears to me to point very strongly to the future. [His lordship read the 22nd section of the Act, and continued:] Now, looking at the question apart from authority, I come to the conclusion that the 11th section of the Act of 1882 does not apply for two reasons; first, because the language of the Act points to the future and is therefore inapplicable to the case of a policy effected before the commencement of the Act. If it had been intended that its provisions should apply to policies affected previously we should have found, I think, not the language which occurs: "In default of any such appointment of a trustee such policy immediately on its being effected shall vest," &c., but in addition some such words as "shall be deemed to have vested." And, secondly, I also think that to hold that section 11 applies would be to hold that the rights acquired while the Act of 1870 was in force were effected by the Act contrary to the express provisions of section 22.

It seems to me therefore that the *cestui que trustent* under this policy have a right to the exclusion of the husband or any person claiming, through him, from any control over the policy-moneys. I think that the conclusion to which I have arrived is in accordance with the decision of Chitty, J., in *In Re Adams' Policy Trusts*. The learned judge there said: "The policy was effected under section 10 of the Married Women's Property Act, 1870, which so far as the case before me is concerned has not been repealed by the Married Women's Property Act, 1882, and this is an application under that section for the appointment of a trustee." That, I think, was a decision that the provisions of the 10th section of the Act of 1870, had not been repealed, but the matter is made more plain by the report of the case in 48 L. T. Rep., at p. 728. It appears from that report that Chitty, J., inquired, in the course of argument, how the application was made under repealed Acts, and the report continues: "Section 22 of the Act of 1882

provides that the repeal of the Acts of 1870 and 1874 'shall not affect any act done or right acquired while either of such Acts was in force.' The right to have a trustee appointed to receive the policy-moneys was a right acquired under the old Act within the meaning of that section. [CHITTY, J.—Yes, I think that the Act of 1882 is prospective only; "shall vest" must relate to the future.] Perhaps it would be better to amend by striking out the rest of the title and leaving the petition entitled, in the Married Women's Property Act, 1870, only." And Chitty, J., directed that to be done. I have ascertained by an examination of the petition that that was done and that the order was made under the Act of 1870 only. Subsequently the case of *In re Soutar's Policy Trust* came before Pearson, J. Then the case of *In re Adams* was not called to his lordship's attention, but counsel for the petitioners seems to have used the same arguments as were used before Chitty, J., in that case. But Pearson, J., said: "I doubt whether section 10 of the Act of 1870 remains in force for any purpose, because section 11 of the Act of 1882 says that if at the time of the death of the insured there shall be no trustee, a trustee or trustees 'may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same.'" And he directed the petition to be entitled under all the Acts. The result is very curious, because in the case before Chitty, J., his lordship directed the additional titles to be struck out. But I do not read the views of Pearson, J., as amounting to more than a mere expression of doubt, and I do not think it is really a decision on the point. For these reasons I think that a trustee must be appointed under the Act of 1870.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Newlands, Thompson, & Co.*, Newcastle-upon-Tyne; *D. W. Stable.*

Chan. Div.
(Vaughan Williams, J.) } May 14.

In re CORNWALL MINERALS RAILWAY CO. (a.)

Company—Winding up—Arrears of interest—Statutory powers—Specialty debt—Statute of Limitations (21 *Jac.* 1, *c.* 16)—*Real Property Limitation Act*, 1833 (3 *& 4 Will.* 4, *c.* 27), *s.* 3—*Companies Clauses Act*, 1863 (26 *& 27 Vict. c.* 118), *ss.* 22, 23.

Section 27 *of the Companies Clauses Act*, 1863, *provides for the recovery of interest in arrear by action or suit against the company. The issue of warrants for arrears of interest does not operate as a satisfaction of the claims for interest. The cause of action is therefore in respect of a specialty debt, and is not within the Statute of Limitations, but of the Real Property Limitation Act*, 1833, *and the period of limitation is therefore twenty years and not six.*

This was an application on behalf of the liquidator in the voluntary winding up of the company for decision whether certain sums of unpaid interest on debenture stock of the company standing in the name of Thomas Holford at the time when the interest became due should be paid to him or whether his claim was barred by the Statute of Limitations. The Cornwall Minerals Railway Co. was incorporated under a special Act, 36 & 37 Vict. c. clxii., which authorized the company to borrow money to the amount of £250,000 on mortgage or by the issue of debenture stock, subject to the provisions of Part 3 of the Companies Clauses Act, 1863. The company borrowed money on debentures, and in 1883 was in arrear. It then entered into a scheme of arrangement with its creditors whereby it was empowered to convert its old debenture stock into two new ones, A and B. These stocks were to bear interest from the 1st of July, 1883, and the interest on the old stock was to cease from that date. The scheme was confirmed on the 6th of February, 1885, and enrolled on the 11th of March, 1885. Certificates were issued to the persons entitled to B stock. Holford was one of these. On the 6th of June, 1885, he received a deferred warrant under the hand of the secretary of the company for the interest on his B stock from 1st of July, 1883, to the 31st of December, 1884, and in September he received a notice that this interest would be paid on presentation of the deferred warrant at the company's bankers. Holford never presented his warrant, and the question now arose whether he was still entitled to be paid or whether the claim was barred by the Statute of Limitations.

A. Read, for the liquidators and ordinary and preference shareholders.—This is a simple contract debt. The holders of these deferred warrants could have sued on them at any time after they received notice in September, 1885, that these warrants would be paid. The statute, therefore, began to run at that date, and the claim is barred. This is a new point; it was raised in argument but not decided in *In re Severn and Wye and Severn Bridge Railway Co.*, 44 W. R. 347, [1896], 1 Ch. 559. In *Barton* v. *North Staffordshire Railway Co.*, 36 W. R. 754, 38 Ch. D. 458, stock was issued under seal of the company, and this is very different to the case of dividends where dividend warrants issued. This claim for arrears of interest for which dividend warrant is given is a simple contract debt given to shareholders by the company, and on which they could have sued at any time after September, 1885.

E. C. Macnaghten, for Holford.—The scheme provided that interest should run from the 1st of July, 1883. This warrant was for interest from that date to the 31st of December, 1884; but the warrant is no payment of the interest till it is cashed. This stock is under the Companies Clauses Act, 1863, and is under the seal of the company, and is a specialty debt. If the view of Christian, L.J., in *Smith* v. *Cork and Bandon Railway Co.*, Ir. Rep.. 3 Eq. 356, 18 W. R. Ch. Dig. 115, is correct it covers my case. There was no actual covenant to pay him except as implied by certificate: *Cork and Bandon Railway* v. *Goode*, 1 W. R. 410, 13 C. B. 826.

Read replied.

VAUGHAN WILLIAMS, J.—In my opinion these gentlemen are entitled to be paid the interest in respect of the stocks referred to in article 1 of the scheme of the 11th of March, 1885. That article provided for the creation of two kinds of debenture stock—viz., A and B stock, in substitution for the existing mortgage and the debenture stock of the company. The statutory powers under which the stock was issued are contained in the Companies Clauses Act, 1863, ss. 22 and 27. Section 22 enables companies under special Acts incorporating Part 3 to raise money by the creation and issue of debenture stock, and to attach interest to the stock so created payable half-yearly or otherwise, and commencing at once or at a future time or otherwise as the company thinks fit. Section 27 provides for the recovery of interest in arrear by action or suit against the company. It seems to me that this interest was recover-

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

able by action or suit against the company under the latter section.

Then we find on the 6th of June, 1885, a letter was written enclosing to each holder a warrant called a "deferred warrant" for interest from the 1st of July, 1883, to the 31st of December, 1884. I have one of these warrants before me now. It does not seem to me that the issue of those warrants operated as a satisfaction of the claim for interest. If it did it may be that a fresh cause of action was created. In either case the cause of action is in respect of a specialty debt, and is not within the Statute of Limitations but of the Real Property Limitation Act, 1833. In my judgment the issue of the warrant did not operate as a satisfaction of the cause of action, and therefore as the original cause of action was statutory the same period of limitation applies as in the case of a specialty debt, and the period is therefore twenty years and not six years, and the Statute of Limitations does not therefore apply.

I see nothing in the scheme which would lead me to suppose that the issue and acceptance of the debenture warrant operated, as has been suggested, as a simple contract and not as a specialty debt. The respondents are therefore entitled to be paid these sums of interest.

Solicitors, *R. A. Read; Cunliffe & Davenport.*

Q. B. Div.
(Collins and Ridley, JJ.) } July 29.

HATTON (*Appellant*) *v.* TREEBY (*Respondent*). (a.)

Local government—Highway—Bicycle—Bicyclist riding at night without a light—Power of police constable to stop—Local Government Act, 1888 (51 & 52 *Vict.* c. 41), s. 85—*Highway Act*, 1835 (5 & 6 *Will.* 4, c. 50), ss. 78, 79.

Section 85 of the Local Government Act, 1888, which declares bicycles to be carriages within the meaning of the Highway Act, and lays down additional regulations (as to having lighted lamps at night and as to the sounding of a bell) to be observed by the riders of the same, does not include the power given in sections 78 and 79 of the Highway Act, 1835, to apprehend without a warrant; and, therefore, a police-constable who sees a person offending against such regulations by riding at night without a lighted lamp, and who, in order to ascertain the name and address of the offender, who refuses to stop, lays hold of and stops the bicycle, and thereby throws the rider off the bicycle, commits an assault upon such offender.

Case stated by justices of the peace in and for the county of Somerset.

The appellant was summoned to appear at a petty sessions held at Keynsham on the 26th of February, 1897, by the respondent (a police-constable of the county of Somerset) for having committed an offence against section 85 of the Local Government Act, 1888, by riding his bicycle on the highway at Keynsham without carrying a lamp attached so constructed and placed as to exhibit a light in the direction in which he was proceeding.

The charge against the appellant was proved, and he was fined 2s. 6d.

The appellant had also summoned the respondent for that he, the respondent, did unlawfully assault and beat the appellant by pushing him or causing him to fall from his bicycle which he was then and there riding on the highway.

The complaint of the appellant was that the respondent had stopped him by catching hold of his bicycle and thereby causing him to fall off.

It was proved and found as a fact that the respondent was acting as a police officer on duty on the 17th of January, and that about 10 p.m. on that day he saw the appellant approaching him riding a bicycle; he saw that the appellant had no light attached to his bicycle, and he thereupon called the appellant to stop in order that he might ascertain his name and address, and to prevent a continuance of the offence. The appellant and a witness who was riding with him stated that they did not hear the call, and the justices did not find as a fact that they did. The appellant failed to stop, and thereupon the respondent caught hold of the handle-bar of the bicycle, and the appellant fell to the ground, such fall being occasioned by the act of the respondent in catching hold of the bicycle.

The justices found as a fact that the respondent did not know the name or address of the appellant, and they were of opinion that the appellant's name and address could not have been ascertained in any other way than by stopping him, and that in so stopping him the respondent was acting in pursuance of his duty, and that he used no more force than was necessary.

The justices were of opinion that, as the appellant was committing an offence punishable on summary conviction in view of the police-constable (the respondent), he, the respondent, was justified in stopping him and did stop him in order to prevent a continuance of the offence, and for the purpose of ascertaining his name and address; and they dismissed the complaint against the respondent.

The question for the court was whether the justices were right in dismissing the complaint of the appellant.

Section 85 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), provides: (1) "Bicycles, tricycles, velocipedes, and other similar machines are hereby declared to be carriages within the meaning of the Highway Acts; and the following additional regulations shall be observed by any person or persons riding or being upon such carriage:

"(a) During the period between one hour after sunset and one hour before sunrise, every person riding or being upon such carriage shall carry attached to the carriage a lamp, which shall be so constructed and placed as to exhibit a light in the direction in which he is proceeding, and so lighted and kept lighted as to afford adequate means of signalling the approach or position of the carriage;" and the second of such regulations had reference to the sounding of a bell or whistle so as to give warning of the approach of the carriage.

(2) "Any person summarily convicted of offending against the regulations made by this section shall, for each and every such offence, forfeit and pay any sum not exceeding forty shillings."

Section 78 of the Highways Act, 1835 (5 & 6 Will. 4, c. 50), specifies a number of offences by drivers of wagons, carts, or other carriages upon highways, and proceeds: "And every such driver offending in either of the said cases shall and may, by the authority of this Act, with or without any warrant, be apprehended by any person who shall see such offence committed, and shall be conveyed before any justice of the peace to be dealt with according to law"; and section 79 provides: "And whereas offences may be committed against this Act by persons whose names are unknown . . . be it therefore enacted, that it shall be lawful for . . . or any other person witnessing the commission of the offence, without any other authority than

(a.) Reported by Sir SHERSTON BAKER Bart., Barrister-at-Law.

this Act, to seize and detain such unknown person who shall commit any such offence, and take him forthwith before any justice of the peace," &c.

Horace Avory (with him *Kenrick* and *Gregory*), for the appellant.—The respondent was clearly guilty of an assault upon the appellant. Stopping the bicycle and thereby throwing the rider to the ground is an assault, because it is an arrest and unless it can be justified it is an assault. We contend it cannot be justified, either at common law or under any statutory authority. At common law a police-constable can arrest without a warrant a person who has committed a felony or a person whom he reasonably suspects to have committed a felony, or where there is a breach of the peace going on; but generally, and apart from these cases, the power to arrest without warrant must—if it exist at all—be given by statute. As a general rule where an offence, as in the present case, is punishable on summary conviction, there is no power to apprehend unless such power is expressly given by statute, and this has been construed very strictly: *Jones* v. *Owen*, 2 Dow. & Ry. 600; *Codd* v. *Cabe*, 1 Ex. D. 352, 24 W. R. Dig. 86. At common law the respondent cannot justify, and he cannot do so under the statute, because the 85th section of the Act of 1888 merely declares that bicycles are to be carriages within the Highway Acts, but it does not say that for breaches of the regulations contained in that section, the power to apprehend given in sections 78 and 79 of the Act of 1835 are to be included. The statute gives no such power to apprehend, and to incorporate the provisions of the Act of 1835 giving power to arrest would be adding a new clause to the Act. This is a new offence created by the Local Government Act, 1888, and the section which creates the offence provides the remedy to be followed, and in such cases it is a general rule of law that that remedy alone can be followed.

He referred to *Reg.* v. *Eaton*, 59 J. P. 506.

Foote, for the respondent.—This is an offence which from its very nature must be committed when it is dark, and therefore, unless there is a power to stop the offender so as to ascertain his name and address, the provisions of the statute would be wholly useless. I rely on the word "additional" in the 85th section of the Act of 1888. That means that the regulations therein laid down are to be additional to those contained in section 78 of the Act of 1835, and the powers given by those sections are to be deemed incorporated with the regulations in section 85, which are said to be additional. Section 78 of the Act of 1835 gives power to arrest without a warrant persons committing any of the specified offences, and section 79 gives power to seize and detain offenders whose names are unknown. These powers of arrest are applicable to cases coming under section 85 of the Act of 1888. Again, if we look at the intention of the constable, this was not an assault at all, as all the definitions of assault go upon the ground that there must be an intention to do a corporal hurt: Bacon's Abr., title "Assault" and "Battery"; Hawkins' Pleas of the Crown; *Coward* v. *Baddeley*, 7 W. R. 466, 4 H. & N. 478. All that is contended for here is the right to stop, and that is not an assault. To convict a person criminally of an assault it must be shown that there was a criminal intention, which was wanting in this case.

Avory, in reply.

COLLINS, J.—I have come to the conclusion in this case that the argument of the appellant must prevail, as it seems to me that section 85 of the Local Government Act, 1888, in the passage which declares bicycles to be carriages within the meaning of the Highway Acts, does not include the power to apprehend offenders which is given by section 78 of the Highway Act, 1835.

The question arises in this way: The appellant was riding a bicycle on the highway without having a light attached thereto in such manner as is required by section 85, sub-section 1 (*a*), of the Local Government Act, 1888, which provides that during certain hours of the night a person "riding or being upon such carriage shall carry attached to the carriage a lamp, which shall be so constructed and placed as to exhibit a light in the direction in which he is proceeding." No doubt the appellant failed to comply with that provision, and the respondent called upon him to stop, which he did not do, and the respondent then stopped him in the way described in the case.

The question is whether that justified the respondent in stopping him as he did. It was contended for the appellant that the respondent had no authority in law for so stopping and arresting the appellant for this offence, unless such authority was given by statute, and that such arrest of the appellant was in law an assault. I agree with that contention, and in my opinion this was an assault, and I think that a summons for assault was properly taken out if the respondent had no statutory authority for so acting. The question therefore comes to this, whether we can find such statutory authority. Referring to the Highway Act of 1835, section 78 deals with offences committed on the highway by drivers and owners of carts and carriages, and the section proceeds to say, "every driver so offending shall and may, by the authority of this Act, be apprehended, with or without warrant, by any person who shall see such offence committed." Section 79 goes on to say that if the person committing the offence is unknown "any person witnessing the commission of the offence" may, "without any other authority than this Act, seize and detain such unknown person." Those being the provisions of the Highway Act upon this point, we come to section 85 of the Local Government Act, 1888, which says that bicycles are hereby declared to be carriages, and certain additional regulations are introduced. It is contended that this provision incorporates the powers as to arrest contained in section 78 of the Act of 1835, and that is the main point we have to deal with, and in doing so we have to remember that we are dealing with a question which involves the liberty of the subject, as the person was arrested here, and we have, therefore, to construe the Act with the greatest care. It seems to me that we cannot adopt the contention put forward for the respondent. The Legislature thought it necessary for some purposes to say in section 85 that bicycles should be carriages within the meaning of the Highway Acts, and then it proceeds to make special regulations, the first of which is the one I have read and which is now in question.

There is nothing in that section which incorporates the powers of arrest given by the Act of 1835. The section for the first time creates the offence and deals with it, and introduces the section of the Highway Act, 1835, in a matter which does not contain this offence; and this section—the only section which creates the offence—does not give the power to arrest, but provides a special remedy in sub-section 2, which is the remedy to be followed. I think, therefore, the justices were wrong, and that the case must be sent back to them.

RIDLEY, J.—I agree. The words of the later Act are not wide enough to do that which the respondent contends for. To do that would be in effect to add another provision to the statute.

Appeal allowed; case remitted.

Solicitors for the appellant, *Gregory, Hirst, & Sandford*, Bristol.

Solicitors for the respondent, *Ford & Ford*, for *Wansbrough, Dickenson, Robinson, & Tayler*, Bristol.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) — May 10.

In re EVANS.
Ex parte DAVIES. (*a.*)

Bankruptcy—Proof—Interest—Promissory note—Principal and surety—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Schedule II., r.* 20—*Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 5.

A surety to a promissory note who has paid the note at maturity may prove in the bankruptcy of the principal debtor for interest on the sum paid from the date of payment to the date of the receiving order.

Motion by a creditor in the bankruptcy by way of appeal from the rejection of part of his proof by the trustee.

On January 4, 1893, the bankrupt and the creditor signed a joint and several promissory note for £65, payable two months after date. When the note became due in March the bankrupt was unable to meet it, and it was paid by the applicant.

The receiving order was made in November, 1896; and the creditor proved in the bankruptcy for £74 12s. 6d., being £65 for principal money and £9 12s. 6d. for interest thereon from the date of payment to the date of the receiving order.

The trustee admitted the proof for £65, but rejected the claim for interest.

The creditor now moved by way of appeal from that decision.

Arthur Powell, for the creditor.—The creditor is entitled to this interest under the provisions of the Bills of Exchange Act, 1882, s. 57, whereby the holder of a bill can recover from any party liable on the bill the amount of the bill and interest thereon from the date of maturity. The creditor here has paid the bill, and is in the position of holder, and has all the holder's rights. I also rely upon the case of *Petre* v. *Duncombe*, 20 L. J. Q. B. 242, where a surety who had had to pay an annuity was held entitled to recover interest on such payments in an action against the grantor of the annuity on whose behalf he had had to pay.

A. Neilson (*C. C. Scott* with him), for the trustee, relied upon rule 20 of Schedule II. of the Bankruptcy Act, 1883. This sum was not payable by virtue of a written instrument at a certain time, nor was any demand in writing made for it giving the debtor notice that interest would be claimed from the date of such demand; consequently, by reason of rule 20, the creditor cannot prove for interest. The Mercantile Law Amendment Act, 1856, s. 5, does not apply where the principal debtor's estate is being administered in bankruptcy.

Arthur Powell replied.

VAUGHAN WILLIAMS, J.—I think that a surety who pays the amount of a promissory note to the principal creditor, and then sues the principal debtor, is entitled to recover, not only the amount of principal which he has paid, but also interest on the same from the date of payment. This follows, in my opinion, from section 5 of the Mercantile Law Amendment Act, 1856: "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt . . . shall be entitled to stand in the place of the creditor, and to use all the remedies . . . of the creditor in any action or other proceeding at law or in equity in order to obtain from the principal debtor . . . indemnification for the advances made and the loss sustained by the person who shall have so paid such debt." But whether that be so or not, it is impossible in bankruptcy that a proof should depend on the time of payment. What I mean is, that if a surety pays after proof by the principal creditor, his proof would be identical with the proof of the principal creditor, and would include the interest proved for by the principal creditor. It is desirable that he should be placed in a similar position; and if I were to deal with this question as one of discretion, and not of law, I should be disposed to allow him interest.

My attention has been called to rule 20 of Schedule II. of the Bankruptcy Act, 1883, which seems to me merely to embody the provisions of section 28 of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), as to interest. It does not add to or take away anything from the provisions of that section. The result is that no interest can be allowed unless the debt or a sum was payable at a certain time by virtue of a written instrument, or unless a demand for it has been made in writing. Here there was no demand in writing, but it was suggested on behalf of the surety that, by virtue of section 5 of the Mercantile Law Amendment Act, 1856, the right of the surety is a right on an instrument in writing—namely, on the promissory note. I take that view of the matter, and I think that under the circumstances I am entitled to allow the applicant to prove for interest on the sum he paid on the note from the time of such payment to the date of the receiving order.

The appeal must therefore be allowed.

Appeal allowed.

Solicitors for the appellant, *Dunkerton & Son*, for *Owen*, Pwllheli.

Solicitors for the respondent, *Saffery, Huntly, & Son*, for *Davies*, Pwllheli.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., Lindley, Lopes, A. L. Smith, Rigby, and Chitty, L.JJ.) — July 5.

POWELL *v.* KEMPTON PARK RACECOURSE CO. (*a.*)

Gaming—Betting—Reserved enclosure on racecourse—"Place"—"Using a place" for betting purposes—Betting Houses Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The defendants were the owners and occupiers of a racecourse, in which was a reserved enclosure, about a quarter of an acre in area, railed off from the rest of the racecourse. The public were admitted to the enclosure upon payment, and every person so admitted was entitled to walk about and stand in any part of it. Among those

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

who paid for admission were a number of professional betting men, called bookmakers, who were admitted on the same terms as the rest of the public. The bookmakers when in the enclosure called out the odds they were prepared to bet against each horse, and were prepared to bet, and did bet, such odds with anyone who was desirous to bet, either on credit or upon the amount of the stake being deposited with the bookmaker. No bookmaker had any right, interest, or control in or over any part of the enclosure; he did not confine himself to any fixed spot in the enclosure, nor did he use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker was usually to be found in or near the same part of the enclosure. Betting of the same kind had been carried on by bookmakers in similar enclosures since the beginning of the century.

Held (Rigby, L.J., *dissenting*), *that the enclosure was not a "place used" by the bookmakers for the purpose of betting with persons resorting thereto, and that therefore the defendants did not permit the same to be so used within the meaning of section 3 of the Betting Houses Act*, 1853.

Hawke *v.* Dunn, 45 W. R. 359, [1897] 1 *Q. B.* 579, *dissented from.*

Appeal from the judgment of Lord Russell of Killowen, C.J., in favour of the plaintiff, at the trial of the action without a jury.

The action was brought by a shareholder in the defendant company, who were the owners and occupiers of Kempton Park Racecourse, for an injunction to restrain the company opening or keeping a certain enclosure on the racecourse for the purpose of persons using the enclosure for the purpose of betting with persons resorting thereto, or for the purpose of money being received by such persons using the same as deposits made on horse-races, and from otherwise carrying on their business in a manner contrary to the provisions of the Betting Houses Act, 1853, and of their memorandum of association, and from expending moneys of the company in the conduct of such illegal business.

In their defence the company alleged that the enclosure was not a "place" within the meaning of the Betting Houses Act, 1853, and they denied that the enclosure was opened or kept for the purposes alleged, and that the bookmakers who frequented it were "persons using the same" within the meaning of the Act; they admitted that a considerable amount of betting was carried on by bookmakers in the enclosure, but under such circumstances that it was not illegal; and they alleged that at the time of the passing of the Act similar betting had been for many years previously habitually carried on in racecourse enclosures, and had since been carried on until recently without the intervention of the authorities.

The admissions of fact are fully stated in the judgments of Lord Esher, M.R., and the other judges.

Lord Russell of Killowen, C.J., held that the case was not distinguishable from *Hawke* v. *Dunn*, 45 W. R. 359, [1897] 1 Q. B. 579, and gave judgment for the plaintiff.

The defendants appealed.

Sir F. Lockwood, Q.C., and *Joseph Walton, Q.C.* (*C. W. Mathews* and *Stutfield* with them), for the defendants.

Asquith, Q.C., and *H. S. Cautley*, for the plaintiff.

Cur. adv. vult.

July 5, 1897. — The following judgments were read:—

Lord ESHER, M.R.—This is an appeal from a *pro forma* decision of the Lord Chief Justice in a case tried before him without a jury. The action was brought against the Kempton Park Racecourse Co. by an alleged shareholder in it, asking for an injunction against the company to forbid them from continuing knowingly and wilfully to permit certain persons to use a certain enclosure belonging to the company illegally within the meaning of the Betting Houses Act, 1853 (16 & 17 Vict. c. 119). The facts are to be collected from admissions made in writing and verbally at the trial before the Lord Chief Justice, and in certain particulars given between the parties before the trial and used as evidence at the trial, and treated as true in fact and undisputed.

As to these particulars Mr. Asquith, who argued the plaintiff's case as well and earnestly as it could be, said, in opening the case before the Lord Chief Justice: "I am instructed that, after a careful investigation, the facts stated in the particulars may be assumed to be correctly stated." It has been suggested to me that the facts stated in the tenth particular as to the former usage on racecourses is not correct. I think it is impossible for the Court of Appeal properly to adopt any such suggestion, and I venture to say that I am convinced that the statement is absolutely correct. From the sources I have named the facts of the case were ascertained to be as follows: The company are the owners of the Kempton Park Racecourse and of certain stands and enclosures on the racecourse. There are several stands, and each stand has an enclosure in front of it, open to the stand, but railed off from the rest of the racecourse by iron railings. One of these enclosures is known as the Reserved Enclosure. Admission is given to that enclosure and its stand to anyone who applies and makes a payment of £1 for and in respect of such admission. Every person so admitted is entitled to walk and stand in the enclosure and every part of it, and to sit in the stands. No part of the enclosure or stand can be, or is, reserved by anyone for his own use when not actually there. Many persons pay for admission to such enclosure and stand upon such terms, and amongst them are many professional betting men called bookmakers, who pay the same amount as others for their admission and who are admitted on the same terms as the others. The bookmakers when in the enclosure shout out the odds they are prepared to bet against each and every horse in a race, and for a certain time they bet such odds with everyone who desires to bet and who is ready, if required, to deposit with the bookmaker the amount which he bets against the bookmaker, so that the bookmaker, in case the horse against which he bets does not win, keeps the money he took on deposit, but if the horse does win he undertakes to pay the odds he bet against the horse. The bookmaker goes to the races and into the enclosure for the purpose of betting in the way described with everyone who will bet with him. The bookmaker bets as a matter of business. To bet in the way described is his business. The businesses of the various bookmakers are as against each other rival and competing, and the business of each bookmaker is independent of that of every other bookmaker. No one of them assumes to exercise or does exercise any manner of exclusive use of any part of the enclosure, but walks or stands in the enclosure and every part of it in the same manner and on the same terms as every other person in the enclosure. The description above given of the betting carried on at Kempton races is a full and accurate account and description of the betting which is carried on not only at Kempton races in the Reserved Enclosure, but in all racecourse enclosures in which betting takes place. By the tenth particular it was alleged that at the time of the passing of the Betting Houses Act, 1853, such enclosures were in like manner frequented by bookmakers, and

betting transactions of precisely the same character were therein openly and habitually carried on by them, and had been so carried on since the beginning of the present century.

It is upon these facts that the plaintiff on the record asks for the injunction he claims against the defendants. He insists that upon these facts the judge who tried the case ought to have found that the company, the owners of the reserved enclosure, did knowingly and wilfully permit the enclosure to be used by persons other than the company—namely, the bookmakers—in a manner made illegal by the statute 16 & 17 Vict. c. 119. It is impossible to say that the company opened, kept, or used the enclosure for the purpose of the company betting with persons resorting thereto. It is impossible to say that the bookmakers or any bookmaker opened or kept the enclosure at all. The question must be whether the bookmakers or some or one was or were permitted to use and did use the enclosure illegally within the meaning of and therefore contrary to the statute. This proposition raises three questions: First, is such an enclosure such a place as can come within the meaning of the statute? Secondly, if yes, was the enclosure so used by anybody as to make the enclosure or any part of it a place illegally used within the meaning of the statute? Thirdly, if it was used illegally, was such use knowingly and wilfully permitted by the company? If all these three propositions are to be answered against the company, the injunction ought to be granted. If any one of them is answered in favour of the company, the injunction ought not to be granted. In this case it is clear that the company must have known what was habitually done in the enclosure. If, then, what was done was illegal, the third proposition must be answered against the company. If what was done was not illegal, the third proposition must be answered in favour of the company. They cannot be said to have permitted what did not exist. This reduces the discussion to the first and second propositions.

In order to determine the first and second propositions and their importance, it is necessary in the first place to determine what is the true construction of the statute. In order to construe the statute the court is bound to consider the condition of things existing immediately before and at the time of the passing of the statute which are dealt with by the statute. The court is bound in this case to consider, amongst other things, the things stated in the tenth particular. The statute commences with a preamble which, in my opinion, is not repealed: "Whereas a kind of gaming has of late sprung up by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices," &c. The mischief described is not gaming by betting nor gaming by receiving money in advance, but by such betting being brought about or rendered more easy by the opening of places called betting houses or offices. It is not betting, whatever may be its kind, which, independent of locality, is struck at, but it is the providing of a locality for particular kinds of betting which is the mischief to be dealt with. Then the enacting parts of the statute commence thus: "For the suppression thereof be it enacted," &c. "Thereof" does not mean "for the suppression of betting"; it refers to the recited mischief of betting in the new manner of betting—that is, by the manner of opening of places called betting houses or offices, which is a manner which brings about betting or makes it more easy for many to bet. Then the enactment proceeds, and the description of the locality is enlarged beyond the description of it in the preamble. It describes not only a place called a betting house or office, but says, "No house, office, room, or other place shall be opened, kept, or used." Still it is a kind of locality which can be opened, kept, or used. And in section 2 this locality, called a house, room, or place, is one which can be taken and deemed to be a common gaming house, in which persons not gaming may be found; into which the police may force entrance by breaking into it; and in which they may arrest and search persons found in it, though those persons are in it without any purpose of gaming at all. Taking into account the mischief indicated in the preamble, and the description of the locality in the enacting part of the statute, the locality being a necessary part of the offence, and the word "place" being indefinite, and so indefinitely large that it must have some limitation, I can see no reason why the rule of construction as to the interpretation of general words in a statute following particular or more limited words should not be applied. That rule requires an interpretation of the general words limiting them to matters or things of the same kind, as to the mischief being dealt with, as the previous words; but an interpretation as wide as the limitation just described will admit. Applying this rule of interpretation to the present statute, it seems to me that the place must be a place used for betting, which can for the purpose of betting be not unreasonably deemed to be a place of the same kind as a house, office, or room used for the purpose of betting. It need not be a building built like a house, room, or office; it need not be a covered place; it need not be railed off, or boarded off, so as to prevent physical access to it except through a particular part of the railing or boarding; but it must be a defined space, capable from its condition of being used by a person who desires so to use it as if it were his house, room, or office, used by him as such for his betting business. I think that the Reserved Enclosure described and existing in this case was, in consequence of its structural condition, a defined space, capable of being used by a person desirous of so using it as if it were his house, room, or office, used as such for his betting business.

Then arises the second question, whether any person did so use the enclosure as to enable the court to say that he used it as if it were his house, office, or room, used by him as such for his betting business. Now, there are and must be some essential rights of a person using a place as his house, his office, or his room, different from the rights as to it of persons who are not using it as their house, office, or room. He must have some right of user peculiar to himself and exclusive of their rights, if any. A man cannot be said to be using a room as his room or office if, when he comes to it, he finds it full of people, even if they have come to see him or to deal with him, and yet he has no right to say, "Make way or room for me to come into my room or office." A man cannot be said to be using a table as his table if any person who can find room at the table has as much right as he has to come to it and use it in any way such person thinks fit. The user by a person of a place as if it were his room or office necessarily implies some exclusive right in him as against some other persons. He may have partners in the room, or he may use part of the room as his office, whilst others have an independent right to use another part of the room as their office; but the part of the room or place which can be said in any reasonable sense to be used by him as his office must be a part which he claims to use and does use exclusively as his against some people. Applying that rule to the enclosure in question, the facts seem to me to show that no one of the bookmakers described in the evidence does claim to use and does use any part of the enclosure as his part of

it exclusively as against any one. To say that he uses or claims to use the spot of ground on which he is at the moment standing as his room, office, or place exclusively as against all the world, as if it were his room or office, is beyond all reason. So long, therefore, as an enclosure on a racecourse is used only as this enclosure was used, it cannot, in my opinion, be said to be a place used contrary to the prohibitions or subject to the penalties imposed by the statute. If an enclosuse on a racecoure or elsewhere is used only as this enclosure was, no one can properly hold that the enclosure is being illegally used contrary to the statute. As matter of law, there is no legal evidence to bring it within the statute. If any other circumstance is added and relied upon in any other case, the whole case must then be considered subject to the rule I have laid down.

It follows that I do not agree with the interpretation put upon the statute or the application made of it to the facts in the case of *Hawke* v. *Dunn*. It seems to me that the learned judges in that case did not rightly determine what kind of user of the place will bring it within the prohibition of the statute. Their judgment is open to this criticism, that, according to it, if a bookmaker makes what the judgment calls a ready-money bet in a place which it is possible to use so as to make it a prohibited place within the statute, the mere fact of his so doing makes it a prohibited place. And it seems to me that this conclusion is founded on the view mentioned in the judgment that one of the practices deemed to be objectionable was the practice of ready-money betting, wherever such betting was made, without reference to the locality in which such bet was made. With that view I cannot, as I have said, agree. I may repeat that, in my opinion, the mischief aimed at was not gaming by betting nor gaming by receiving money in advance, but by such betting being brought about or rendered more easy by the opening or keeping or using a place for the purpose of making, as a matter of business, such bets.

The other cases which have been cited before us must be considered, if this judgment of mine is correct, as instances to which the rule now laid down must be applied. I cannot undertake by ingenuity to explain any of them away. I think that my present view of the statute is what I substantially stated, though not so elaborately, in *Bows* v. *Fenwick*, 22 W. R. 804, L. R. 9 C. P. 339. Whether the statute was in that case rightly applied to what was called an umbrella may be doubtful. If the thing was really a tent I should think the decision right; if the thing was really an ordinary umbrella I think the decision was wrong. In *Snow* v. *Hill*, 33 W. R. 475, 14 Q. B. D. 588, I think that A. L. Smith, L.J., took the the same view of the statute as I had done in *Bows* v. *Fenwick*, and do now. I think that the case of *Gallaway* v. *Maries*, 30 W. R. 151, 8 Q. B. D. 275—the case of a betting man standing on a stool to bet—was, with deference, wrongly decided. I must say that I think *Eastwood* v. *Miller*, 22 W. R. 799, L. R. 9 Q. B. 440, was wrong. The defendant occupied the field and charged people for entering it. But I cannot see that he used it for the purpose of betting himself at all. I am of opinion that this appeal should be allowed.

LINDLEY, L.J.—This action is brought by a shareholder of a company to restrain it from carrying on its business in a manner alleged by the plaintiff to be illegal—viz., contrary to the provisions of what is now shortly called the Betting Houses Act, 1853 (16 & 17 Vict. c. 119). An injunction had been granted by the Lord Chief Justice on the authority of *Hawke* v. *Dunn*, a considered and unanimous decision of a Divisional Court, and which the Lord Chief Justice considered himself compelled to follow. No objection was taken before him nor before us that the court had no jurisdiction to grant an injunction to restrain the commission of what is a criminal offence if the plaintiff is right. It has been assumed, and perhaps rightly, that the court has jurisdiction to protect the shareholders of a company from a misapplication by the company of its property, although such misapplication may be punishable as a criminal offence. I shall also assume such jurisdiction and leave this point open for decision when raised and insisted on.

The present case was decided on admitted facts, and one of those facts—viz., what was common practice in 1853—is very important. The particulars describe in detail the enclosure complained of and the use made of it, and in the tenth particular it is stated that "at the time of the passing of the Betting Houses Act, 1853, such enclosures were in like manner frequented by bookmakers, and betting transactions of precisely the same character were therein openly and habitually carried on by them and had been so carried on since the beginning of the present century." I presume that this statement could be proved, if not admitted, and that it is admitted simply to save the expense of formal proof.

With these preliminary observations I proceed to consider the statute on which the case really turns. The title, if part of the Act, the preamble, and the first twelve sections are all material; the other sections throw no light on them. An examination of the statute from its commencement to the end of section 12 shows—(1) that the object of the Legislature was, if possible, to suppress a kind of gaming which had then lately (in 1853) sprung up, and which is described in the preamble; (2) that in order to attain this object betting houses and other places are prohibited and are declared to be common nuisances and to be gaming houses within 8 & 9 Vict. c. 109, sections 1 and 2; (3) that penalties are imposed on those who keep such places and those who in any way advertize them (sections 3, 4, and 7); (4) that places suspected of being such as are prohibited may be broken into and persons in them may be arrested, and all documents found therein and relating to racing or betting may be seized (sections 11 and 12). The Act, in short, is aimed at betting houses and at those who keep them; it is not aimed at betting anywhere nor at persons who go to betting houses to bet with those who keep them. The language of sections 1 and 3 in some respects goes much further than that of the preamble, and, when clear and unambiguous, effect must be given to the wider language of the enacting sections. For example, the preamble mentions only "the opening of places called betting houses or offices and the receipt of money in advance by the owners or occupiers of such houses and offices or by other persons acting on their behalf," whilst section 1 plainly prohibits not only the opening but the keeping and using of such places and betting with persons resorting thereto, whether they pay money in advance or not. The language of the prohibition being in these respects plain and unambiguous, it cannot be properly restricted by the language of the preamble. But when it becomes necessary to ascertain what sort of places other than betting houses, rooms, or offices were aimed at, there is much more difficulty. No person can bet except in some place or other, and whenever he bets in any place he uses that place for betting. To construe "other place" or "place" in its ordinary sense of any and every place where persons can or do bet

would involve an absolute prohibition of betting, and would have rendered it quite unnecessary to specify betting houses, rooms, or offices. But the Legislature clearly did not intend to prohibit and have not prohibited all betting, nor even all betting by persons who deposit their stakes. Some limitation must therefore be put on the expression "other place" or "place," and the real difficulty is to discover, first, what sort of place is prohibited; and, secondly, to determine whether the enclosure with which we have to deal on the present occasion is such a place.

The language of the Act itself indicates what sort of place was aimed at by the Legislature, although no definition of the word "place" is to be found in the Act. The places aimed at are described as "places called betting houses or offices" (see the preamble); they are referred to as "house, office, room, or other place" (section 1); as some place to which persons do or can resort for betting (section 1); as some place where the business of betting is carried on (sections 1, 3, and 4); as some place used as a betting house or office, and which can be forcibly entered under a magistrate's warrant, or an order of the Commissioners of Police (sections 11, 12); as some place which can be advertised as a betting place (section 7); as some place which can be reasonably regarded as a common nuisance (section 1); and which it is not absurd to treat as a gaming house within 8 & 9 Vict. c. 109 (section 2). The sort of place aimed at can be gathered, though not very distinctly, from the language then used; and it appears to me reasonably clear that a betting house or office is the type of place which the Legislature had in view; and that no place is within the Act which is so unlike a betting house or office as not to resemble it otherwise than by being a place where some persons sometimes bet or even go to bet. I cannot bring myself to think that a place which is so unlike a betting house or office as an ordinary English racecourse is within the Act at all. This was the view taken by the Scotch court in *Henretty* v. *Hart*, 13 Court of Sess. Cas. (Court of Justiciary), 4th series, 9, cited by Mr. Walton. On the other hand there may be betting houses or offices or other places of that sort on a heath or anywhere where people congregate to see a race or any other exhibition. There may be a betting booth, or enclosure, or ring, or place, not easy to describe by any appropriate name, which sufficiently conforms to the type of a betting house or office as to be hit by the Act; and I am not prepared to say that the cases of *Shaw* v. *Morley*, 16 W. R. 763, L. R. 3 Ex. 137; *Bows* v. *Fenwick*; and *Gallaway* v. *Maries*, were decided on any erroneous principle.

The desk the stool and umbrella, and the wooden box which had to be considered in those cases were held to conform to the type of a betting office and to be prohibited accordingly. These cases seem to me to go to the very verge of the law in the application of the principle on which they were decided. *Doggett* v. *Catterns*, 13 W. R. 160, 17 C. B. N. S. 669, in Ex. Ch., 13 W. R. 390, 19 C. B. N. S. 765, turned on sections 4 and 5 of the statute, and the actual decision does not assist us. There was so much difference of opinion about the meaning of a "place" that the case is a very unreliable guide on that head. *Eastwood* v. *Miller* and *Haigh* v. *Town Council of Sheffield*, 23 W. R. 547, L. R. 10 Q. B. 102, are the only other cases prior to *Hawke* v. *Dunn* which I think it necessary to notice. Both were cases stated by magistrates who found that the grounds then in question were places within the Act. The court, therefore, had only to say whether there was evidence to justify such a finding, and the court decided that there was. The court came to the conclusion that it could not say as a matter of law that the magistrates were wrong. But bearing this in mind *Eastwood* v. *Miller* seems to have been merely a case of betting at a pigeon match, and went too far. In *Haigh* v. *Town Council of Sheffield* there were several circumstances to justify the finding of the magistrates—viz., the connection of the grounds with the house, the desks and stools, and clerks, which, if inside the house instead of outside, would have made the case an easy one. It would have been going too far to say that there was no evidence there to support the finding of the magistrates.

Having pointed out to the best of my ability what sort of betting place is prohibited, I pass on to consider whether the Reserved Enclosure with which we have to deal is the kind of place aimed at by the Legislature. It is a place where any one can go who chooses to pay £1; where bookmakers and others resort for betting purposes; where bets are made for money deposited as well as on credit, and where many persons go without betting or intending to bet, but simply to see the race and their friends and acquaintances. The place does not, in my judgment, come up to the type of a betting house or office such as the Legislature has prohibited. This conclusion is, in my opinion, strengthened by the preamble and by the statement as to the long existence and use of such enclosures as these before 1853. Having regard to this statement and to the preamble and to the ambiguity of the word "place" in the enacting clauses, I am unable to construe the Act as aimed at or as including such an enclosure as this is. This conclusion is further strengthened by the fact that such enclosures so used were not supposed to be illegal until the last two or three years. As regards the case of *Hawke* v. *Dunn*, I am of opinion that it was wrongly decided, and that sufficient attention was not paid to the type of place which the Legislature was aiming at. The decision can, in my judgment, only be supported by treating the Act as an Act for the suppression of betting instead of an Act for the suppression of betting in a particular description of place. The appeal ought to be allowed, and judgment entered for the defendants.

LOPES, L.J.—The plaintiff claims an injunction against the defendant company to restrain them from using or knowingly permitting to be used a certain enclosure at Kempton Park, known as the Reserved Enclosure, for betting purposes, and from carrying on their business in a manner contrary to the provisions of the Betting Houses Act, 1853, and contrary to their memorandum of association, and from expending the assets of the company in and about the conduct of of such illegal business.

The case was heard before the Lord Chief Justice (Lord Russell of Killowen), and he granted the injunction, acting upon the recent decision in *Hawke* v. *Dunn*. The use of the enclosure for the purposes alleged, and the knowledge of the defendants that it was so used was admitted, but it was contended that the enclosure was not a "place" within the meaning of the statute. The enclosure in question is uncovered, and is about a quarter of an acre in extent. The public are admitted indiscriminately to this enclosure on making the required payment; some are professional bookmakers, others go there for the purpose of backing horses with the professional bookmakers, and others do not bet at all. The bookmakers go there as a portion of the general public, and on the same terms in all respects. They have no special rights, privileges, or control beyond those possessed by the general public, who frequent the enclosure. The bookmaker does not confine himself to any fixed spot in the enclosure, nor does he use

anything brought on, or fixed to, the soil, such as a desk, stool, umbrella, or box, but is generally to be found in or near to the same part of the enclosure. No betting lists are exhibited.

Is this enclosure "a place" within the meaning of the Betting Houses Act, 1853?

Betting *per se* is not illegal, and is only made illegal by the Act of 1853 if carried on in prohibited places.

The Act of 1853 is a penal statute, and must be construed strictly; by which I mean that the court, in construing such a statute, must see that the thing charged is an offence within the plain meaning of the words used, so as to carry out the true intention of the Legislature. I accept the statement, and have no doubt of its accuracy—namely, that at the time of the passing of the Act of 1853 betting of the same character as that complained of in this case had for many years previously been habitually and notoriously carried on on racecourses and in enclosures on racecourses, and has since that time been so carried on until quite recently without any suggestion of its being illegal.

I now approach the Act of 1853. It is called an Act for the Suppression of Betting Houses. The title, it is true, is no part of the Act, but, as was said by Jessel, M.R., in *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511, it is always in the roll, and may be looked at in order to remove any ambiguity in the words of the Act. It cannot be used to control the express provisions of an Act, yet, if there be in those provisions anything admitting of a doubt, the title of the Act is a matter proper to be considered in order to assist in the interpretation of the Act, and thereby to give to the doubtful language in the body of the Act a meaning consistent, rather than at variance, with the clear title of the Act.

Applying this rule to the present case, it is not too much to say that it shows the words "place" or "other place" was intended to have a restricted or limited meaning, otherwise the title of the Act might have been "An Act for the Suppression of Betting Places."

Again, look at the preamble. "Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies." The only places mentioned are betting houses or offices, and the demoralization is said to be caused by a kind of gaming "of late sprung up." There is no mention of racecourses, though horse-races are evidently in the mind of the Legislature. Betting on racecourses and in enclosures on racecourses had existed for years, and could not be said to be "a kind of gaming of late sprung up." On the other hand, betting in betting houses was new, and was in 1853 regarded as an evil to be remedied. The rule is that when the words of the enactment are clear the preamble is to be disregarded, but when the words are equivocal effect is to be given to it to the extent that it shows what the Legislature are intending, and if general language is used in the enactment which it is clear must have been intended to have some limitation put upon it, the preamble may be used to indicate to what particular instances the enactment is intended to apply.

It cannot be said that "place" or "other place" was intended to include all places; if so, it would amount to this, that the Act was passed to suppress betting, for no person, so far as I know, can bet without occupying a place, if it is only the place upon which he is at the time standing; and, if he bets, he uses that place for betting.

Both the title of the Act and the preamble of the the Act indicate some limitation to be put on the words "place" or "other place."

But what limitation? That is to be gathered from the words used in the first four sections of the Act, "house, office, room, or other place," and "house, office, room, or place." Surely the doctrine of *noscitur a sociis* or *ejusdem generis* is applicable here. That doctrine may be thus expressed—namely, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. A good illustration of what I mean is the case of *Powell* v. *Boraston*, 13 W. R. 465, 18 C. B. N. S. 175, where it was held that "other building" to qualify for the parliamentary franchise under section 27 of the Reform Act, 1832, must be something substantial and *ejusdem generis* with the preceding words, "house, warehouse, counting-house, shop." I cannot hold that an open racecourse or open enclosure in a racecourse is *ejusdem generis* with house, office, or room—an enclosure where there is no structure of any kind, nothing built upon or fixed into the soil, and no appropriation of any fixed spot, and to which the public are indiscriminately admitted.

But if we further examine the statute we shall find further indications that this statute was never intended to apply to racecourses or enclosures in racecourses used for betting. By section 2 the place struck at is to be deemed to be a common gaming house within the statute 8 & 9 Vict. c. 109, and may be indicted as such. How could an enclosure in a racecourse by any stretch of the imagination be deemed to be a gaming house? Section 7, again, does not seem applicable to an enclosure on a racecourse, but rather to something like a house, office, or room, which can be advertized. Then, again, section 11, authorizing police constables to enter by force "whether by breaking doors or otherwise," and to search and to seize all lists, cards, or other documents relating to betting found in such house or premises, points rather to betting houses or places resembling a house, room, or office rather than an open enclosure in a racecourse. Section 12 is very significant. It enables a commissioner of police to authorize any superintendent of police to enter any house, office, room, or place if he suspects that such office, room, or place is kept or used—as what?—as a betting house or office. How could this enclosure be used as a betting house or office? I cannot think that a place so unlike a house, office, or room as the enclosure can have been contemplated by the Act. If this enclosure is within the Act, why not the whole racecourse? Why not any place where a man stands and bets? So to hold would be equivalent to holding that betting anywhere and everywhere is illegal, and would make it difficult to understand why the Act of Parliament specified any places.

The Act was intended to strike at betting houses or something resembling a betting house where betting was carried on, but was not intended to interfere with betting on racecourses such as had been carried on for very many years before the passing of the Act. If the contention of the respondent is correct, the Act of 1853 should have been entitled an Act, not for the suppression of betting houses, but for the suppression of betting. In my judgment *Hawke* v. *Dunn* was wrongly decided. That case has carried the law further than any of the previous cases and cannot be supported.

I think it unnecessary to refer at any length to the previous authorities. They are all distinguishable from the present case. The cases most relied on by

the respondents were the cases of a desk, stool, umbrella, and box placed upon or fixed in the *locus in quo*. I do not believe that in any of those cases a conviction would have taken place if the desk, stool, umbrella, or box had not been present, and the court had been asked to hold the *locus in quo* prohibited under the Act without such accessories. There is no desk, stool, umbrella, or box in this enclosure, and, as I have said before, nothing that can be said to have any resemblance to a house, room, or office used for betting. Whether the construction of the statute was not somewhat strained in these cases to which I have last referred it is unnecessary for the purposes of this case to decide. In *Galloway* v. *Maries*, which was heard by Grove, J., and myself, and which was the box case, I felt great hesitation in holding that a wooden box such as described could be a place within the meaning of the Act, but considered that I was bound by previous decisions. Each case must depend upon its own particular circumstances, and it is not difficult to imagine something placed on a racecourse which, without being a house, room, or office, would so resemble them and so partake of their nature when used for betting purposes as to come within the meaning of the Act.

I do not attempt to define what is a "place"; all I say is—and that I say without hesitation—that this enclosure is not a place within the meaning of the Act of Parliament.

No point has been made that an injunction will not lie to restrain the commission of a criminal offence. I believe that it will lie when its object is to protect the shareholders of a company from any misapplication of its property, although such application may be punishable as a criminal offence. The appeal will be allowed.

A. L. SMITH, L.J.—This action is brought to review in a court of appeal a judgment given in the Queen's Bench Division in the case of *Hawke* v. *Dunn*, and the real question to be determined, disregarding the form in which the action is brought, is whether a professional bookmaker, who carries on his business in the accustomed manner, moving about an enclosure at a race-meeting betting with those of the public who are desirous of betting with him, sins against the provisions of the Betting Houses Act, 1853, entitled "An Act for the Suppression of Betting Houses."

If such bookmaker sins against the Act, so do all owners of racecourses who knowingly and wilfully permit such bookmaker to carry on his calling in the enclosures thereat, and each, whether bookmaker or owner of a racecourse, is liable to fine or imprisonment with or without hard labour for not exceeding six calendar months, and any person who may happen to be within the enclosure when a professional bookmaker is there plying his calling is liable to be arrested and searched and taken before a justice of the peace.

Although the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), in one particular deals with this Act of 1853, as also does the Short Titles Act of 1892 (55 Vict. c. 10), they are wholly immaterial to the present case, and the Act of 1853 must be construed as if those Acts had not been passed and the question had arisen shortly after the Royal Assent had been given to the Act of 1853 upon the 20th of August of that year.

Before I turn to this Act, upon the true construction of which the decision of this case entirely depends, I must point out that prior to the time of its passing all kinds of betting, whether by professional bookmakers or by the public, were perfectly legal, no matter where the bets were made, or whether carried on upon credit or by the payment of money by way of deposit on bets, which is called "ready-money betting."

In the year 1845 the Legislature had enacted by the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, that all contracts or agreements by way of gaming or wagering should thereafter be null and void and incapable of being enforced in any court of law or equity, so that bets after the passing of the Act of 1845 won upon horse-races or other events became mere debts of honour incapable of being enforced, but the bet itself or betting in general, whether upon credit or by way of ready-money, wherever carried on, was in no way made illegal, the only disability attaching thereto being that money won by betting could not be recovered if the loser did not choose to pay. Thus far the Legislature had gone, and so matters stood at the time when the Act for the suppression of betting houses came to be passed in 1853.

The material facts of this case, which are admitted to be correct, are as follows: At Kempton Park Racecourse there is a piece of ground of about a quarter of an acre in extent, known as the Reserved Enclosure, which is enclosed by iron rails. Persons are admitted to this enclosure on race-days varying in number from 500 to 2,000, amongst whom there are always professional bookmakers varying from 100 to 200 in number. These bookmakers are admitted to this enclosure as members of the general public and upon the same terms, both as to payment and re-admission. These bookmakers have no rights, interest, or control in or over the enclosure, nor have they any special rights or privileges therein. Each bookmaker is accompanied by a clerk. The bookmakers do not confine themselves to any fixed spot in the enclosure, nor do they use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker is usually to be found in or near the same spot of the enclosure. In this enclosure these bookmakers carry on their business in competition with each other, betting with those of the public who are within the enclosure and who may be desirous of betting with them, whether upon credit or by way of ready-money betting. It is also admitted to be the fact that from the commencement of the present century—that is, for at least half a century before the passing of the Betting Houses Act of 1853—and down to the present time enclosures at race-meetings similar to that at Kempton Park have been frequented by bookmakers who have therein openly and habitually carried on betting transactions of precisely the same character as those carried on by the bookmakers in the present case—that is, upon credit and by way of ready money, and that until recently there had been no suggestion that such betting was illegal.

These being the facts of this case, I come to the question—What kind of betting has the Act of 1853 for the first time made illegal? It cannot be said that it has made betting upon horse-racing or other events *per se* illegal, for it has done nothing of the kind, and when I turn to the preamble of the Act, which in my opinion must first be read, there is no obscurity as to what the Legislature aimed at when it passed the Act in question. I pause here to see whether in this part of the Act (which, be it remembered, is the part in which the Legislature has declared the object it had in view in passing the Act) it can be said that the business of a professional bookmaker, when carried on by him in an enclosure at a race-meeting in the ordinary way in the circumstances above stated, was aimed at by the Legislature, and was the mischief it intended to put down. Assuredly it cannot be so said. First of all the

business of a professional bookmaker at a race-meeting, whether on credit or for ready money, was not "a kind of gaming which had of late sprung up." It was as old as the present century. Secondly, bookmakers at a race-meeting ordinarily open no places called betting houses or offices or anything equivalent to them, nor as owners or occupiers of such houses or offices do they receive money in advance. Thirdly, it will be noticed that this then well-known business of a professional bookmaker at race-meetings is not mentioned in this preamble, and it will not be found alluded to throughout the Act.

It appears to me when this part of the Act is considered, that the then well-known business of professional bookmakers at race-meetings was not only not aimed at by the Legislature, but was purposely omitted, for it is inconceivable, if the object of the Legislature was to bring the accustomed business of professional bookmakers at race-meetings within the meshes of the Act, which business for upwards of half a century had been notoriously carried on thereat throughout the kingdom, that the preamble should have confined (and, as I think, studiously confined) the declared object of the Act to a kind of gaming which had then of late sprung up by the opening of places called betting houses or offices, and the receipt of money in advance by the owners and occupiers thereof. Moreover, it appears to me to be out of all reason to think that this Act for the suppression of betting houses and offices was aimed at the owners of racecourses who permitted their enclosures to be used in the then well-known and accustomed manner. Mr. Asquith in a very excellent argument for the plaintiff sought to get rid of the effect of this preamble by making his point upon a later part of the Act, which I have hereafter to deal with.

Now, what effect has the preamble of an Act of Parliament when the Act has to be construed? I do not doubt that if the words of the enacting part of an Act of Parliament are clear and unambiguous they must be construed according to their ordinary meaning, even although by so doing the Act is extended beyond what is shown to be its object by its preamble. But the preamble must always play an important part in the construction of a statute. Dyer, C.J., calls the preamble of a statute "A key to open the minds of the makers of the Act and the mischiefs which they intended to redress": *Stowel* v. *Zouch*, Plowden 353, at p. 369. Lord Coke said, "The rehearsall or preamble of the statute is a good meane to find out the meaning of the statute and as it were a key to open the understanding thereof": Co. Littleton, 79*a*; see also 4 Institutes 330. And Lord Tenterden, when delivering the considered judgment of the Court of King's Bench in *Halton* v. *Cove*, 1 B. & Ad. 538, at p. 558, thus sums up the matter. He says: "It is very true, as was argued for the plaintiff, that the enacting words of an Act of Parliament are not always to be limited by the words of the preamble, but must in many instances go beyond it. Yet, on a sound construction of every Act of Parliament, I take it the words in the enacting part must be confined to that which is the plain object and general intention of the Legislature in passing the Act, and that the preamble affords a good clue to discover what that object was." Mr. Asquith's contention is that the enacting parts of the Act of 1853 are such that they clearly extend the Act beyond the limited objects declared in its preamble, and that bookmakers carrying on their business within enclosures at race-meetings in the ordinary way are within the enacting parts of the Act notwithstanding its preamble, and he must admit, if this be so, that owners of racecourses who knowingly and wilfully permit such business to be carried on within their enclosures are equally liable with the professional bookmaker to fine or imprisonment.

Then what is it that this Act of 1853 in its enacting parts has enacted? By section 1 it enacts—firstly, that, "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, . . . or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto"—that is, betting either on credit or by way of ready money; secondly, "or" (that is, no house, office, room, or other place shall be opened, kept, or used) "for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as and for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race." This in express terms hits what is in the preamble—namely, betting by way of deposit.

This section does go beyond the preamble in this, that it embraces and renders illegal betting by way of credit, which is not within the preamble, as also betting by way of ready money, which is within the preamble, but only, be it observed, if either takes place in the prohibited premises. There are also other words in the enacting section which I will refer to hereafter. These two classes of betting were held to be distinct offences by Lord Coleridge, C.J., and Collins, J., in *Bond* v. *Plumb*, 42 W. R. 222, [1894] 1 Q. B. 169. This first section, thirdly, enacts that "every house, office, room, or other place opened, kept, or used for the purposes aforesaid or any of them"—that is, for betting on credit or by way of ready money, "is hereby declared to be a common nuisance and contrary to law."

Section 2 enacts that "every house, room, office, or place opened, kept, or used for the purposes aforesaid or any of them shall be taken and deemed to be a common gaming house within the meaning of" the Act of 1845 (8 & 9 Vict. c. 109), "to amend the law concerning games and wagers." If a house is proved to be a common gaming house, all persons found therein may be arrested, searched, and brought before a justice of the peace, and every owner or keeper of such house and every person having the care or management thereof is liable to a maximum penalty of £100 or six months' imprisonment with or without hard labour.

Section 11 appears to me to have practically the same effect as section 2, and it gives express power of entry into any house, office, room, or place kept or used as a betting house or office, and, if necessary, to use force for making such entry whether by breaking doors or otherwise, and it also gives express powers of arrest and search therein.

Section 12 gives similar powers to the metropolitan police within the metropolis.

So much for the sections relating to the premises on which betting is prohibited by the Act.

I now come to section 3, which deals with the persons owning, occupying, or using the same. This section makes the doing of three things criminal, and subjects the offender to penalties similar to those above-mentioned. The first offence is for "any person who, being owner or occupier of any house, office, room, or other place, or a person using the same" to open, keep, or use the same for the purpose of betting with persons resorting thereto—this is, upon credit or by way of ready money. The second

able by action or suit against the company under the latter section.

Then we find on the 6th of June, 1885, a letter was written enclosing to each holder a warrant called a "deferred warrant" for interest from the 1st of July, 1883, to the 31st of December, 1884. I have one of these warrants before me now. It does not seem to me that the issue of those warrants operated as a satisfaction of the claim for interest. If it did it may be that a fresh cause of action was created. In either case the cause of action is in respect of a specialty debt, and is not within the Statute of Limitations but of the Real Property Limitation Act, 1833. In my judgment the issue of the warrant did not operate as a satisfaction of the cause of action, and therefore as the original cause of action was statutory the same period of limitation applies as in the case of a specialty debt, and the period is therefore twenty years and not six years, and the Statute of Limitations does not therefore apply.

I see nothing in the scheme which would lead me to suppose that the issue and acceptance of the debenture warrant operated, as has been suggested, as a simple contract and not as a specialty debt. The respondents are therefore entitled to be paid these sums of interest.

Solicitors, *R. A. Read; Cunliffe & Davenport.*

Q. B. Div.
(Collins and Ridley, JJ.) July 29.

HATTON (*Appellant*) *v.* TREEBY (*Respondent*). (*a.*)

Local government—Highway—Bicycle—Bicyclist riding at night without a light—Power of police constable to stop—Local Government Act, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 85—*Highway Act,* 1835 (5 *&* 6 *Will.* 4, *c.* 50), *ss.* 78, 79.

Section 85 *of the Local Government Act,* 1888, *which declares bicycles to be carriages within the meaning of the Highway Act, and lays down additional regulations (as to having lighted lamps at night and as to the sounding of a bell) to be observed by the riders of the same, does not include the power given in sections* 78 *and* 79 *of the Highway Act,* 1835, *to apprehend without a warrant; and, therefore, a police-constable who sees a person offending against such regulations by riding at night without a lighted lamp, and who, in order to ascertain the name and address of the offender, who refuses to stop, lays hold of and stops the bicycle, and thereby throws the rider off the bicycle, commits an assault upon such offender.*

Case stated by justices of the peace in and for the county of Somerset.

The appellant was summoned to appear at a petty sessions held at Keynsham on the 26th of February, 1897, by the respondent (a police-constable of the county of Somerset) for having committed an offence against section 85 of the Local Government Act, 1888, by riding his bicycle on the highway at Keynsham without carrying a lamp attached so constructed and placed as to exhibit a light in the direction in which he was proceeding.

The charge against the appellant was proved, and he was fined 2s. 6d.

The appellant had also summoned the respondent for that he, the respondent, did unlawfully assault and beat the appellant by pushing him or causing him to fall from his bicycle which he was then and there riding on the highway.

(*a.*) Reported by Sir SHERSTON BAKER Bart., Barrister-at-Law.

The complaint of the appellant was that the respondent had stopped him by catching hold of his bicycle and thereby causing him to fall off.

It was proved and found as a fact that the respondent was acting as a police officer on duty on the 17th of January, and that about 10 p.m. on that day he saw the appellant approaching him riding a bicycle; he saw that the appellant had no light attached to his bicycle, and he thereupon called the appellant to stop in order that he might ascertain his name and address, and to prevent a continuance of the offence. The appellant and a witness who was riding with him stated that they did not hear the call, and the justices did not find as a fact that they did. The appellant failed to stop, and thereupon the respondent caught hold of the handle-bar of the bicycle, and the appellant fell to the ground, such fall being occasioned by the act of the respondent in catching hold of the bicycle.

The justices found as a fact that the respondent did not know the name or address of the appellant, and they were of opinion that the appellant's name and address could not have been ascertained in any other way than by stopping him, and that in so stopping him the respondent was acting in pursuance of his duty, and that he used no more force than was necessary.

The justices were of opinion that, as the appellant was committing an offence punishable on summary conviction in view of the police-constable (the respondent), he, the respondent, was justified in stopping him and did stop him in order to prevent a continuance of the offence, and for the purpose of ascertaining his name and address; and they dismissed the complaint against the respondent.

The question for the court was whether the justices were right in dismissing the complaint of the appellant.

Section 85 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), provides: (1) "Bicycles, tricycles, velocipedes, and other similar machines are hereby declared to be carriages within the meaning of the Highway Acts; and the following additional regulations shall be observed by any person or persons riding or being upon such carriage:

"(*a*) During the period between one hour after sunset and one hour before sunrise, every person riding or being upon such carriage shall carry attached to the carriage a lamp, which shall be so constructed and placed as to exhibit a light in the direction in which he is proceeding, and so lighted and kept lighted as to afford adequate means of signalling the approach or position of the carriage;" and the second of such regulations had reference to the sounding of a bell or whistle so as to give warning of the approach of the carriage.

(2) "Any person summarily convicted of offending against the regulations made by this section shall, for each and every such offence, forfeit and pay any sum not exceeding forty shillings."

Section 78 of the Highways Act, 1835 (5 & 6 Will. 4, c. 50), specifies a number of offences by drivers of wagons, carts, or other carriages upon highways, and proceeds: "And every such driver offending in either of the said cases shall and may, by the authority of this Act, with or without any warrant, be apprehended by any person who shall see such offence committed, and shall be conveyed before any justice of the peace to be dealt with according to law"; and section 79 provides: "And whereas offences may be committed against this Act by persons whose names are unknown . . . be it therefore enacted, that it shall be lawful for . . . or any other person witnessing the commission of the offence, without any other authority than

this Act, to seize and detain such unknown person who shall commit any such offence, and take him forthwith before any justice of the peace," &c.

Horace Avory (with him *Kenrick* and *Gregory*), for the appellant.—The respondent was clearly guilty of an assault upon the appellant. Stopping the bicycle and thereby throwing the rider to the ground is an assault, because it is an arrest and unless it can be justified it is an assault. We contend it cannot be justified, either at common law or under any statutory authority. At common law a police-constable can arrest without a warrant a person who has committed a felony or a person whom he reasonably suspects to have committed a felony, or where there is a breach of the peace going on; but generally, and apart from these cases, the power to arrest without warrant must—if it exist at all—be given by statute. As a general rule where an offence, as in the present case, is punishable on summary conviction, there is no power to apprehend unless such power is expressly given by statute, and this has been construed very strictly: *Jones* v. *Owen*, 2 Dow. & Ry. 600; *Codd* v. *Cabe*, 1 Ex. D. 352, 24 W. R. Dig. 86. At common law the respondent cannot justify, and he cannot do so under the statute, because the 85th section of the Act of 1888 merely declares that bicycles are to be carriages within the Highway Acts, but it does not say that for breaches of the regulations contained in that section, the power to apprehend given in sections 78 and 79 of the Act of 1835 are to be included. The statute gives no such power to apprehend, and to incorporate the provisions of the Act of 1835 giving power to arrest would be adding a new clause to the Act. This is a new offence created by the Local Government Act, 1888, and the section which creates the offence provides the remedy to be followed, and in such cases it is a general rule of law that that remedy alone can be followed.

He referred to *Reg.* v. *Eaton*, 59 J. P. 506.

Foote, for the respondent.—This is an offence which from its very nature must be committed when it is dark, and therefore, unless there is a power to stop the offender so as to ascertain his name and address, the provisions of the statute would be wholly useless. I rely on the word "additional" in the 85th section of the Act of 1888. That means that the regulations therein laid down are to be additional to those contained in section 78 of the Act of 1835, and the powers given by those sections are to be deemed incorporated with the regulations in section 85, which are said to be additional. Section 78 of the Act of 1835 gives power to arrest without a warrant persons committing any of the specified offences, and section 79 gives power to seize and detain offenders whose names are unknown. These powers of arrest are applicable to cases coming under section 85 of the Act of 1888. Again, if we look at the intention of the constable, this was not an assault at all, as all the definitions of assault go upon the ground that there must be an intention to do a corporal hurt: Bacon's Abr., title "Assault" and "Battery"; Hawkins' Pleas of the Crown; *Coward* v. *Baddeley*, 7 W. R. 466, 4 H. & N. 478. All that is contended for here is the right to stop, and that is not an assault. To convict a person criminally of an assault it must be shown that there was a criminal intention, which was wanting in this case.

Avory, in reply.

COLLINS, J.—I have come to the conclusion in this case that the argument of the appellant must prevail, as it seems to me that section 85 of the Local Government Act, 1888, in the passage which declares bicycles to be carriages within the meaning of the Highway Acts, does not include the power to apprehend offenders which is given by section 78 of the Highway Act, 1835.

The question arises in this way: The appellant was riding a bicycle on the highway without having a light attached thereto in such manner as is required by section 85, sub-section 1 (*a*), of the Local Government Act, 1888, which provides that during certain hours of the night a person "riding or being upon such carriage shall carry attached to the carriage a lamp, which shall be so constructed and placed as to exhibit a light in the direction in which he is proceeding." No doubt the appellant failed to comply with that provision, and the respondent called upon him to stop, which he did not do, and the respondent then stopped him in the way described in the case.

The question is whether that justified the respondent in stopping him as he did. It was contended for the appellant that the respondent had no authority in law for so stopping and arresting the appellant for this offence, unless such authority was given by statute, and that such arrest of the appellant was in law an assault. I agree with that contention, and in my opinion this was an assault, and I think that a summons for assault was properly taken out if the respondent had no statutory authority for so acting. The question therefore comes to this, whether we can find such statutory authority. Referring to the Highway Act of 1835, section 78 deals with offences committed on the highway by drivers and owners of carts and carriages, and the section proceeds to say, "every driver so offending shall and may, by the authority of this Act, be apprehended, with or without warrant, by any person who shall see such offence committed." Section 79 goes on to say that if the person committing the offence is unknown "any person witnessing the commission of the offence" may, "without any other authority than this Act, seize and detain such unknown person." Those being the provisions of the Highway Act upon this point, we come to section 85 of the Local Government Act, 1888, which says that bicycles are hereby declared to be carriages, and certain additional regulations are introduced. It is contended that this provision incorporates the powers as to arrest contained in section 78 of the Act of 1835, and that is the main point we have to deal with, and in doing so we have to remember that we are dealing with a question which involves the liberty of the subject, as the person was arrested here, and we have, therefore, to construe the Act with the greatest care. It seems to me that we cannot adopt the contention put forward for the respondent. The Legislature thought it necessary for some purposes to say in section 85 that bicycles should be carriages within the meaning of the Highway Acts, and then it proceeds to make special regulations, the first of which is the one I have read and which is now in question.

There is nothing in that section which incorporates the powers of arrest given by the Act of 1835. The section for the first time creates the offence and deals with it, and introduces the section of the Highway Act, 1835, in a matter which does not contain this offence; and this section—the only section which creates the offence—does not give the power to arrest, but provides a special remedy in sub-section 2, which is the remedy to be followed. I think, therefore, the justices were wrong, and that the case must be sent back to them.

RIDLEY, J.—I agree. The words of the later Act are not wide enough to do that which the respondent contends for. To do that would be in effect to add another provision to the statute.

Appeal allowed; case remitted.

Solicitors for the appellant, *Gregory, Hirst, & Sandford*, Bristol.

Solicitors for the respondent, *Ford & Ford*, for *Wansbrough, Dickenson, Robinson, & Tayler*, Bristol.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) — May 10.

In re EVANS.
Ex parte DAVIES. (*a.*)

Bankruptcy—Proof—Interest—Promissory note—Principal and surety—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Schedule II., r.* 20—*Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 5.

A surety to a promissory note who has paid the note at maturity may prove in the bankruptcy of the principal debtor for interest on the sum paid from the date of payment to the date of the receiving order.

Motion by a creditor in the bankruptcy by way of appeal from the rejection of part of his proof by the trustee.

On January 4, 1893, the bankrupt and the creditor signed a joint and several promissory note for £65, payable two months after date. When the note became due in March the bankrupt was unable to meet it, and it was paid by the applicant.

The receiving order was made in November, 1896; and the creditor proved in the bankruptcy for £74 12s. 6d., being £65 for principal money and £9 12s. 6d. for interest thereon from the date of payment to the date of the receiving order.

The trustee admitted the proof for £65, but rejected the claim for interest.

The creditor now moved by way of appeal from that decision.

Arthur Powell, for the creditor.—The creditor is entitled to this interest under the provisions of the Bills of Exchange Act, 1882, s. 57, whereby the holder of a bill can recover from any party liable on the bill the amount of the bill and interest thereon from the date of maturity. The creditor here has paid the bill, and is in the position of holder, and has all the holder's rights. I also rely upon the case of *Petre* v. *Duncombe*, 20 L. J. Q. B. 242, where a surety who had had to pay an annuity was held entitled to recover interest on such payments in an action against the grantor of the annuity on whose behalf he had had to pay.

A. Neilson (*C. C. Scott* with him), for the trustee, relied upon rule 20 of Schedule II. of the Bankruptcy Act, 1883. This sum was not payable by virtue of a written instrument at a certain time, nor was any demand in writing made for it giving the debtor notice that interest would be claimed from the date of such demand; consequently, by reason of rule 20, the creditor cannot prove for interest. The Mercantile Law Amendment Act, 1856, s. 5, does not apply where the principal debtor's estate is being administered in bankruptcy.

Arthur Powell replied.

VAUGHAN WILLIAMS, J.—I think that a surety who pays the amount of a promissory note to the principal creditor, and then sues the principal debtor, is entitled to recover, not only the amount of principal which he has paid, but also interest on the same from the date of payment. This follows, in my opinion, from section 5 of the Mercantile Law Amendment Act, 1856: "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt . . . shall be entitled to stand in the place of the creditor, and to use all the remedies . . . of the creditor in any action or other proceeding at law or in equity in order to obtain from the principal debtor . . . indemnification for the advances made and the loss sustained by the person who shall have so paid such debt." But whether that be so or not, it is impossible in bankruptcy that a proof should depend on the time of payment. What I mean is, that if a surety pays after proof by the principal creditor, his proof would be identical with the proof of the principal creditor, and would include the interest proved for by the principal creditor. It is desirable that he should be placed in a similar position; and if I were to deal with this question as one of discretion, and not of law, I should be disposed to allow him interest.

My attention has been called to rule 20 of Schedule II. of the Bankruptcy Act, 1883, which seems to me merely to embody the provisions of section 28 of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), as to interest. It does not add to or take away anything from the provisions of that section. The result is that no interest can be allowed unless the debt or a sum was payable at a certain time by virtue of a written instrument, or unless a demand for it has been made in writing. Here there was no demand in writing, but it was suggested on behalf of the surety that, by virtue of section 5 of the Mercantile Law Amendment Act, 1856, the right of the surety is a right on an instrument in writing—namely, on the promissory note. I take that view of the matter, and I think that under the circumstances I am entitled to allow the applicant to prove for interest on the sum he paid on the note from the time of such payment to the date of the receiving order.

The appeal must therefore be allowed.

Appeal allowed.

Solicitors for the appellant, *Dunkerton & Son*, for *Owen*, Pwllheli.

Solicitors for the respondent, *Saffery, Huntly, & Son*, for *Davies*, Pwllheli.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., Lindley, Lopes, A. L. Smith, Rigby, and Chitty, L.JJ.) — July 5.

POWELL *v.* KEMPTON PARK RACECOURSE CO. (*a.*)

Gaming—Betting—Reserved enclosure on racecourse—"Place"—"Using a place" for betting purposes—Betting Houses Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The defendants were the owners and occupiers of a racecourse, in which was a reserved enclosure, about a quarter of an acre in area, railed off from the rest of the racecourse. The public were admitted to the enclosure upon payment, and every person so admitted was entitled to walk about and stand in any part of it. Among those

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

who paid for admission were a number of professional betting men, called bookmakers, who were admitted on the same terms as the rest of the public. The bookmakers when in the enclosure called out the odds they were prepared to bet against each horse, and were prepared to bet, and did bet, such odds with anyone who was desirous to bet, either on credit or upon the amount of the stake being deposited with the bookmaker. No bookmaker had any right, interest, or control in or over any part of the enclosure; he did not confine himself to any fixed spot in the enclosure, nor did he use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker was usually to be found in or near the same part of the enclosure. Betting of the same kind had been carried on by bookmakers in similar enclosures since the beginning of the century.

Held (Rigby, L.J., *dissenting*), *that the enclosure was not a "place used" by the bookmakers for the purpose of betting with persons resorting thereto, and that therefore the defendants did not permit the same to be so used within the meaning of section* 3 *of the Betting Houses Act*, 1853.

Hawke *v.* Dunn, 45 W. R. 359, [1897] 1 *Q. B.* 579, *dissented from.*

Appeal from the judgment of Lord Russell of Killowen, C.J., in favour of the plaintiff, at the trial of the action without a jury.

The action was brought by a shareholder in the defendant company, who were the owners and occupiers of Kempton Park Racecourse, for an injunction to restrain the company opening or keeping a certain enclosure on the racecourse for the purpose of persons using the enclosure for the purpose of betting with persons resorting thereto, or for the purpose of money being received by such persons using the same as deposits made on horse-races, and from otherwise carrying on their business in a manner contrary to the provisions of the Betting Houses Act, 1853, and of their memorandum of association, and from expending moneys of the company in the conduct of such illegal business.

In their defence the company alleged that the enclosure was not a "place" within the meaning of the Betting Houses Act, 1853, and they denied that the enclosure was opened or kept for the purposes alleged, and that the bookmakers who frequented it were "persons using the same" within the meaning of the Act; they admitted that a considerable amount of betting was carried on by bookmakers in the enclosure, but under such circumstances that it was not illegal; and they alleged that at the time of the passing of the Act similar betting had been for many years previously habitually carried on in racecourse enclosures, and had since been carried on until recently without the intervention of the authorities.

The admissions of fact are fully stated in the judgments of Lord Esher, M.R., and the other judges.

Lord Russell of Killowen, C.J., held that the case was not distinguishable from *Hawke* v. *Dunn*, 45 W. R. 359, [1897] 1 Q. B. 579, and gave judgment for the plaintiff.

The defendants appealed.

Sir F. Lockwood, Q.C., and *Joseph Walton, Q.C.* (*C. W. Mathews* and *Stutfield* with them), for the defendants.

Asquith, Q.C., and *H. S. Cautley*, for the plaintiff.

Cur. adv. vult.

July 5, 1897. — The following judgments were read:—

Lord ESHER, M.R.—This is an appeal from a *pro forma* decision of the Lord Chief Justice in a case tried before him without a jury. The action was brought against the Kempton Park Racecourse Co. by an alleged shareholder in it, asking for an injunction against the company to forbid them from continuing knowingly and wilfully to permit certain persons to use a certain enclosure belonging to the company illegally within the meaning of the Betting Houses Act, 1853 (16 & 17 Vict. c. 119). The facts are to be collected from admissions made in writing and verbally at the trial before the Lord Chief Justice, and in certain particulars given between the parties before the trial and used as evidence at the trial, and treated as true in fact and undisputed.

As to these particulars Mr. Asquith, who argued the plaintiff's case as well and earnestly as it could be, said, in opening the case before the Lord Chief Justice: "I am instructed that, after a careful investigation, the facts stated in the particulars may be assumed to be correctly stated." It has been suggested to me that the facts stated in the tenth particular as to the former usage on racecourses is not correct. I think it is impossible for the Court of Appeal properly to adopt any such suggestion, and I venture to say that I am convinced that the statement is absolutely correct. From the sources I have named the facts of the case were ascertained to be as follows: The company are the owners of the Kempton Park Racecourse and of certain stands and enclosures on the racecourse. There are several stands, and each stand has an enclosure in front of it, open to the stand, but railed off from the rest of the racecourse by iron railings. One of these enclosures is known as the Reserved Enclosure. Admission is given to that enclosure and its stand to anyone who applies and makes a payment of £1 for and in respect of such admission. Every person so admitted is entitled to walk and stand in the enclosure and every part of it, and to sit in the stands. No part of the enclosure or stand can be, or is, reserved by anyone for his own use when not actually there. Many persons pay for admission to such enclosure and stand upon such terms, and amongst them are many professional betting men called bookmakers, who pay the same amount as others for their admission and who are admitted on the same terms as the others. The bookmakers when in the enclosure shout out the odds they are prepared to bet against each and every horse in a race, and for a certain time they bet such odds with everyone who desires to bet and who is ready, if required, to deposit with the bookmaker the amount which he bets against the bookmaker, so that the bookmaker, in case the horse against which he bets does not win, keeps the money he took on deposit, but if the horse does win he undertakes to pay the odds he bet against the horse. The bookmaker goes to the races and into the enclosure for the purpose of betting in the way described with everyone who will bet with him. The bookmaker bets as a matter of business. To bet in the way described is his business. The businesses of the various bookmakers are as against each other rival and competing, and the business of each bookmaker is independent of that of every other bookmaker. No one of them assumes to exercise or does exercise any manner of exclusive use of any part of the enclosure, but walks or stands in the enclosure and every part of it in the same manner and on the same terms as every other person in the enclosure. The description above given of the betting carried on at Kempton races is a full and accurate account and description of the betting which is carried on not only at Kempton races in the Reserved Enclosure, but in all racecourse enclosures in which betting takes place. By the tenth particular it was alleged that at the time of the passing of the Betting Houses Act, 1853, such enclosures were in like manner frequented by bookmakers, and

betting transactions of precisely the same character were therein openly and habitually carried on by them, and had been so carried on since the beginning of the present century.

It is upon these facts that the plaintiff on the record asks for the injunction he claims against the defendants. He insists that upon these facts the judge who tried the case ought to have found that the company, the owners of the reserved enclosure, did knowingly and wilfully permit the enclosure to be used by persons other than the company—namely, the bookmakers—in a manner made illegal by the statute 16 & 17 Vict. c. 119. It is impossible to say that the company opened, kept, or used the enclosure for the purpose of the company betting with persons resorting thereto. It is impossible to say that the bookmakers or any bookmaker opened or kept the enclosure at all. The question must be whether the bookmakers or some or one was or were permitted to use and did use the enclosure illegally within the meaning of and therefore contrary to the statute. This proposition raises three questions: First, is such an enclosure such a place as can come within the meaning of the statute? Secondly, if yes, was the enclosure so used by anybody as to make the enclosure or any part of it a place illegally used within the meaning of the statute? Thirdly, if it was used illegally, was such use knowingly and wilfully permitted by the company? If all these three propositions are to be answered against the company, the injunction ought to be granted. If any one of them is answered in favour of the company, the injunction ought not to be granted. In this case it is clear that the company must have known what was habitually done in the enclosure. If, then, what was done was illegal, the third proposition must be answered against the company. If what was done was not illegal, the third proposition must be answered in favour of the company. They cannot be said to have permitted what did not exist. This reduces the discussion to the first and second propositions.

In order to determine the first and second propositions and their importance, it is necessary in the first place to determine what is the true construction of the statute. In order to construe the statute the court is bound to consider the condition of things existing immediately before and at the time of the passing of the statute which are dealt with by the statute. The court is bound in this case to consider, amongst other things, the things stated in the tenth particular. The statute commences with a preamble which, in my opinion, is not repealed: "Whereas a kind of gaming has of late sprung up by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices," &c. The mischief described is not gaming by betting nor gaming by receiving money in advance, but by such betting being brought about or rendered more easy by the opening of places called betting houses or offices. It is not betting, whatever may be its kind, which, independent of locality, is struck at, but it is the providing of a locality for particular kinds of betting which is the mischief to be dealt with. Then the enacting parts of the statute commence thus: "For the suppression thereof be it enacted," &c. "Thereof" does not mean "for the suppression of betting"; it refers to the recited mischief of betting in the new manner of betting—that is, by the manner of opening of places called betting houses or offices, which is a manner which brings about betting or makes it more easy for many to bet. Then the enactment proceeds, and the description of the locality is enlarged beyond the description of it in the preamble. It describes not only a place called a betting house or office, but says, "No house, office, room, or other place shall be opened, kept, or used." Still it is a kind of locality which can be opened, kept, or used. And in section 2 this locality, called a house, room, or place, is one which can be taken and deemed to be a common gaming house, in which persons not gaming may be found; into which the police may force entrance by breaking into it; and in which they may arrest and search persons found in it, though those persons are in it without any purpose of gaming at all. Taking into account the mischief indicated in the preamble, and the description of the locality in the enacting part of the statute, the locality being a necessary part of the offence, and the word "place" being indefinite, and so indefinitely large that it must have some limitation, I can see no reason why the rule of construction as to the interpretation of general words in a statute following particular or more limited words should not be applied. That rule requires an interpretation of the general words limiting them to matters or things of the same kind, as to the mischief being dealt with, as the previous words; but an interpretation as wide as the limitation just described will admit. Applying this rule of interpretation to the present statute, it seems to me that the place must be a place used for betting, which can for the purpose of betting be not unreasonably deemed to be a place of the same kind as a house, office, or room used for the purpose of betting. It need not be a building built like a house, room, or office; it need not be a covered place; it need not be railed off, or boarded off, so as to prevent physical access to it except through a particular part of the railing or boarding; but it must be a defined space, capable from its condition of being used by a person who desires so to use it as if it were his house, room, or office, used by him as such for his betting business. I think that the Reserved Enclosure described and existing in this case was, in consequence of its structural condition, a defined space, capable of being used by a person desirous of so using it as if it were his house, room, or office, used as such for his betting business.

Then arises the second question, whether any person did so use the enclosure as to enable the court to say that he used it as if it were his house, office, or room, used by him as such for his betting business. Now, there are and must be some essential rights of a person using a place as his house, his office, or his room, different from the rights as to it of persons who are not using it as their house, office, or room. He must have some right of user peculiar to himself and exclusive of their rights, if any. A man cannot be said to be using a room as his room or office if, when he comes to it, he finds it full of people, even if they have come to see him or to deal with him, and yet he has no right to say, "Make way or room for me to come into my room or office." A man cannot be said to be using a table as his table if any person who can find room at the table has as much right as he has to come to it and use it in any way such person thinks fit. The user by a person of a place as if it were his room or office necessarily implies some exclusive right in him as against some other persons. He may have partners in the room, or he may use part of the room as his office, whilst others have an independent right to use another part of the room as their office; but the part of the room or place which can be said in any reasonable sense to be used by him as his office must be a part which he claims to use and does use exclusively as his against some people. Applying that rule to the enclosure in question, the facts seem to me to show that no one of the bookmakers described in the evidence does claim to use and does use any part of the enclosure as his part of

it exclusively as against any one. To say that he uses or claims to use the spot of ground on which he is at the moment standing as his room, office, or place exclusively as against all the world, as if it were his room or office, is beyond all reason. So long, therefore, as an enclosure on a racecourse is used only as this enclosure was used, it cannot, in my opinion, be said to be a place used contrary to the prohibitions or subject to the penalties imposed by the statute. If an enclosuse on a racecoure or elsewhere is used only as this enclosure was, no one can properly hold that the enclosure is being illegally used contrary to the statute. As matter of law, there is no legal evidence to bring it within the statute. If any other circumstance is added and relied upon in any other case, the whole case must then be considered subject to the rule I have laid down.

It follows that I do not agree with the interpretation put upon the statute or the application made of it to the facts in the case of *Hawke* v. *Dunn*. It seems to me that the learned judges in that case did not rightly determine what kind of user of the place will bring it within the prohibition of the statute. Their judgment is open to this criticism, that, according to it, if a bookmaker makes what the judgment calls a ready-money bet in a place which it is possible to use so as to make it a prohibited place within the statute, the mere fact of his so doing makes it a prohibited place. And it seems to me that this conclusion is founded on the view mentioned in the judgment that one of the practices deemed to be objectionable was the practice of ready-money betting, wherever such betting was made, without reference to the locality in which such bet was made. With that view I cannot, as I have said, agree. I may repeat that, in my opinion, the mischief aimed at was not gaming by betting nor gaming by receiving money in advance, but by such betting being brought about or rendered more easy by the opening or keeping or using a place for the purpose of making, as a matter of business, such bets.

The other cases which have been cited before us must be considered, if this judgment of mine is correct, as instances to which the rule now laid down must be applied. I cannot undertake by ingenuity to explain any of them away. I think that my present view of the statute is what I substantially stated, though not so elaborately, in *Bows* v. *Fenwick*, 22 W. R. 804, L. R. 9 C. P. 339. Whether the statute was in that case rightly applied to what was called an umbrella may be doubtful. If the thing was really a tent I should think the decision right; if the thing was really an ordinary umbrella I think the decision was wrong. In *Snow* v. *Hill*, 33 W. R. 475, 14 Q. B. D. 588, I think that A. L. Smith, L.J., took the the same view of the statute as I had done in *Bows* v. *Fenwick*, and do now. I think that the case of *Gallaway* v. *Maries*, 30 W. R. 151, 8 Q. B. D. 275—the case of a betting man standing on a stool to bet—was, with deference, wrongly decided. I must say that I think *Eastwood* v. *Miller*, 22 W. R. 799, L. R. 9 Q. B. 440, was wrong. The defendant occupied the field and charged people for entering it. But I cannot see that he used it for the purpose of betting himself at all. I am of opinion that this appeal should be allowed.

LINDLEY, L.J.—This action is brought by a shareholder of a company to restrain it from carrying on its business in a manner alleged by the plaintiff to be illegal—viz., contrary to the provisions of what is now shortly called the Betting Houses Act, 1853 (16 & 17 Vict. c. 119). An injunction had been granted by the Lord Chief Justice on the authority of *Hawke* v. *Dunn*, a considered and unanimous decision of a Divisional Court, and which the Lord Chief Justice considered himself compelled to follow. No objection was taken before him nor before us that the court had no jurisdiction to grant an injunction to restrain the commission of what is a criminal offence if the plaintiff is right. It has been assumed, and perhaps rightly, that the court has jurisdiction to protect the shareholders of a company from a misapplication by the company of its property, although such misapplication may be punishable as a criminal offence. I shall also assume such jurisdiction and leave this point open for decision when raised and insisted on.

The present case was decided on admitted facts, and one of those facts—viz., what was common practice in 1853—is very important. The particulars describe in detail the enclosure complained of and the use made of it, and in the tenth particular it is stated that "at the time of the passing of the Betting Houses Act, 1853, such enclosures were in like manner frequented by bookmakers, and betting transactions of precisely the same character were therein openly and habitually carried on by them and had been so carried on since the beginning of the present century." I presume that this statement could be proved, if not admitted, and that it is admitted simply to save the expense of formal proof.

With these preliminary observations I proceed to consider the statute on which the case really turns. The title, if part of the Act, the preamble, and the first twelve sections are all material; the other sections throw no light on them. An examination of the statute from its commencement to the end of section 12 shows—(1) that the object of the Legislature was, if possible, to suppress a kind of gaming which had then lately (in 1853) sprung up, and which is described in the preamble; (2) that in order to attain this object betting houses and other places are prohibited and are declared to be common nuisances and to be gaming houses within 8 & 9 Vict. c. 109, sections 1 and 2; (3) that penalties are imposed on those who keep such places and those who in any way advertize them (sections 3, 4, and 7); (4) that places suspected of being such as are prohibited may be broken into and persons in them may be arrested, and all documents found therein and relating to racing or betting may be seized (sections 11 and 12). The Act, in short, is aimed at betting houses and at those who keep them; it is not aimed at betting anywhere nor at persons who go to betting houses to bet with those who keep them. The language of sections 1 and 3 in some respects goes much further than that of the preamble, and, when clear and unambiguous, effect must be given to the wider language of the enacting sections. For example, the preamble mentions only "the opening of places called betting houses or offices and the receipt of money in advance by the owners or occupiers of such houses and offices or by other persons acting on their behalf," whilst section 1 plainly prohibits not only the opening but the keeping and using of such places and betting with persons resorting thereto, whether they pay money in advance or not. The language of the prohibition being in these respects plain and unambiguous, it cannot be properly restricted by the language of the preamble. But when it becomes necessary to ascertain what sort of places other than betting houses, rooms, or offices were aimed at, there is much more difficulty. No person can bet except in some place or other, and whenever he bets in any place he uses that place for betting. To construe "other place" or "place" in its ordinary sense of any and every place where persons can or do bet

would involve an absolute prohibition of betting, and would have rendered it quite unnecessary to specify betting houses, rooms, or offices. But the Legislature clearly did not intend to prohibit and have not prohibited all betting, nor even all betting by persons who deposit their stakes. Some limitation must therefore be put on the expression "other place" or "place," and the real difficulty is to discover, first, what sort of place is prohibited; and, secondly, to determine whether the enclosure with which we have to deal on the present occasion is such a place.

The language of the Act itself indicates what sort of place was aimed at by the Legislature, although no definition of the word "place" is to be found in the Act. The places aimed at are described as "places called betting houses or offices" (see the preamble); they are referred to as "house, office, room, or other place" (section 1); as some place to which persons do or can resort for betting (section 1); as some place where the business of betting is carried on (sections 1, 3, and 4); as some place used as a betting house or office, and which can be forcibly entered under a magistrate's warrant, or an order of the Commissioners of Police (sections 11, 12); as some place which can be advertised as a betting place (section 7); as some place which can be reasonably regarded as a common nuisance (section 1); and which it is not absurd to treat as a gaming house within 8 & 9 Vict. c. 109 (section 2). The sort of place aimed at can be gathered, though not very distinctly, from the language then used; and it appears to me reasonably clear that a betting house or office is the type of place which the Legislature had in view; and that no place is within the Act which is so unlike a betting house or office as not to resemble it otherwise than by being a place where some persons sometimes bet or even go to bet. I cannot bring myself to think that a place which is so unlike a betting house or office as an ordinary English racecourse is within the Act at all. This was the view taken by the Scotch court in *Henretty* v. *Hart*, 13 Court of Sess. Cas. (Court of Justiciary), 4th series, 9, cited by Mr. Walton. On the other hand there may be betting houses or offices or other places of that sort on a heath or anywhere where people congregate to see a race or any other exhibition. There may be a betting booth, or enclosure, or ring, or place, not easy to describe by any appropriate name, which sufficiently conforms to the type of a betting house or office as to be hit by the Act; and I am not prepared to say that the cases of *Shaw* v. *Morley*, 16 W. R. 763, L. R. 3 Ex. 137; *Bows* v. *Fenwick*; and *Gallaway* v. *Maries*, were decided on any erroneous principle.

The desk the stool and umbrella, and the wooden box which had to be considered in those cases were held to conform to the type of a betting office and to be prohibited accordingly. These cases seem to me to go to the very verge of the law in the application of the principle on which they were decided. *Doggett* v. *Catterns*, 13 W. R. 160, 17 C. B. N. S. 669, in Ex. Ch., 13 W. R. 390, 19 C. B. N. S. 765, turned on sections 4 and 5 of the statute, and the actual decision does not assist us. There was so much difference of opinion about the meaning of a "place" that the case is a very unreliable guide on that head. *Eastwood* v. *Miller* and *Haigh* v. *Town Council of Sheffield*, 23 W. R. 547, L. R. 10 Q. B. 102, are the only other cases prior to *Hawke* v. *Dunn* which I think it necessary to notice. Both were cases stated by magistrates who found that the grounds then in question were places within the Act. The court, therefore, had only to say whether there was evidence to justify such a finding, and the court decided that there was. The court came to the conclusion that it could not say as a matter of law that the magistrates were wrong. But bearing this in mind *Eastwood* v. *Miller* seems to have been merely a case of betting at a pigeon match, and went too far. In *Haigh* v. *Town Council of Sheffield* there were several circumstances to justify the finding of the magistrates—viz., the connection of the grounds with the house, the desks and stools, and clerks, which, if inside the house instead of outside, would have made the case an easy one. It would have been going too far to say that there was no evidence there to support the finding of the magistrates.

Having pointed out to the best of my ability what sort of betting place is prohibited, I pass on to consider whether the Reserved Enclosure with which we have to deal is the kind of place aimed at by the Legislature. It is a place where any one can go who chooses to pay £1; where bookmakers and others resort for betting purposes; where bets are made for money deposited as well as on credit, and where many persons go without betting or intending to bet, but simply to see the race and their friends and acquaintances. The place does not, in my judgment, come up to the type of a betting house or office such as the Legislature has prohibited. This conclusion is, in my opinion, strengthened by the preamble and by the statement as to the long existence and use of such enclosures as these before 1853. Having regard to this statement and to the preamble and to the ambiguity of the word "place" in the enacting clauses, I am unable to construe the Act as aimed at or as including such an enclosure as this is. This conclusion is further strengthened by the fact that such enclosures so used were not supposed to be illegal until the last two or three years. As regards the case of *Hawke* v. *Dunn*, I am of opinion that it was wrongly decided, and that sufficient attention was not paid to the type of place which the Legislature was aiming at. The decision can, in my judgment, only be supported by treating the Act as an Act for the suppression of betting instead of an Act for the suppression of betting in a particular description of place. The appeal ought to be allowed, and judgment entered for the defendants.

LOPES, L.J.—The plaintiff claims an injunction against the defendant company to restrain them from using or knowingly permitting to be used a certain enclosure at Kempton Park, known as the Reserved Enclosure, for betting purposes, and from carrying on their business in a manner contrary to the provisions of the Betting Houses Act, 1853, and contrary to their memorandum of association, and from expending the assets of the company in and about the conduct of of such illegal business.

The case was heard before the Lord Chief Justice (Lord Russell of Killowen), and he granted the injunction, acting upon the recent decision in *Hawke* v. *Dunn*. The use of the enclosure for the purposes alleged, and the knowledge of the defendants that it was so used was admitted, but it was contended that the enclosure was not a "place" within the meaning of the statute. The enclosure in question is uncovered, and is about a quarter of an acre in extent. The public are admitted indiscriminately to this enclosure on making the required payment; some are professional bookmakers, others go there for the purpose of backing horses with the professional bookmakers, and others do not bet at all. The bookmakers go there as a portion of the general public, and on the same terms in all respects. They have no special rights, privileges, or control beyond those possessed by the general public, who frequent the enclosure. The bookmaker does not confine himself to any fixed spot in the enclosure, nor does he use

anything brought on, or fixed to, the soil, such as a desk, stool, umbrella, or box, but is generally to be found in or near to the same part of the enclosure. No betting lists are exhibited.

Is this enclosure "a place" within the meaning of the Betting Houses Act, 1853?

Betting *per se* is not illegal, and is only made illegal by the Act of 1853 if carried on in prohibited places.

The Act of 1853 is a penal statute, and must be construed strictly; by which I mean that the court, in construing such a statute, must see that the thing charged is an offence within the plain meaning of the words used, so as to carry out the true intention of the Legislature. I accept the statement, and have no doubt of its accuracy—namely, that at the time of the passing of the Act of 1853 betting of the same character as that complained of in this case had for many years previously been habitually and notoriously carried on on racecourses and in enclosures on racecourses, and has since that time been so carried on until quite recently without any suggestion of its being illegal.

I now approach the Act of 1853. It is called an Act for the Suppression of Betting Houses. The title, it is true, is no part of the Act, but, as was said by Jessel, M.R., in *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511, it is always in the roll, and may be looked at in order to remove any ambiguity in the words of the Act. It cannot be used to control the express provisions of an Act, yet, if there be in those provisions anything admitting of a doubt, the title of the Act is a matter proper to be considered in order to assist in the interpretation of the Act, and thereby to give to the doubtful language in the body of the Act a meaning consistent, rather than at variance, with the clear title of the Act.

Applying this rule to the present case, it is not too much to say that it shows the words "place" or "other place" was intended to have a restricted or limited meaning, otherwise the title of the Act might have been "An Act for the Suppression of Betting Places."

Again, look at the preamble. "Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies." The only places mentioned are betting houses or offices, and the demoralization is said to be caused by a kind of gaming "of late sprung up." There is no mention of racecourses, though horse-races are evidently in the mind of the Legislature. Betting on racecourses and in enclosures on racecourses had existed for years, and could not be said to be "a kind of gaming of late sprung up." On the other hand, betting in betting houses was new, and was in 1853 regarded as an evil to be remedied. The rule is that when the words of the enactment are clear the preamble is to be disregarded, but when the words are equivocal effect is to be given to it to the extent that it shows what the Legislature are intending, and if general language is used in the enactment which it is clear must have been intended to have some limitation put upon it, the preamble may be used to indicate to what particular instances the enactment is intended to apply.

It cannot be said that "place" or "other place" was intended to include all places; if so, it would amount to this, that the Act was passed to suppress betting, for no person, so far as I know, can bet without occupying a place, if it is only the place upon which he is at the time standing; and, if he bets, he uses that place for betting.

Both the title of the Act and the preamble of the the Act indicate some limitation to be put on the words "place" or "other place."

But what limitation? That is to be gathered from the words used in the first four sections of the Act, "house, office, room, or other place," and "house, office, room, or place." Surely the doctrine of *noscitur a sociis* or *ejusdem generis* is applicable here. That doctrine may be thus expressed—namely, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. A good illustration of what I mean is the case of *Powell* v. *Boraston*, 13 W. R. 465, 18 C. B. N. S. 175, where it was held that "other building" to qualify for the parliamentary franchise under section 27 of the Reform Act, 1832, must be something substantial and *ejusdem generis* with the preceding words, "house, warehouse, counting-house, shop." I cannot hold that an open racecourse or open enclosure in a racecourse is *ejusdem generis* with house, office, or room—an enclosure where there is no structure of any kind, nothing built upon or fixed into the soil, and no appropriation of any fixed spot, and to which the public are indiscriminately admitted.

But if we further examine the statute we shall find further indications that this statute was never intended to apply to racecourses or enclosures in racecourses used for betting. By section 2 the place struck at is to be deemed to be a common gaming house within the statute 8 & 9 Vict. c. 109, and may be indicted as such. How could an enclosure in a racecourse by any stretch of the imagination be deemed to be a gaming house? Section 7, again, does not seem applicable to an enclosure on a racecourse, but rather to something like a house, office, or room, which can be advertized. Then, again, section 11, authorizing police constables to enter by force "whether by breaking doors or otherwise," and to search and to seize all lists, cards, or other documents relating to betting found in such house or premises, points rather to betting houses or places resembling a house, room, or office rather than an open enclosure in a racecourse. Section 12 is very significant. It enables a commissioner of police to authorize any superintendent of police to enter any house, office, room, or place if he suspects that such office, room, or place is kept or used—as what?—as a betting house or office. How could this enclosure be used as a betting house or office? I cannot think that a place so unlike a house, office, or room as the enclosure can have been contemplated by the Act. If this enclosure is within the Act, why not the whole racecourse? Why not any place where a man stands and bets? So to hold would be equivalent to holding that betting anywhere and everywhere is illegal, and would make it difficult to understand why the Act of Parliament specified any places.

The Act was intended to strike at betting houses or something resembling a betting house where betting was carried on, but was not intended to interfere with betting on racecourses such as had been carried on for very many years before the passing of the Act. If the contention of the respondent is correct, the Act of 1853 should have been entitled an Act, not for the suppression of betting houses, but for the suppression of betting. In my judgment *Hawke* v. *Dunn* was wrongly decided. That case has carried the law further than any of the previous cases and cannot be supported.

I think it unnecessary to refer at any length to the previous authorities. They are all distinguishable from the present case. The cases most relied on by

the respondents were the cases of a desk, stool, umbrella, and box placed upon or fixed in the *locus in quo*. I do not believe that in any of those cases a conviction would have taken place if the desk, stool, umbrella, or box had not been present, and the court had been asked to hold the *locus in quo* prohibited under the Act without such accessories. There is no desk, stool, umbrella, or box in this enclosure, and, as I have said before, nothing that can be said to have any resemblance to a house, room, or office used for betting. Whether the construction of the statute was not somewhat strained in these cases to which I have last referred it is unnecessary for the purposes of this case to decide. In *Galláway* v. *Maries*, which was heard by Grove, J., and myself, and which was the box case, I felt great hesitation in holding that a wooden box such as described could be a place within the meaning of the Act, but considered that I was bound by previous decisions. Each case must depend upon its own particular circumstances, and it is not difficult to imagine something placed on a racecourse which, without being a house, room, or office, would so resemble them and so partake of their nature when used for betting purposes as to come within the meaning of the Act.

I do not attempt to define what is a "place"; all I say is—and that I say without hesitation—that this enclosure is not a place within the meaning of the Act of Parliament.

No point has been made that an injunction will not lie to restrain the commission of a criminal offence. I believe that it will lie when its object is to protect the shareholders of a company from any misapplication of its property, although such application may be punishable as a criminal offence. The appeal will be allowed.

A. L. SMITH, L.J.—This action is brought to review in a court of appeal a judgment given in the Queen's Bench Division in the case of *Hawke* v. *Dunn*, and the real question to be determined, disregarding the form in which the action is brought, is whether a professional bookmaker, who carries on his business in the accustomed manner, moving about an enclosure at a race-meeting betting with those of the public who are desirous of betting with him, sins against the provisions of the Betting Houses Act, 1853, entitled "An Act for the Suppression of Betting Houses."

If such bookmaker sins against the Act, so do all owners of racecourses who knowingly and wilfully permit such bookmaker to carry on his calling in the enclosures thereat, and each, whether bookmaker or owner of a racecourse, is liable to fine or imprisonment with or without hard labour for not exceeding six calendar months, and any person who may happen to be within the enclosure when a professional bookmaker is there plying his calling is liable to be arrested and searched and taken before a justice of the peace.

Although the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), in one particular deals with this Act of 1853, as also does the Short Titles Act of 1892 (55 Vict. c. 10), they are wholly immaterial to the present case, and the Act of 1853 must be construed as if those Acts had not been passed and the question had arisen shortly after the Royal Assent had been given to the Act of 1853 upon the 20th of August of that year.

Before I turn to this Act, upon the true construction of which the decision of this case entirely depends, I must point out that prior to the time of its passing all kinds of betting, whether by professional bookmakers or by the public, were perfectly legal, no matter where the bets were made, or whether carried on upon credit or by the payment of money by way of deposit on bets, which is called "ready-money betting."

In the year 1845 the Legislature had enacted by the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, that all contracts or agreements by way of gaming or wagering should thereafter be null and void and incapable of being enforced in any court of law or equity, so that bets after the passing of the Act of 1845 won upon horse-races or other events became mere debts of honour incapable of being enforced, but the bet itself or betting in general, whether upon credit or by way of ready-money, wherever carried on, was in no way made illegal, the only disability attaching thereto being that money won by betting could not be recovered if the loser did not choose to pay. Thus far the Legislature had gone, and so matters stood at the time when the Act for the suppression of betting houses came to be passed in 1853.

The material facts of this case, which are admitted to be correct, are as follows: At Kempton Park Racecourse there is a piece of ground of about a quarter of an acre in extent, known as the Reserved Enclosure, which is enclosed by iron rails. Persons are admitted to this enclosure on race-days varying in number from 500 to 2,000, amongst whom there are always professional bookmakers varying from 100 to 200 in number. These bookmakers are admitted to this enclosure as members of the general public and upon the same terms, both as to payment and re-admission. These bookmakers have no rights, interest, or control in or over the enclosure, nor have they any special rights or privileges therein. Each bookmaker is accompanied by a clerk. The bookmakers do not confine themselves to any fixed spot in the enclosure, nor do they use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker is usually to be found in or near the same spot of the enclosure. In this enclosure these bookmakers carry on their business in competition with each other, betting with those of the public who are within the enclosure and who may be desirous of betting with them, whether upon credit or by way of ready-money betting. It is also admitted to be the fact that from the commencement of the present century—that is, for at least half a century before the passing of the Betting Houses Act of 1853—and down to the present time enclosures at race-meetings similar to that at Kempton Park have been frequented by bookmakers who have therein openly and habitually carried on betting transactions of precisely the same character as those carried on by the bookmakers in the present case—that is, upon credit and by way of ready money, and that until recently there had been no suggestion that such betting was illegal.

These being the facts of this case, I come to the question—What kind of betting has the Act of 1853 for the first time made illegal? It cannot be said that it has made betting upon horse-racing or other events *per se* illegal, for it has done nothing of the kind, and when I turn to the preamble of the Act, which in my opinion must first be read, there is no obscurity as to what the Legislature aimed at when it passed the Act in question. I pause here to see whether in this part of the Act (which, be it remembered, is the part in which the Legislature has declared the object it had in view in passing the Act) it can be said that the business of a professional bookmaker, when carried on by him in an enclosure at a race-meeting in the ordinary way in the circumstances above stated, was aimed at by the Legislature, and was the mischief it intended to put down. Assuredly it cannot be so said. First of all the

business of a professional bookmaker at a race-meeting, whether on credit or for ready money, was not "a kind of gaming which had of late sprung up." It was as old as the present century. Secondly, bookmakers at a race-meeting ordinarily open no places called betting houses or offices or anything equivalent to them, nor as owners or occupiers of such houses or offices do they receive money in advance. Thirdly, it will be noticed that this then well-known business of a professional bookmaker at race-meetings is not mentioned in this preamble, and it will not be found alluded to throughout the Act.

It appears to me when this part of the Act is considered, that the then well-known business of professional bookmakers at race-meetings was not only not aimed at by the Legislature, but was purposely omitted, for it is inconceivable, if the object of the Legislature was to bring the accustomed business of professional bookmakers at race-meetings within the meshes of the Act, which business for upwards of half a century had been notoriously carried on thereat throughout the kingdom, that the preamble should have confined (and, as I think, studiously confined) the declared object of the Act to a kind of gaming which had then of late sprung up by the opening of places called betting houses or offices, and the receipt of money in advance by the owners and occupiers thereof. Moreover, it appears to me to be out of all reason to think that this Act for the suppression of betting houses and offices was aimed at the owners of racecourses who permitted their enclosures to be used in the then well-known and accustomed manner. Mr. Asquith in a very excellent argument for the plaintiff sought to get rid of the effect of this preamble by making his point upon a later part of the Act, which I have hereafter to deal with.

Now, what effect has the preamble of an Act of Parliament when the Act has to be construed? I do not doubt that if the words of the enacting part of an Act of Parliament are clear and unambiguous they must be construed according to their ordinary meaning, even although by so doing the Act is extended beyond what is shown to be its object by its preamble. But the preamble must always play an important part in the construction of a statute. Dyer, C.J., calls the preamble of a statute "A key to open the minds of the makers of the Act and the mischiefs which they intended to redress": *Stowel* v. *Zouch*, Plowden 353, at p. 369. Lord Coke said, "The rehearsall or preamble of the statute is a good meane to find out the meaning of the statute and as it were a key to open the understanding thereof": Co. Littleton, 79*a*; see also 4 Institutes 330. And Lord Tenterden, when delivering the considered judgment of the Court of King's Bench in *Halton* v. *Cove*, 1 B. & Ad. 538, at p. 558, thus sums up the matter. He says: "It is very true, as was argued for the plaintiff, that the enacting words of an Act of Parliament are not always to be limited by the words of the preamble, but must in many instances go beyond it. Yet, on a sound construction of every Act of Parliament, I take it the words in the enacting part must be confined to that which is the plain object and general intention of the Legislature in passing the Act, and that the preamble affords a good clue to discover what that object was." Mr. Asquith's contention is that the enacting parts of the Act of 1853 are such that they clearly extend the Act beyond the limited objects declared in its preamble, and that bookmakers carrying on their business within enclosures at race-meetings in the ordinary way are within the enacting parts of the Act notwithstanding its preamble, and he must admit, if this be so, that owners of racecourses who knowingly and wilfully permit such business to be carried on within their enclosures are equally liable with the professional bookmaker to fine or imprisonment.

Then what is it that this Act of 1853 in its enacting parts has enacted? By section 1 it enacts—firstly, that, "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, . . . or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto"—that is, betting either on credit or by way of ready money; secondly, "or" (that is, no house, office, room, or other place shall be opened, kept, or used) "for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as and for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race." This in express terms hits what is in the preamble—namely, betting by way of deposit.

This section does go beyond the preamble in this, that it embraces and renders illegal betting by way of credit, which is not within the preamble, as also betting by way of ready money, which is within the preamble, but only, be it observed, if either takes place in the prohibited premises. There are also other words in the enacting section which I will refer to hereafter. These two classes of betting were held to be distinct offences by Lord Coleridge, C.J., and Collins, J., in *Bond* v. *Plumb*, 42 W. R. 222, [1894] 1 Q. B. 169. This first section, thirdly, enacts that "every house, office, room, or other place opened, kept, or used for the purposes aforesaid or any of them"—that is, for betting on credit or by way of ready money, "is hereby declared to be a common nuisance and contrary to law."

Section 2 enacts that "every house, room, office, or place opened, kept, or used for the purposes aforesaid or any of them shall be taken and deemed to be a common gaming house within the meaning of" the Act of 1845 (8 & 9 Vict. c. 109), "to amend the law concerning games and wagers." If a house is proved to be a common gaming house, all persons found therein may be arrested, searched, and brought before a justice of the peace, and every owner or keeper of such house and every person having the care or management thereof is liable to a maximum penalty of £100 or six months' imprisonment with or without hard labour.

Section 11 appears to me to have practically the same effect as section 2, and it gives express power of entry into any house, office, room, or place kept or used as a betting house or office, and, if necessary, to use force for making such entry whether by breaking doors or otherwise, and it also gives express powers of arrest and search therein.

Section 12 gives similar powers to the metropolitan police within the metropolis.

So much for the sections relating to the premises on which betting is prohibited by the Act.

I now come to section 3, which deals with the persons owning, occupying, or using the same. This section makes the doing of three things criminal, and subjects the offender to penalties similar to those above-mentioned. The first offence is for "any person who, being owner or occupier of any house, office, room, or other place, or a person using the same" to open, keep, or use the same for the purpose of betting with persons resorting thereto—this is, upon credit or by way of ready money. The second

offence is for "any person who being the owner or occupier of any house, room, office, or other place" to "knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid or either of them"—that is, betting on credit or by way of ready money. And the third offence is for any person to have the care or management of or in any manner assist in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid or either of them, which means the assisting in the conduct of the business of a betting house for carrying on betting either on credit or for ready money. Neither this section nor the Act prohibits persons (other than professional bookmakers) resorting to betting houses for the purpose of betting therein, though if found therein they are liable to arrest and search and to be taken before a justice of the peace.

When the preamble and these sections of the Act are read together, as they must be in order to understand the true scope of the Act, in my judgment the enacting sections have reference to the opening, keeping, and using of betting houses, offices, and rooms, "or other places" akin or equivalent thereto, wherein the business of a betting house or betting office is carried on.

There are words in the enacting sections which are not to be found in the preamble, for instance, the words "room or other place," "any person using the same," "any person having the management of the business," but these words were inserted, in my judgment, not for the purpose of extending the operation of the Act, and of embracing cases not within its operation, but for the better carrying out the object intended, and reaching every kind of evasion which might otherwise have been attempted, and that this was the view of Lush, J., will be seen upon reference to a passage in his judgment in the case of *Haigh* v. *Town Council of Sheffield*, in which passage I entirely agree. In my opinion when the Legislature added throughout the enacting sections of the Act the words "other place" or "place," and abstained from defining, as it did, what those words should mean, it did so, not for the purpose of extending the ambit of the Act, but in order to leave it to the court, as each case arose, to determine whether the individual charged was or was not in fact attempting to evade and evading the Act by carrying on the business of a betting house in a "place" akin or equivalent to that of a betting house or office, though not actually in a house or office. It is for this purpose that the words "room," "other place," "place," "any person using the same," "any person having the management of the same" were added.

If a person carries on the business of betting in a place akin to that of a betting house, whether such place is set up upon a racecourse or elsewhere, then he is guilty of the betting made illegal by the Act, for he is then carrying on the business of a betting house in a prohibited place. It is the user of the prohibited place for the business of betting which is struck at by the Act.

This, in my judgment, is the true construction of the Act for the suppression of betting houses. The Scotch case of *Henretty* v. *Hart*, cited by Mr. Joseph Walton, supports my view of the Act.

I now come to those cases decided upon the Act which in my view have an important bearing upon this case. There are but three cases in the books during the forty-four years the Act of 1853 has been in operation in which professional bookmakers at race-meetings have been proceeded against under the Act. In each the bookmaker was convicted, but the grounds upon which the convictions were upheld are most significant.

The first case is that of *Shaw* v. *Morley*, which related to a plot of ground outside the enclosure at Doncaster race-stand upon which had been erected a wooden structure of five feet high fronting two ways, one to the course, the other to the enclosure. It was covered with green baize and had boards used as desks fronting each way. Upon this structure were the words "William Nicholl, of Nottingham," and papers partly printed and partly written with the names of races, horses, and betting prices. The betting lists so exhibited had on them the odds upon and against each horse in each race which William Nicholl, the proprietor of the structure, was willing to bet. The appellant Shaw transacted the betting business so carried on at one frontage of this structure for Nicholl. Kelly, C.B., Martin, B., and Pigott, B., held that what Shaw was doing was within the 3rd section of the Act, and quite rightly, for what he was doing was in truth and in fact carrying on the business of a betting house or office, if not in a betting house, office, or room, at any rate in a place akin or equivalent thereto, and was therefore carrying on betting in a prohibited place. If Shaw had not been convicted because he was not in fact using a betting house or office, the Act would clearly have been evaded, for, as I have said, a man may well set up and use a betting house or office or other place akin or equivalent thereto upon a racecourse and carry on the business of a betting house thereat.

The next case is that of *Bows* v. *Fenwick*. This case went a step in advance of the last, but was really decided upon similar grounds. In this case a professional bookmaker upon the Roodee at Chester during the races stood upon a stool 2ft. 6in. high over which was a large umbrella, capable of covering several persons, upon which was painted "G. Bows, Victoria Club, Leeds," which umbrella was fixed into the ground with a spike. There was also a card exhibited on which were the words, "We pay all bets first past the post." The court, which consisted of Lord Coleridge, C.J., Brett, J., and Denman, J., held that the business so carried on by the bookmaker was within section 3 of the Act of 1853, because the bookmaker was carrying on his business in a fixed and ascertained place, per Lord Coleridge, C.J.; because "the kind of gaming prohibited by the Act was the opening and keeping a place for the purpose of gaming or betting with persons resorting thereto—a 'fixed place' . . . whether on a racecourse or elsewhere," per Brett, J.; because "there was a piece of ground ascertained and appropriated by the appellant for carrying on his proceedings," per Denman, J. The *ratio decidendi* of these learned judges appears to me to be that the evidence showed that the appellant was carrying on his business of betting within a prohibited place—that is, a place akin or equivalent to that of a betting house or office, and that this was the inference which they drew from the facts proved. I do not dissent from this inference, but I think that it is the limit to which the provisions of the Act can be extended.

The last case is that of *Gallaway* v. *Maries*. In this case the court went further, and, with submission, I think went too far. In this case a bookmaker, together with a companion, carried on his business of betting at Four Oaks Park Races within the enclosure, the companion standing upon a small wooden box unattached to the ground. The court (Grove, J., and Lopes, J.) held this to be within section 3 of the Act of 1853, Grove, J., because the box defined a certain spot, Lopes, J., with much doubt, after pointing out that placing down a piece of matting and standing upon it would have been the same thing, but, thinking himself governed by

Bows v. *Fenwick*, assented to upholding the conviction.

I cannot think that the correct inference was drawn—namely, that this appellant was keeping or using a place akin or equivalent to a betting house or office. But whatever may be said of these three cases, there is this undeniable fact apparent in each, that not one of the eight learned judges who respectively decided them (Kelly, C.B., Martin, B., Pigott, B., Lord Coleridge, C.J., Brett, J., Denman, J., Grove, J., and Lopes, J.) would have held the convicted bookmaker to have brought himself within the Act of 1853 had it not been for the special user he had made of the particular desk, the stool and umbrella, and the box. It is immaterial whether the right inference was drawn or not from the proved facts of these cases; the point, and a most important point it is, is that not one of these learned judges would have held the point tenable that professional bookmakers by using an enclosure at a race-meeting, as they did in the present case, had brought themselves within the Act of 1853, and had it not been for the special user which had been made of the desk, the umbrella and stool, and the box in these cases, the convictions would obviously have been quashed. There is therefore a formidable consensus of judicial opinion to be set-off against the opinion of the five learned judges who decided in the present year the case of *Hawke* v. *Dunn*.

I do not propose to deal with the numerous cases which have arisen about the user of rooms at public-houses by betting men when carrying on their business of betting with persons resorting thereto, for the words "house" and "room" are specifically mentioned in the Act as two of the prohibited places when used by a betting man for carrying on the business of betting therein, and in my judgment these cases have no application to betting in an enclosure at a racecourse in the usual way as in the present case.

There are, however, two cases decided in 1874 to which I must refer. The first is *Eastwood* v. *Miller*. In this case the occupier of enclosed grounds containing nearly four acres was charged that he did unlawfully use a certain place—to wit, a field—for the purpose of betting on a certain pigeon-shooting match for money contrary to 16 & 17 Vict. c. 119, s. 3.

It is true that professional bookmakers were present, but Lush, J., apparently took the question to be whether the appellant "used or permitted the place to be used for the purpose of betting," and Archibald, J., said: "There are two questions—first, whether this is a place; and, secondly, whether it was permitted to be used for the purpose of betting." I must point out that if this was the question there was no offence committed, for it cannot be contended that owning, occupying, keeping, or using a place for persons betting therein *inter se* is any offence within the Act. It is, too, remarkable that neither of the cases of *Shaw* v. *Morley*, in 1868, nor of *Bows* v. *Fenwick*, of the 4th of May, 1874, were called to the attention of the court. It may be that the latter case had not, upon the 3rd of June, 1874, when *Eastwood* v. *Miller* was decided, been published in the reports, and it should be also noticed that *Eastwood* v. *Miller* was only argued on one side. If this decision decided that a professional bookmaker moving about a four-acre field betting with persons desirous of betting with him is using a place akin or equivalent to a betting house or office, I respectfully say that in my judgment the decision is wrong.

The other case is that of *Haigh* v. *Town Council of Sheffield*, in which the appellant was charged with keeping and wilfully permitting a cricket ground, of which he was occupier, to be used by certain persons for the purpose of betting with persons resorting thereto. Fifteen or twenty professional bookmakers stood on chairs and stools in different spots betting with different persons and had each a man behind him recording the bets. The magistrate convicted the appellant, and the Court of Queen's Bench (Blackburn, Lush, and Mellor, JJ.) held that they were right. If this conviction had been supported upon the inference drawn in *Bows* v. *Fenwick* I should have had nothing to say to it, but it does not appear to have been so. Blackburn, J., said: "By section 3 it is made an offence in the owner or occupier to permit the place to be kept or used for the purpose of betting. It must be taken on the statement of the case that the appellant was well aware of what was going on. . . . The magistrate was therefore right in saying that the appellant did permit the place to be used for betting." To use or to permit a place to be used for the purpose of betting, as before pointed out, is no offence at all, but to use or to permit a betting house, office, room, or other place akin or equivalent thereto to be used for the purpose of carrying on the business of a betting house or office is the offence created by the Act, and what is rendered illegal. If this case decides that professional bookmakers moving about a field betting with those of the public who are willing to bet with them are carrying on the business of a betting house in a place akin or equivalent to that of a betting house or office, I do not agree with it, and I think, if this be so, that this decision, as well as *Eastwood* v. *Miller*, is wrong.

Lord Coleridge, C.J., and I, in the case of *Snow* v. *Hill*, held that the appellant, who was charged with "being a person using a certain place" (to wit, a reserved portion of a field) "unlawfully did use the said place for the purpose of betting with persons resorting thereto," was not within the Act of 1853, because he exercised his business of bookmaker upon no ascertained piece of ground—in other words, upon no premises akin or equivalent to a betting house or office as in *Shaw* v. *Morley*, *Bows* v. *Fenwick*, and as had been held in *Gallaway* v. *Maries*, and we followed the more recent cases in preference to *Eastwood* v. *Miller* and *Haigh* v. *Town Council of Sheffield*, decided in 1874.

It is a mistake to say, as Mr. Justice Hawkins said in *Reg.* v. *Preedy*, 17 Cox C. C. 433, and again in *Hawke* v. *Dunn*, that we decided *Snow* v. *Hill* upon the ground that there was no evidence that the bookmaker was carrying on the business of a bookmaker, but was only carrying on betting as one of the public. The view taken by Lindley, L.J., of *Snow* v. *Hill* in *Liddell* v. *Lofthouse*, 44 W. R. 349, [1896] 1 Q. B. 295, is correct, and I also entirely agree in his judgment therein when he drew the inference and held that the hoarding in that case was a "place" within the meaning of the Act. What Lindley, L.J., said of the case of *Doggett* v. *Catterns* I also agree with, and have nothing to add thereto.

For the reasons above I am of opinion that to use an enclosure at a race-meeting as it was used in the present case is not the user of a place akin or equivalent to a betting house or betting office, which is what is prohibited by the Act.

In my judgment the case of *Hawke* v. *Dunn* was not correctly decided, and the court was not justified in extending the meaning of the Act, which it did by in reality striking out the dominant words "house," "office," and room," and relying upon the words "other place" as if they were the dominant words of the section. If this construction of the Act be correct the dominant words of the Act are mere sur-

plusage, which is a construction I cannot adopt, and in my judgment this appeal must be allowed.

RIGBY, L.J.—I have the misfortune to differ in this case from my learned brothers, but as I have formed an opinion differing from them I feel bound to give my reasons at considerable, but I hope not undue, length.

The facts admitted in this case so far as they appear material are as follows: The "Reserved Enclosure" as it is called is part of the lands called the Kempton Park Racecourse, owned and occupied by the defendant company, and does not exceed a quarter of an acre in area. Its linear dimensions appear to be about 40 yards by 30. At one end, being that most distant from the actual racecourse, it consists of raised tiers of seats covered over with a roof forming part of the grand stand. The rest of the enclosure is fenced off from the adjoining land by iron rails, but is not covered in. Professional betting men or bookmakers frequent the enclosure on race days in numbers varying from 100 to 200. The whole number of persons admitted to the enclosure on race days varies from 500 to 2,000. The bookmakers attend for the purpose of carrying on their business there in manner described in the particulars. Of other members of the public frequenting the enclosure the greater number go there for the purpose of backing horses with bookmakers, but a certain number do not bet at all. The bookmaker in the enclosure invariably carries on the practice of betting there as described in the particulars. He does not confine himself to any fixed spot in the enclosure, nor does he use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker is usually to be found in or near the same part of the enclosure. With a few exceptions, when betting takes place on future events, the betting is confined to betting on the races of the day; and no betting commences on any individual race before the names of the horses which are going to run in that race are announced on the telegraph board, usually about a quarter of an hour before the time appointed for the race to be run. Such betting is known as post betting, and continues in most cases till the fall of the flag, when the horses start, and bets are frequently made while the race is being run. Members of the general public are generally backers, and each selects as a rule one horse which he desires to back. In general it is the object of the bookmaker to back the field against as many horses as possible. These general propositions are, however, subject to important exceptions, as pointed out in the particulars.

The practice of calling out the odds which he will give or take in respect of a particular horse is largely adopted by every bookmaker betting in the enclosure for the purpose of attracting the attention of backers. No person in the enclosure is admitted with or has any greater or less right to act as a bookmaker than any other person, although in fact and practice the limited number of persons who do act in that capacity collectively form the market for such bets as the rest of the public or the backers wish to make.

Some bookmakers carry on a ready-money business in the enclosure—that is, they usually require the backer to deposit his stake in respect of the bet at the time the bet is made. Others do the greater part of their business on credit—that is to say, no money is deposited on either side, but they only do business in this way with persons whom they know to be of good credit. Should any person unknown to them offer to bet with them, they would either decline to bet or require such person to deposit his stake. All the above facts are to be found in the pleadings or particulars, and are taken and admitted to be true. In their defence the defendant company denied that it knowingly and wilfully permitted the enclosure to be used for the purpose alleged, but before the Lord Chief Justice, and again before the Court of Appeal, it was distinctly admitted that the defendant company, knowing the facts as to the user of the enclosure above referred to, went on admitting persons to the enclosure and charging them a fee of £1 for admission thereto, and in that sense permitted the user. On this admission it would seem that the defendant company does in law permit the user, such as is shown in the particulars, of the enclosure.

As a sort of supplement to the particulars there is an important statement of fact with reference to what has taken place in other enclosures, which so far as is necessary will be dealt with hereafter, when the effect of the preamble is considered. On the admitted facts the following observations occur. The area of the enclosure does not equal that of many rooms that might be mentioned. If there was an average attendance of bookmakers (150) the whole area (about 1,200 yards) would afford on an average for each bookmaker, if they distributed themselves evenly, about 8 superficial yards, the area of only a very small room or office of 8ft. by 9ft. If, however, as is probable, the bookmakers were to take their positions on the outside of the enclosure as being the place where they would be most easily found, there would not be a lineal yard for each bookmaker. It is true that the position of a particular bookmaker in the enclosure is not fixed to any particular spot or indicated by any mark, but as he is usually to be found in or near the same part of the enclosure it seems plain that he must practically confine himself to a space in the enclosure not exceeding the dimensions of a very small room. During the quarter of an hour or so within which the betting on a particular race is practically confined, the inference must be that for practical purposes he may be as easily found by those who look for him as though he were all the tim - seated at a desk or standing on a box or platform of his own. During the same time his opportunities of betting with persons who resort to the enclosure and their chance of finding him to bet with will be as great as if he were in a house, room, or office.

Lastly, subject to the question whether the enclosure is a "place" within the meaning of the Act, it is plain that the kind of betting carried on there is that which was struck at by the Act, for the bookmakers not only bet with persons resorting to the enclosure, but receive deposits on promises to pay, though the practice is subject to the limitations mentioned in the particulars. Passing on to the questions that have been argued on the appeal, it seems that the three main points for decision are: (1) Whether the enclosure is a place within the meaning of the Act; (2) whether it is kept or permitted to be used by the defendant company for any purpose forbidden by the Act; (3) whether there is anything in the Act from which it can safely be inferred that such an enclosure was intended to be excepted. Having regard to the admission made at the trial, the second point seems to depend upon the question whether within the meaning of the Act the enclosure is used by the bookmakers frequenting it.

It will be convenient to deal first with the enacting clauses which must govern, unless there be some ambiguity which makes it permissible to refer to the preamble. Section 1 contains the leading enactment which has to be construed. Leaving out words inapplicable to the present case, the section provides that "no house, office, room, or other place shall be opened, kept, or used for the purpose . . . any person using the same for betting with persons resorting thereto, or for the purpose of any money or

valuable thing being received on behalf of a person using the same as a consideration for a promise to pay money on any event relating to any horse-race." It is reasonably plain from the enacting clauses that the very general word "place" as used here must receive some limitation. If a man were to use within the meaning of the Act every place on which he happened to stand when he made a bet or received a deposit, the operation of the statute would prevent any person carrying on the business of a bookmaker or perhaps any betting at all. A place, however, need not be a house, office, or room. Such a construction would be equivalent to striking it out of the Act. It is said that it must be *ejusdem generis* with house, office, or room. But the difficulty in such a case is to determine the genus which is to comprize as species all the cases that have to be dealt with, and as that can only be gathered from the Act taken as a whole not much if any assistance can be obtained from the *ejusdem generis* doctrine. It will be safer and easier, and at the same time sufficient for the present case, to indicate some place that must be included rather than to attempt a definition to cover all places that ought to be included in the Act. The words "other place" being obviously introduced to supplement the words house, office, or room, it would be wrong to exclude any place the use of which involves exactly the same mischief.

Perhaps it would be safe to say that no place should be excluded to which in a reasonable sense persons can resort with a reasonable business probability of being brought into contact there for practical betting purposes with a person or persons using it for betting with those who do resort to it if the latter choose to bet. At any rate it would seem clear that mere variation in the physical condition of a place accessible as a place of resort—as, for instance, whether the place is or is not covered for the time being wholly or partially by a roof—cannot form the test for determining whether it falls within the Act or not. An uncovered yard whether or not included within the curtilage of a house, an uncovered skating-rink or skittle alley, a piece of building ground for the time being either entirely vacant or with buildings in no way covered in, are all cases in which the mischief and nuisance arising from their being used for the purposes forbidden by the Act would be in no way increased by covering them in or mitigated by their being left uncovered. The same thing may be said of the way in which a place is bounded, except perhaps that an enclosure surrounded by an open railing or a place unenclosed but capable otherwise of identification may be more of a nuisance than one which is entirely fenced off by walls of masonry from the view of, and so as to prevent interference from within with the outside public. If an enclosure similar in all respects to that which is being dealt with in this case were found to be used in a town for purposes similar to those for which the Reserved Enclosure is used it would seem impossible to contend that it would not be a place within the meaning of the Act.

Secondly, with reference to user, it is plain that the same rules which apply to houses and rooms must apply in general to places which are not houses or rooms but still are within the Act. Now, it seems impossible to say that a man does not use a house or a room which as a whole is set apart by the owner or occupier or permitted by him to be used for purposes forbidden by the Act unless he confines himself to one spot in the house or room as the case may be. The house may contain many rooms or the room be very large, but the man is using the house or room when he uses any part of it, and the Act has in it nothing to suggest that absolute fixity of position or any other localization of the user, than is involved by the boundaries of the house or room itself, is necessary.

Again, it seems impossible to say that the user of a house or room to fall within the Act must be an exclusive user by one person of the whole or any particular part. First of all, this would involve the change of the more general phrase "any person using" into the more restricted phrase "the person using," for which there is no warrant. But further, such a construction of the Act would leave it open to avoid its operation in a vast number of cases though the mischief struck at remained or was increased. It seems impossible to contend successfully that the use of a house or room with the permission of the owner and occupier by one professional betting man is more of a nuisance or otherwise more objectionable than a similar use by more than one either jointly or one competing with another at the same time. Indeed, the more men permitted to use the house or room at the same time the greater would be the nuisance and the greater the probability of mischief. The same considerations must in general apply to any place not being in a house or room which is brought within the meaning of the Act. But several objections to this construction as applicable to the present case have been urged. It is said that section 2, which provides that every place kept or used for the purposes aforesaid or any of them shall be taken and deemed to be a common gaming house within the meaning of the Gaming Act, 1845, shows that "place" should be confined to something in the nature of a house and that the section cannot properly be applied to an enclosure open to the sky. But the words "taken and deemed" are usually employed to indicate that the thing spoken of is not in itself the thing which for the purpose of attracting to it certain legal incidents it is to be deemed to be. Then it is said that is impossible to suppose that the Legislature intended to attach the incidents of a common gaming house to such a place as the Reserved Enclosure. The proper way of ascertaining the intention is by construing the words used, and it cannot be doubted that the Legislature intended to attach those incidents to any place within the meaning of the Act, including the cases of uncovered places in towns already referred to. Of course, in determining the meaning of the word "place," section 2 may be looked at as well as any other part of the Act. But, whatever validity such an argument might have in the case of an entire racecourse, which may extend over many acres and be resorted to by thousands or tens of thousands of persons who never bet at all, and many and indeed most of whom may never come into contact with a bookmaker at all, it cannot outweigh the reasons for considering as a place within the Act the Reserved Enclosure which contains on an average not less than one bookmaker out of every ten persons resorting to it, whilst the greater number of the persons not bookmakers go there for the purpose of backing horses with bookmakers. "Places" which are not houses may, under the provisions of the Gaming Act, 1845, itself, be gaming houses. Sections 11 and 12 of the Act under discussion show that it was the deliberate intention of the Legislature to apply the main provisions of the Gaming Act to places within the Act, and if, as is extremely unlikely, these sections which are in the main intended to procure evidence in cases of suspicion were to be put in force in a case like that of the Reserved Enclosure the minority who attend without any intention of betting would only have themselves to thank for any resulting inconvenience occasioned to them.

Thirdly, it is said that the Act was not intended to apply to betting on racecourses at all. If by this

is meant only that ordinary betting whether between persons who are not professional betting men or between professional betting men who in no way attach themselves to a place for the purpose of betting with those who resort thereto, it is apparently true, not only of racecourses, but of all other parts of the country. But then the objection has no reference to the state of facts on which the court is called upon to adjudicate. But if it means that every sort of betting is permissible provided only that it takes place on a racecourse the objection plainly goes too far. The enacting part of the Act contains no reference direct or indirect to racecourses at all. It would seem to be impossible to contend successfully that the defendant company might lawfully permit a house, room, or office on the racecourse to be used by a bookmaker for purposes forbidden by the Act, though apparently there would be no reason why they should not have done so if the Act had not been passed. Or again, that a bookmaker might take up his stand at a place on a racecourse outside an enclosure and there carry on his business without removing from the spot, though probably such a practice prevailed at the passing of the Act and had done so ever since bookmakers came into existence as a class. When once it appears that the Act is applicable in some cases to owners and occupiers of racecourses as well as to other owners and occupiers the contention becomes one for a partial exception only—that is to say, an exception of enclosures for betting purposes, which certainly is a difficult one to support and could not be made out unless there can be shown to be a material distinction between them and other parts of racecourses. The title and preamble have been relied upon for this purpose. The title may be dealt with shortly. With reference to Acts passed as this was before 1854, when the practice of the House of Commons was altered by Standing Order 34, which for the first time authorized the House in Committee to amend the title, there is a great preponderance of authority in favour of the proposition that the title forms no part of the Act and cannot even be looked at for the purpose of construing the Act: see Maxwell on Statutes, 2nd ed., pp. 50, 51, and cases there cited. But this question need not be gone into further, because in the present case it is quite plain that the Act is not confined to the purpose indicated by the title. The preamble no doubt stands on a different footing since it does form part of the Act. But there are numerous instances in which the enacting clauses have gone upon their true construction beyond the scope of the preamble and yet have not been controlled by it, and the true rule seems to be that the preamble cannot be resorted to for the purpose of controlling the enacting clauses either by restricting the scope of them or by enlarging it, and cannot be relied upon unless it be in itself clear and precise in meaning and there is some ambiguity in the enacting clauses themselves which may be cleared up by it. Of course cases will arise where it may be difficult to determine whether the enacting clauses do or do not present such an ambiguity as to require or admit the explanatory operation of the preamble, but the above examination of the enacting part of the Act seems to show that independently of the preamble there could be no reasonable doubt as to the construction. Even if it be admissible, great care is required in drawing conclusions from it. The recital is "Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting houses or offices and the receiving of money in advance by the owners or occupiers of such houses or offices or by other persons acting on their behalf on their promises to pay money on the events of horse-races and the like contingencies." Then follow the words "For the suppression thereof be it enacted, &c."

Now, it is clear that the enacting clauses do go beyond the preamble in many particulars of importance—*e.g.*, by including within the prohibition of the statute some places which are not houses or offices and also by including houses, offices, and places where money is received in advance, not by or on behalf of the owners or occupiers, but by persons using the houses, &c., and also by including the receipt by any of the same persons not only of money but also of any valuable thing, and also by extending them (*i.e.*, the owners' or occupiers' promises to pay money) to promises by any of the aforesaid persons to give any valuable thing or to secure the paying or giving by some other person of any money or valuable thing. There can be no doubt that these extensions of the operation of the Act, all of which are to be found in section 1, were intentional and deliberate and could not be affected or controlled by the preamble, though it mentions none of them. Why, then, should it be held that the equally plain enactment of the same section whereby every house, office, room, or place opened, kept, or used for the purposes mentioned, or any of them, is declared to be a common nuisance and contrary to law should be subject to the exception of places whether on a racecourse or elsewhere which had been for a considerable time so opened, kept, or used. No doubt the preamble mentions that a kind of gaming had of late sprung up. These words, however, would be sufficiently satisfied by the great and notorious increase shortly before the passing of the Act of the kind of gaming referred to without its being necessary to interpret them as asserting that it had not previously been known. But even assuming that no betting houses or offices had existed otherwise than within the vague period covered by the words "of late," which would be a very strong assumption to make if we are also to assume that the same kind of gaming had been openly and notoriously carried on in racecourse enclosures for more than half-a-century, it would be going far beyond the principle which has hitherto been applied to the control by the preamble of the enacting clause if it were held that places which otherwise would fall within the enacting clauses are to be excepted because they have long been opened, kept, or used for the forbidden purposes. The respondents rely upon a statement introduced at the end of the particulars to the effect that the description of the betting carried on in the Reserved Enclosure applies not only to that enclosure. It is there said that at the time of the passing of the Act of 1853 such enclosures were in like manner frequented the bookmakers and betting transactions of precisely the same character were therein openly and habitually carried on by them, and had been so carried on since the beginning of the present century. This statement requires careful consideration before it can safely be acted upon. The first observation that occurs upon it is that it is a wholly one-sided one in the sense that it deals with racecourse enclosures only and not with other places at all; in other words, it affords no means of judging how far the practice was exceptional. It gives no information as to the practice of bookmakers outside the enclosure. It would be a singular thing if long before the passing of the Act, and, indeed, from an early period after they came into existence as a class, bookmakers did not do what they certainly were doing notwithstanding the Act very soon after its passing, as appears by reported cases—namely, appropriate on the racecourse places where they could carry on their business. If they

were so doing, the only distinction that could be suggested between enclosures and other places on racecourses appropriated by bookmakers would be that in the former the betting would be more concentrated and the bookmakers more easy to find. The reasonable inference seems to be that enclosures were used to supply a felt want for a more convenient place for the bookmakers to carry on their already established business in, and thereby to make a profit to the owners rather than that they preceded and afforded the example for the business of betting in outside places on the racecourses. Taking the words "since the beginning of the present century" literally and according to their primary meaning and contrasting them with the words "ever since," which occur immediately afterwards, they do not involve a statement that the practice began with the century or at any definite time before the commencement of the Act. The omission of the word "ever" may have been intentional, and then the statement becomes as vague with reference to time as the preamble itself of the Act, and no argument can be founded on it. There can be no reason why the parties to the action should not be kept strictly to the statements which they deliberately prepare. If, however, by straining the language the statement is construed as fixing the commencement of the practice referred to as far back as the beginning of the century, the statement so construed entirely differs in its nature from the admissions contained in the particulars as to matters within the knowledge of the parties to the action. It becomes an assertion of fact as to a period far beyond living memory, and the court has no knowledge of the evidence on which it is founded and no means of judging as to its accuracy. It would be unfortunate if the decision of an important question of construction were to depend upon a statement which may turn out seriously to exaggerate the length of time during which the practice referred to had existed before the passing of the Act. It would seem, however, that even on the construction last referred to the statement, though accurate, would afford no ground for exempting racecourse enclosures from the operation of the Act. The application of it must depend upon the assumption that the promoters of the Act and the members of the Legislature generally knew of the facts contained in the statement relating to such enclosures, and with that knowledge intended by the words used in the preamble to exclude them. But if that knowledge and intention both existed it is almost impossible to give any sufficient reason why some more direct language was not used in order to make the intention clear. It is quite a common thing for a preamble to contain a statement of the occasion which has led to the necessity for legislation without exhaustively describing the legislation intended, and that has been already shown to be the case with reference to this preamble and section 1 of this Act. Further, if the Legislature had intended to leave unaffected cases in which the kind of betting struck at had gone on for a long time, the natural thing would have been to limit a time for that purpose, and not to leave so important a question to be determined on the vague phrase "of late sprung up." It could hardly be contended with success that a betting-house otherwise clearly within the Act would escape the operation of it by being shown to have been opened for forty or fifty years before the passing of the Act, and the same considerations ought to be applied to all places within the meaning of the Act, as there is nothing to make a distinction in this respect between one place and another.

I have thought it better down to this point to confine myself to a consideration of the Act itself and to express my own individual opinion on the construction of the Act independently of the decided cases, partly because there is no case binding upon this court, and partly in order to avoid the danger of losing sight of the Act itself in considering the decisions upon it. Those decisions are, however, of great importance, and I now proceed shortly to refer to them.

First, as to place there is a remarkable consensus of opinion, when the cases are examined, and in my judgment no single case which, when properly understood, would conflict with the interpretation which I have above suggested. *Doggett* v. *Catterns* has been thought to be a decision that a place under a clump of trees, without any mark of appropriation by the betting man charged, cannot be a place within the meaning of the Act. This is shown by Lindley and Kay, L.JJ., in *Liddell* v. *Lofthouse* not to be the case, the decision having turned upon the construction of section 4 of the Act, which was held not to apply to a man using a place independently of the owner or occupier. In that case not only Erle, C.J., and Keating, J., in the court below, but a majority of the judges in the Exchequer chamber—namely, Pollock, C.B., Crompton and Blackburn, JJ., and Channell, B., thought that the place in question would be a place within the meaning of the Act if it could have had an owner or occupier. *Snow* v. *Hill*, decided by Coleridge, C.J., and A. L. Smith, J., in 1885, was relied upon both in *Hawke* v. *Dunn*, the case against which the appeal is in substance brought and on this appeal, but there was in that case, so far as the report shows, no evidence of the kind of betting struck at by the Act. For anything that appeared in *Snow* v. *Hill* the defendant, who did not confine himself to any particular part of the racecourse, but was walking about making bets, may have been not a professional bookmaker, betting with persons resorting to the place, but an ordinary member of the public making casual bets. *Shaw* v. *Morley*, decided by Kelly, C.B., and Martin and Pigott, BB., in 1868, was a clear decision that an uncovered place on a racecourse might be an office or place within the meaning of the Act. *Bows* v. *Fenwick*, decided by Coleridge, C.J., and Brett and Denman, J.J., in 1874, was a decision that a place on the Chester racecourse, identified only by a stool and umbrella, was a "place" within the meaning of the Act. *Gallaway* v. *Maries*, decided by Grove and Lopes, JJ., in 1881, was a case only differing from *Bows* v. *Fenwick* in the fact that the means of identifying the place was a loose box—obviously, I think, an immaterial distinction. *Haigh* v. *Town Council of Sheffield*, decided by Blackburn, Mellor, and Lush, JJ., in 1874, was one brought against the occupying tenant of a cricket ground (used not only for cricket, but for foot-racing, games, and sports) for permitting the user of the enclosure for betting with persons resorting thereto. The evidence showed that from fifteen to twenty professional bookmakers stood on chairs and stools in different spots, calling out the odds and betting with different persons and receiving deposits. Any one of these bookmakers might, within the principles of the cases already cited, have been convicted of using the place where they stood for illegal purposes, and the conclusion arrived at by the court that the defendant, who knowingly permitted such user, was guilty of an offence under the Act seems to me an inevitable one. In my judgment none of the last three cases referred to can have depended upon the character of the umbrella, box, or stool, and the only way in which the existence of those articles was material was as affording evidence that the bookmaker practically confined himself to a place where he could be

readily found. *Eastwood* v. *Miller*, relied upon in *Haigh* v. *Town Council of Sheffield*, was decided by Lush and Archbold, JJ., in 1874, and treated a place 3a. 3r. 25p. in area as a place within the meaning of the Act. In that case there are expressions of both the learned judges to the effect that the size of the place cannot be of importance. It is not necessary to rely upon those expressions or to discuss them. The evidence showed that there were at least two bookmakers betting and receiving deposits, and the fair inference would be that they would so far confine themselves to one spot as to be capable of being found when the race was over, and that I think would be enough to justify the decision. With regard to the Scotch case of *Henretty* v. *Hart* I will only say that I cannot reconcile the reasoning of the two learned judges, Young and Clerk, L.JJ., with the decision in *Haigh* v. *Town Council of Sheffield* before referred to, and that I prefer to rely upon that judgment. I concur more nearly with the reasoning of Lord Craighill, the dissentient judge, in *Henretty* v. *Hart*. Finally, the case of *Liddell* v. *Lofthouse*, already mentioned and decided by Lindley and Kay, L.JJ., in 1896, shows that a place is not less a place within the meaning of the Act because the betting man using it has not placed any mark of his own upon it.

Secondly, as to user, the cases above referred to are authorities also as to this point, and I need only refer in addition to decisions as to user in the following cases which I think important for the decision of the question before the court. The first is *Reg.* v. *Preedy*, decided by Hawkins, J., in 1888, in which that learned judge goes through all the authorities and explains the meaning of user in accordance with what I have above indicated. The others are *Hornsby* v. *Raggett*, 40 W. R. 111, [1892] 1 Q. B. 20, decided by Mathew and A. L. Smith, JJ., in 1891, and *M'William* v. *Dawson*, 56 J. P. 182, decided in the same year by the same learned judges, and in which it was held that a man used a tap-room or bar in a public-house for betting, though he did not confine himself to any particular part of it.

Thirdly, as to the exemption claimed, the only case in which the precise point whether enclosures like the Reserved Enclosure as distinguished from other places on racecourses are exempted by implication from the Act is that of *Hawke* v. *Dunn*. I concur in substance with the reasoning of the judges in that case contained in the judgment of Hawkins, J. But almost all the cases decided under the Act, and especially all those where bookmakers have been convicted for carrying on their business on racecourses, are directly applicable to enclosures unless a substantial and material difference between the enclosure and other ascertained places on racecourses can be made out; but though the preamble has been frequently referred to it has never seemed to occur to anyone concerned that it made the length of time during which the practice charged has been carried on in any way relevant.

On the above considerations I have arrived at the conclusion that the Reserved Enclosure is a place within the meaning of the Act, that it is permitted to be used by the defendant company for purposes forbidden by the Act, and that the plaintiff as a shareholder is entitled to the injunction asked for. The result would be, according to my individual opinion, that the appeal should be dismissed.

CHITTY, L.J.—After the exhaustive judgments which have been delivered, little remains for me beyond expressing my own opinion. The facts have been fully stated; the Act of Parliament has been examined closely, and its provisions have been stated, analysed, discussed, criticized, and considered. For myself I have gone through a similar course of investigation. What I propose to do is to deal only with the more salient points and to state the conclusion at which I have arrived. The case was heard by the Lord Chief Justice, (Lord Russell of Killowen) on the admissions contained in the particulars and also on the additional admissions made at the Bar, the just inference from which appears to be that which the Lord Chief Justice was prepared to draw—namely, that the defendants knowingly and wilfully permit the Reserved Enclosure to be used for the purposes for which it is actually used. The correctness of the admissions was not in any way called in question before the Lord Chief Justice; they could not be questioned, nor were they questioned, in the argument before us. It is satisfactory to know that Mr. Asquith was instructed to say, and did say, in his opening before the Lord Chief Justice, that on a careful investigation the facts stated in the particulars may be assumed to be correctly stated. He said that the sole object of the action, so far as he was instructed, was to obtain the decision of the highest court in the country upon what is undoubtedly a very important question of law.

The question really is a mixed question of fact and law. It appears to be this: Is the Reserved Enclosure described in the particulars, and used for the purposes therein stated on the days when the races are held, a "place" within the prohibition of the Act of 1853? The two points—(1) the nature of the place, and (2) the nature of the user—although properly made the subject of separate consideration, must in the result be dealt with together in combination in order to arrive at a just conclusion. It appears to me to be incorrect to ask whether the enclosure is excluded; the right question is whether it is included. As the statute creates a criminal offence, it is incumbent on those who allege that the offence has been committed, to show affirmatively that it has been committed. I am not here relying on the old rule that penal statutes ought to be construed strictly. I think that all statutes ought to be construed reasonably; but at the same time I think that the Judicature ought to be on its guard against holding that certain acts are a criminal offence against a statute, unless it is reasonably plain that those acts do amount to the offence within the meaning of the Legislature as disclosed by the statute itself and such surrounding circumstances as are properly admissible in evidence. The state of the law when the Act of 1853 was passed was this: The Legislature had before it in 1845 the question of betting. By the Act then passed it deliberately refrained from declaring betting illegal; it contented itself with making the contract of betting void, and taking away any right of action to recover a bet lost. The law stood thus when the Act of 1853 was passed: It was lawful for a man to bet, to bet habitually and systematically, and to carry on a business of betting whether on credit or by way of deposit; there was no difference in law between making a single or occasional bet and being a professional bookmaker. The law as to betting was not altered by the Act of 1853 except only by the special prohibitions contained in that statute. On that statute it is plain that betting of itself is not made illegal. Betting or not betting a man must be in some place, and it is clear that the word "place" in that Act has not the general meaning of any or every place. Some particular kind of place is aimed at; what that is must be discovered from the statute itself. It is plain on the statute that the persons, not being the bookmakers, who resort to the "place" are

not liable to the penalties of fine and imprisonment imposed by the Act, but they are liable to what may be justly described as the degradation of being arrested and searched and taken before a magistrate. Consequently, if the plaintiff's contention be right, all persons who are found in this enclosure during the races, or, at all events, while the betting as described is going on, are liable to this treatment, although they are present for the mere purpose of seeing the races or their friends and acquaintances, and have no thought of making a bet. I am unable to think that this point is disposed of by saying that before the betting begins they may safely remain, but that directly it begins they must go, or submit to the risk of being molested by the police.

Coming a little more closely to the language of the statute, I pass by the title, on which I place no reliance. It appears to me that no argument could be founded on the title which is not more plainly indicated by the preamble. Here we come to the old question of what is the true relation of the preamble to the enactments themselves. Undoubtedly it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms. But it has been well said that the preamble is a key to the statute and that it affords a clue to the scope of the Act; these statements, however, are subordinate to the settled rule above referred to. The contest and the difficulty arise directly you begin to apply these rules to the particular statute. The effect of the preamble must vary according to the greater or less ambiguity of the enacting words and the distinctive language of the preamble itself. Two things, I think, are clear on the interpretation of this statute; first, the preamble states in unambiguous language the principal mischief for the suppression of which the Act was passed; and, secondly, the word "place" in the enactments is not used in its most comprehensive sense and is to that extent, at all events, ambiguous.

Now I refer to one point in the preamble. It shows that the kind of gaming intended to be suppressed was a kind which had then lately sprung up. I read the words "of late" in the preamble as referring to something which had sprung up during the eight years' interval after 1845, when the Legislature had considered the question of betting; but, whether this be so or not, it is impossible to read the words as relating to a practice which had been going on since the beginning of the century at all racecourse enclosures. Here the fact stated in the tenth clause of the particulars is of great importance. The practice of the bookmakers and the betting transactions of the same character as those which take place in this Reserved Enclosure had been carried on in similar enclosures throughout the country from the beginning of the century, not secretly, but openly and habitually. It is inconceivable that these practices, notorious as they must have been, should have been unknown to the Legislature when they passed the Act of 1853, and it is difficult to suppose that, if they had intended to suppress them, some direct and unmistakable words relating to them should not have been found in the Act; yet there are no such words. It is just worthy of mention that, although the Act has been in operation for nearly forty-four years, it is only recently that a suggestion has been made that these practices in the racecourse enclosures are illegal and render the enclosures themselves prohibited places. During this long period the informers, an alert race, have been asleep, the magistrates somnolent, and the police supine, if this recent suggestion be well founded. But, of course, this is but a mere observation, and affords no answer to the charge if the recent discovery is a real discovery of the true intentions of the Legislature.

Lord Justice Lindley has already given a careful analysis of the Act. I think it correct and shall not repeat it. The Act contains no definition of the word "place"; the absence of such definition I take to be intentional. The Legislature meant, in my opinion, each case to be dealt with on its own facts, and it seems to me that we ought not to attempt to define what the Legislature has purposely left undefined. The enactments certainly go beyond the preamble. The view I take is this: the Legislature, having before it the leading idea of suppressing the opening of betting houses or offices and the receiving of money in advance by the owners of such houses or offices or by other persons acting on their behalf, foresaw the necessity of employing in the enactments other words which would prevent evasion and subterfuges, and has framed the enactments accordingly: see the judgment of Lush, J., in *Haigh* v. *Town Council of Sheffield*. But after careful examination of the sections I am unable to find any sufficiently disclosed intention to enlarge the general ambit of the Act. The business of a bookmaker is not prohibited; by itself it is still lawful; dropping for the moment, but not forgetting, the amplifying words, the gist of the offence aimed at appears to me to be the using of a house, room, or office or other place as presently explained for the purpose of betting with persons resorting thereto.

In the enactments the general and ambiguous word "place" is always preceded by the words "house, office, room" or "house, room, office"; it has sometimes the word "other" prefixed and sometimes not. Nothing turns on the omission of the word "other" where this omission occurs. The leading idea and the standard description are to be found in the words "house, room, and office"; the place is something of the same kind taken in connection with the user. The ordinary rule of construction sometimes called "*ejusdem generis*" sometimes "*noscitur a sociis*" applies. "Place" must mean something of the same kind; something which conforms to the leading idea conveyed by the words with which it is associated. Plainly the enclosure is not a "house" nor a "room" nor an "office." The word "office" in this connection appears to me to have the most comprehensive meaning and the largest import of the three unambiguous words. What are the characteristics, the usual fittings up, or accessories of an "office"? A desk, a table, a chair, and things of that description. Now, in this enclosure the bookmakers have no apparatus of that kind. There are certain structures which, in my opinion, fall within the Act wherever set up or found; a booth, a tent, and an umbrella fixed in the ground by a spike, which is but a kind of tent, are all within the meaning of "place" when it is used for the purposes indicated. A movable structure on wheels, such as those in which merchants conduct their business of lading and unlading ships in the docks of Liverpool, mentioned by Martin, B., in *Shaw* v. *Morley*, is a good example of an office or place within the Act. The fact of such an office or place being set up and used by the bookmaker on a racecourse would not take it out of the Act; a racecourse is nowhere mentioned in it.

Now, it was pressed upon us by Mr. Asquith in his able argument that the bookmakers do, in fact, use this enclosure as the place where they separately carry on their betting businesses as described in the particulars, but the question is whether they use the enclosure as a betting house, room, or office, or as a place conformable to the leading idea conveyed by the three standard words. I think that they do not.

The enclosure is visited by two thousand persons on attractive race-days, of whom two hundred are bookmakers. The bookmakers and their clerks and the general public are all admitted to the enclosure without distinction and on the same terms. Many of the general public bet with the bookmakers; some do not bet with them at all, they go merely to see the races or to meet their friends and acquaintances. The bookmakers have no special right or privilege within the enclosure; no particular part of the enclosure is assigned or allotted to them. They carry on their betting in competition. Although each bookmaker may generally be found near the same place, he has no special right to the place he occupies temporarily; if he moves from it, as he does, any member of the general public may take the place he has quitted. He has no fixed or ascertained place within the enclosure; he cannot claim any particular station; he has no individual control over the place he occupies beyond such as every one else within the enclosure has over the place he occupies for the time being. The term "spot" was employed in the argument; I discard the word altogether, it is not found in the statute.

Some of the principal authorities have already been stated and dealt with at length. I shall confine myself to expressing my opinion upon them. No doubt there has been considerable difference in the judicial opinions expressed on the construction of this Act. The Act is so drawn as almost to invite difference of opinion—certainly so as to give rise to it. I think that the following cases were rightly decided—namely, *Shaw* v. *Morley*, *Bows* v. *Fenwick*, and *Snow* v. *Hill*. From *Doggett* v. *Catterns*, in which there was much divergence of opinion, I am unable to obtain any safe guidance. I think that *Eastwood* v. *Miller* and *Haigh* v. *Town Council of Sheffield* carry the statute beyond its true limit. I am prepared to go as far as *Bows* v. *Fenwick*, the case of the umbrella with a spike; possibly *Gallaway* v. *Maries*, the case of the box (simply), may be supported on the same ground, but it is open to question. I concur with A. L. Smith, L.J., in what he has said about the opinions of the eight judges who decided the cases of *Shaw* v. *Morley*, *Bows* v. *Fenwick*, and *Snow* v. *Hill*. Their method of reasoning on the statute is inconsistent with the decision in *Hawke* v. *Dunn*.

My conclusion is that the construction put upon the Act by the plaintiff's counsel does not give the proper effect to the dominant words "house, room, or office," and further, I am satisfied that the Legislature has not manifested in the enacting part of the Act a clear intention of declaring illegal such an enclosure as this is and used as it is used.

For the above reasons I think that the appeal ought to be allowed; and for the same reasons that the decision in *Hawke* v. *Dunn* ought to be overruled.

Appeal allowed.

Solicitors for the plaintiff, *Le Brasseur & Oakley.*

Solicitor for the defendant, *Arthur Cheese.*

From Prob. Div. and Adm. Div. (Lindley, Lopes, and Chitty, L.JJ.) — July 21.

SMITH v. SMITH. (a.)

Divorce—Practice—Application for rehearing, whether to be made to Divisional Court or to Court of Appeal—Trial without a jury—Divorce Rules, 1865, *r.* 62—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 1.

An application for leave to serve notice of motion for a rehearing of a petition for divorce must, if the petition was heard by a judge without a jury, be made to a Divisional Court of the Probate, Divorce, and Admiralty Division, and not to the Court of Appeal.

Original motion by Mrs. M. A. Smith for leave to serve notice of motion for a rehearing of her petition for divorce.

The petition was heard in March, 1897, before Barnes, J., without a jury, and the time allowed by the rules for making an application for a rehearing had expired.

The question was whether the application ought to be made to the Court of Appeal or to a Divisional Court.

Rule 62 of the Divorce Rules, 1865 (as amended in 1887), provides that applications for a new trial of issues of fact tried by a jury, or for a rehearing of a cause, shall be made to the Probate, Divorce, and Admiralty Division.

The Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 1, provides that every motion for a new trial or to set aside a verdict, finding, or judgment in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein, with a jury, shall be heard and determined by the Court of Appeal, and not by a Divisional Court of the High Court.

The applicant's solicitors had consulted the registrar, who had advised them that their application ought to be made to the Court of Appeal.

Adam Walker, for the original motion.

Bargrave Deane, Q.C., and *C. J. Willock*, for the husband.

H. C. Gollan, for the intervener.

LINDLEY, L.J.—I do not think the Court of Appeal has any jurisdiction in this case. The proper court for the applicant to apply to is a Divisional Court of the Probate, Divorce, and Admiralty Division. The Supreme Court of Judicature Act, 1890, applies only to applications for new trials and rehearings in cases which have been tried with a jury. The case of *Wilkins* v. *Wilkins*, 44 W. R. 305, [1896] P. 108, is not in any way inconsistent with that view. So far as the present case is concerned, there is nothing to alter the effect of rule 62 of the Divorce Rules, which still applies in such circumstances. I think justice will be done by making no order on the motion.

LOPES and CHITTY, L.JJ., concurred.

Motion refused, without costs.

Solicitors, *A. M. Griffith-Williams; W. P. Neal; Townsend & Sharpe.*

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — July 15.

SMALL AND OTHERS v. UNITED KINGDOM MUTUAL MARINE INSURANCE ASSOCIATION. (a.)

Insurance, marine—Mortgage of shares in ship—Policy on ship—Right of mortgagee to sue on policy—Mortgagor master of ship—Barratry of master.

The plaintiff advanced a sum of money to a person who was about to purchase certain shares in a ship upon

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the terms that the latter should be appointed captain, and that the advance should be secured by a mortgage of the borrower's shares in the ship, and that an insurance should be effected on the ship to cover the plaintiff's interest as mortgagee. A policy on the ship was accordingly effected by the ship's husband "as well in their own names as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all." The policy covered a loss by perils of the sea and by barratry of the master. The mortgagor was appointed captain, and the ship was lost through his barratrous act. In an action on the policy,

Held, that, as the plaintiff's interest in the ship was covered by the policy, he was entitled to recover, the causa proxima *of the loss being a peril of the sea; and, further, that, if the mortgagor was appointed captain by the plaintiff as well as by the co-owners, the wrongful act of the captain was barratrous as against the plaintiff, and the latter could recover as for a loss by barratry.*

Appeal from the judgment of Mathew, J.; reported [1897] 2 Q. B. 42, 45 W. R. Dig. 74.

The action was brought by the executors of Samuel Small to recover for a total loss upon a policy of marine insurance alleged to have been effected on his behalf with the defendant association on the ship *James Livesey*.

The defence was that the policy had been made for and on behalf of Wilkes, the master of the ship, and that the vessel had been wilfully cast away by Wilkes.

It was ordered that the question should be first tried whether, assuming the alleged barratrous conduct of the master, that was a defence to the action, the trial of the question as to the truth of the charge against the master being reserved until after the preliminary question had been disposed of.

Wilkes was the son-in-law of Samuel Small, and had applied to Small for an advance to enable him to purchase, with two co-owners, the ship *James Livesey*, of which he was to be appointed captain. Wilkes was to have twenty-four sixty-fourth shares in the ship.

Small agreed to lend Wilkes £700 upon having his advance secured by a mortgage of Wilkes' shares in the ship, and his solicitors were instructed to act for him in obtaining from Wilkes the mortgage and such other securities as they thought necessary.

The solicitors informed Wilkes that the advance would not be made unless, in addition to the mortgage, satisfactory arrangements were made to cover Small's interest as mortgagee by insurance.

The solicitors in the first instance stipulated that the policies of insurance should be handed to them to be deposited with Small's securities; but Wilkes pointed out that the insurances on the ship were to be effected through Carlsen, Nielsen, & Co., who were to act as ship's husbands, and that the co-owners would not consent to their parting with the policies. Upon Wilkes' promise that the insurances should be effected for Small, the solicitors did not insist upon a deposit of the policies. The ship was afterwards covered by insurances effected through Carlsen, Nielsen, & Co. upon the instructions of Wilkes and his co-owners, the policies being effected by Carlsen, Nielsen, & Co., "as well in their own names as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all," and the perils insured against including perils of the sea and barratry of the master or mariners. During the currency of the policies the ship became a total loss.

Mathew, J., came to the conclusion that the insurance was effected to cover the interests of Small as mortgagee and of Wilkes as mortgagor; and, further, that Small took part in placing Wilkes in the position of master. He gave judgment for the plaintiffs.

The defendants appealed.

J. A. Hamilton and *Lord Robert Cecil* (*Joseph Walton, Q.C.*, with them) for the defendants.—The mortgagee did not insure his own interest as a separate interest. There was an insurance on the ship taken out by Wilkes, so far as his share was concerned, on behalf of himself and his mortgagee. The mortgagee can only claim on that policy through Wilkes, and as the defendants have a defence against Wilkes, they have a defence against his mortgagee who claims under him. If the mortgagee recovers on the policy, Wilkes will benefit by it, as the money recovered will go towards satisfying the mortgage. By section 34 of the Merchant Shipping Act, 1894, the mortgagee does not become the owner of the ship, but the mortgagor remains the owner, and there can be no barratry against the mortgagee who stands in no better position than his mortgagor.

They referred to *Hobbs* v. *Hannam*, 3 Camp. 93.

T. G. Carver and *W. E. Lloyd*, for the plaintiffs, were not called upon.

Lord Esher, M.R.—The plaintiffs, who are the executors of Small, are suing the defendants upon a policy of insurance on ship for a total loss by the perils insured against. The plaintiffs can only sue if the policy was made on behalf of Small. They could sue under the statute if the policy had been assigned to Small. But there has been no assignment here. The plaintiffs claim on the ground that Small was a party to the policy. The first question therefore is, Was Small a party to the policy? Mathew, J., came to the conclusion upon the facts that, by arrangement between Wilkes and Small, Wilkes was to get an insurance on the ship for and on behalf of Small so as to cover Small's interest as mortgagee. It is clear that Small, as mortgagee, had an insurable interest in the ship. If the ship were lost, his interest in the ship as mortgagee would be lost too. He could no doubt sue the mortgagor for the money lent, but his interest in the ship would be gone. Therefore Small was insured against the perils covered by the policy to the extent of his interest in the ship, and it was clear that the interests of mortgagor and mortgagee were distinct interests. The mortgagee claimed his interest, not through the mortgagor, but as a distinct interest. If that were the only relation between the mortgagor and the mortgagee, the mortgagee would have nothing to say to the sailing of the ship. The mortgagee would sue upon the policy to the extent of his interest in the ship. If he had nothing to say to the captain, the captain's acts were the same as the acts of a stranger. If a stranger was guilty of some wrongful act, and the sea in consequence got into the ship and the ship were lost, in insurance law the *causa proxima* of the loss would be the coming in of the sea. There would then be a loss by a peril of the sea. The wrongful act would not be the *causa proxima* of the loss, and the mortgagee would recover on the policy as upon a loss by a peril of the sea, and not as upon a loss by barratry. The wrongful act of a stranger, as the captain in the case supposed was, would not affect the mortgagee. If, on the other hand, the captain was the mortgagee's captain, then the captain was guilty of misconduct called barratry against the persons who appointed him. Before the policy was effected, Small agreed to advance Wilkes the money, knowing that he was to be captain of the ship, and Mathew,

J., has found that Small took part in placing Wilkes in the position of captain. Therefore Wilkes was to be captain for and on behalf of Small, as well as of the co-owners. That being so, the wrongful act was that of the captain, as against those who appointed him, and in this view the plaintiffs can recover under the clause in the policy as for a loss by barratry of the master. In either view, therefore, the judgment is right.

A. L. SMITH, L.J.—I am of the same opinion. The real point appears to me to be this—if Small was the assignee of Wilkes, any defences that could be raised against Wilkes would be available against Small. The plaintiffs, however, do not sue upon the ground that Small was the assignee of Wilkes, but they sue upon a policy effected by Wilkes for Small. It seemed that Wilkes had not the money to pay for his shares in the ship, and Small advanced him £700, taking a mortgage of Wilkes' shares in the ship, upon the terms that Wilkes was to be the captain of the ship, and that a policy should be effected for Small to cover his advance. Accordingly a policy was effected with the defendants by Carlsen, Nielsen, & Co., "as well in their own names as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all." In my opinion Small would have been entitled to sue upon that policy in his own name, and therefore his executors are entitled to sue. That being so, how does the wrongful act of the captain affect Small? Small had nothing to do with the wrongful act of Wilkes, and he was entitled to sue upon the policy for the loss of the ship by a peril of the sea, and the defendants cannot set up the wrongful act of Wilkes as any answer to that claim. There is another ground upon which we can decide this case. Mathew, J., held, and I think rightly, that Small took part in appointing Wilkes captain of the ship, and that therefore the barratrous act of Wilkes was a barratrous act against Small as well as against the other co-owners. The plaintiffs can therefore sue upon the clause in the policy covering barratry of the captain. The judgment was therefore right.

RIGBY, L.J., concurred.

Solicitors for the plaintiffs, *Warriner & Co.*, for *Davis & Lloyd*, Newport, Mon.

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

From Chan. Div. (Lindley, Lopes, and Chitty, L.JJ.) July 14.

HILL *v.* ROWLANDS. (*a.*)

Mortgage—Right to redeem—Second mortgagee—Order nisi *for foreclosure, with liberty to redeem—Chief clerk's certificate finding six months' interest due to first mortgagee—Second mortgagee seeking to redeem on payment only of interest to date.*

Where an order for foreclosure directed (in the usual form) that the second mortgagee should be at liberty to redeem on payment to the first mortgagee within six calendar months after the date of the chief clerk's certificate of what should be certified to be due, and the chief clerk's certificate included (in the usual way) interest to the end of the six calendar months so allowed for redemption:

Held, that the second mortgagee was not entitled to have the premises reconveyed to him on payment, before the expiration of the six months, of the principal and costs, together with interest merely to the date of payment, but that payment of interest for the full period of six months was necessary.

Appeal from Romer, J.

In 1895 the plaintiffs, the first mortgagees of certain property, commenced an action to enforce their security. On the 27th of March, 1896, after the plaintiffs had taken possession of the mortgaged property, an order in the usual form was made for a foreclosure *nisi*. The order reserved to the second mortgagees liberty to redeem on paying to the plaintiffs, within six calendar months after the date of the certificate, and at such time and place as should be appointed, what should be certified to be due to the plaintiffs. In November, 1896, the mortgagor's trustee in bankruptcy (to whom a further period for redemption had been given by the order) paid off the second mortgagee, who thereupon reconveyed to him the mortgaged property, subject only to the first mortgage. On the 5th of May, 1897, the chief clerk made his certificate, certifying the amount which was due to the plaintiffs for principal and interest to the date of the certificate and for their taxed costs, and also for the further interest which would become due to the plaintiffs during the period of six calendar months allowed to the second mortgagee for redemption. The mortgagor's trustee in bankruptcy, in whom the rights of the second mortgagee were now vested, desired to pay off the mortgage debt and interest before the expiration of the period allowed for redemption. He therefore, on the 12th of June, 1897, gave notice of motion that the plaintiffs might be ordered to reconvey the mortgaged property to him upon payment by him of the principal moneys and interest found due to the date of the certificate, together with interest from the date of the certificate down to the date of the service of the notice of motion. Romer, J., held that the trustee in bankruptcy was bound by the certificate, and could not redeem except on payment of the full sum found due by the certificate. His lordship therefore refused the motion with costs. The trustee in bankruptcy appealed.

Macnaghten, Q.C., and *H. Wace*, for the appeal, cited *Smith* v. *Smith*, 40 W. R. 32, [1891] 3 Ch. 550; *Paynter* v. *Carew*, 2 W. R. 345, Kay, Appendix xxxvi.; and *In re Alcock, Prescott* v. *Phipps*, 23 Ch. D. 372.

Levett, Q.C., and *Kenyon Parker*, for the plaintiffs, were not called upon.

LINDLEY, L.J.—This application has certainly the merit of novelty; but it is so entirely contrary to the settled practice of the court, and so contrary also to the principles by which we are always guided, that it cannot possibly succeed. I am not going to say anything about whether a mortgagor can or cannot stop a foreclosure suit before decree by tendering the money with interest to date. There seems to be some authority that he can. I express no opinion about that. I will assume that he could. But we are not now dealing with anything before judgment, but with a judgment and what has been done under it. The judgment is express. It is a judgment in the ordinary form for foreclosure of the mortgage, and it has reference to the sum which shall be found due on the chief clerk taking the accounts and making his certificate in the ordinary form. The certificate has now been made in the ordinary way, and the sum found due includes six months' interest. Now, after all that, the mortgagor comes and says that his tender need not be on the terms upon which by the

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

order he is entitled to redeem; he does not want to pay to the mortgagee what has been found due by the certificate, but he proposes to tender less. The mortgagor justifies that contention in this way. He says that the certificate has included interest for six months, and that the inclusion of that six months' interest was a concession to the mortgagor. It was giving him six months to redeem; but it was also an advantage to the mortgagee, because the mortgagee does not know whether he will have any money to invest or not. That period has been settled on considerations of convenience to both parties, and the mortgagor, when he comes to redeem under a judgment, must comply with the terms of the judgment, whatever his rights might have been if he had tendered the money before judgment. I think, therefore, that the appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. I am not so familiar with matters of this kind as my learned brothers, but it seems to me clear that the certificate determines the rights of the parties. Now, the certificate which gives the mortgagee six months' interest in lieu of notice, and gives him six months to find an investment for his money. As to how the case might stand if payment had been made before judgment, with interest up to the date of payment, I express no opinion.

CHITTY, L.J.—I think that, when examined on principle, the appeal fails. The contention of the appellants is peculiar. It is that upon payment of what is certified by the chief clerk to be due for principal and costs, with interest to the date of payment, the mortgagor is discharged. Now, according to the usual form the sum to be certified is a sum composed of principal, interest, and costs down to the date of the certificate, six months' interest, according to the invariable practice of the court, being added for the period of six months after the certificate. It has always been upon payment of that sum that the reconveyance or redemption is to take place. The order is quite specific in giving six calendar months, and the mortgagor may make his payment at any time within that period, but he must pay the sum mentioned in the certificate. It is the established practice of the court, and is never departed from, that the mortgagor has a period of six months within which he can redeem. Here certain proceedings have taken place—the judgment and the certificate—and the reason, if one has to seek for a reason, is that the mortgagor has six months to find the money, and the mortgagee has a like period which he can usefully employ in looking out for a new security. I think the settled practice ought not to be departed from. Although foreclosures have been going on for centuries, there is no authority for the appellants' contention.

Appeal dismissed.

Solicitors, *Pritchard, Englefield, & Co.*; *Thomas White & Sons.*

High Court of Justice.

Chan. Div. North, J. — July 10.

In re ROSS'S CHARITY. (*a.*)

Charity—Ecclesiastical charity—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *ss.* 14, 70, 75.

A testatrix charged certain lands with the payment of £3 a year, to be paid on the feast day of St. Thomas the Apostle to the churchwardens of A., to be laid out by them in the purchase of flannel petticoats, stockings, or gowns to be given to six old and poor widows of the said parish whom they should judge to be the properest objects to receive the same, with preference to those who, not being disabled by infirmity or sickness, were most constant in their attendance on the public services of the church.

Held, that this was not an ecclesiastical charity within the meaning of section 75 *of the Local Government Act,* 1894, *and that new trustees might be appointed under section* 14 *of that Act by the parish council, in the place of the churchwardens.*

Petition.

Mary Ross by her will, in 1799, charged certain lands with the payment of £3 a year, to be paid on the feast day of St. Thomas the Apostle in every year for ever to the churchwardens of the parish of Bishop's Hatfield, to be laid out by them in the purchase of flannel petticoats, stockings, or gowns, to be given as soon as might be to six old and poor widows of the said parish of Bishop's Hatfield whom they should judge to be the properest objects to receive the same, with preference to those who, not being disabled by infirmity or sickness, were most constant in their attendance on the public services of the church.

The Local Government Act, 1894, s. 14, sub-section 2, enacts that "where overseers of a rural parish as such are, either alone or jointly with any other persons, trustees of any parochial charity, such number of the councillors of the parish or other persons, not exceeding the number of the overseer trustees, as the council may appoint, shall be trustees in their place, and, when the charity is not an ecclesiastical charity, this enactment shall apply as if churchwardens as such were specified therein as well as the overseers."

The question whether Mary Ross's Charity came within this provision was referred to the Charity Commissioners in accordance with the Local Government Act, 1894, s. 70, sub-section (2). The Charity Commissioners determined that (1) "the said charity was not an ecclesiastical charity within the meaning of section 75 (2) of the Local Government Act, 1894; (2) an appointment under section 14 (2) of the said Act by the parish council of the above-mentioned parish (being a rural parish) of trustees in the place of the churchwardens is valid."

The churchwardens presented this petition by way of appeal from the Charity Commissioners.

Lord Robert Cecil, for the petitioners.—Section 75 of the Local Government Act, 1894, says what an "ecclesiastical charity" includes. This is clearly an ecclesiastical charity, and the parish council has no power to appoint trustees.

He cited *Shore* v. *Wilson*, 9 Cl. & F. 355; *Attorney-General* v. *Calvert*, 23 Beav. 248, 5 W. R. Ch. Dig. 13.

Vaughan Hawkins, for the Charity Commissioners.—This is an eleemosynary charity; attendance at church

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

is not, in the view of the commissioners, a test of church membership: *Attorney-General* v. *St. John's Hospital, Bath*, 24 W. R. 913, 2 Ch. D. 554.

Lord R. Cecil replied.

NORTH, J.—The charity is not an ecclesiastical charity within the meaning of the Local Government Act, 1894, which was defined by section 75 as including a charity the endowment whereof was held, amongst other purposes, "for the benefit of any particular church or denomination, or any members thereof as such." The words of the trust constitute beyond all doubt what is called an eleemosynary charity, in respect of which the general rule is that the court does not look at all at the religion of the founder. This is clearly shown by the case of *Attorney-General* v. *Calvert*; but there is nothing to prevent a founder, if he desires to do so, from limiting the objects of his bounty to those of a particular religion, but in that case there must be some clear indication of such an intention. Here there is nothing to show that the charity is to be confined in that way. It is said that the charity is one for the benefit of members of the Established Church "as such." The will does not say in terms that the charity is to be in favour of members of the Church of England; but there are said to be three indications of such an intention—(1) the annuity is to be paid to the churchwardens; (2) it is to be paid to them upon a festival of the Church; and (3) a preference is to be shown in favour of those most constant in attending the services of the church. In my opinion none of these indications suffice to show that the benefit of the charity was intended to be confined to members of the Church of England. Malins, V.C., held that the fact that the master of a hospital was to be a clergyman did not cause the benefit to be confined to members of the Church of England. Directing payment on St. Thomas's Day, again, is merely equivalent to directing payment on the 21st of December. The preference given to those who attend church most regularly does not confine the gift to members of the Church of England, for the preference only comes in in cases of difficulty and when they can go to church.

As to the construction of section 14, I take that clause to mean that where the churchwardens as such are either alone or jointly with any other persons trustees of any parochial non-ecclesiastical charity, such number of persons not exceeding the number of churchwardens as the parish council may appoint are to be trustees in the place of the churchwardens.

In my opinion there is no question of the power of the parish council to appoint trustees in the place of the churchwardens, and I must dismiss the petition.

Solicitors, *Mason & Co.*; *Clabon.*

Chan. Div.
Byrne, J. } July 5; Aug. 6.

BRITISH NATURAL PREMIUM PROVIDENT ASSOCIATION (LIMITED) v. BYWATER. (a.)

Practice — Costs — Interlocutory proceedings — Costs reserved—New regulation.

Where interlocutory applications have been ordered to stand to the trial and are not then mentioned to the judge, the costs of such applications are to be treated as costs in the action, and taxed accordingly, and need not be mentioned in the judgment. Where such applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment nor allowed on taxation without the special direction of the judge.

Motion.

The defendants Bywater and Smallwood (who was a creditor of Bywater) in 1893 took out a policy of assurance upon the life of Bywater with the plaintiffs.

This policy was subsequently deposited by way of equitable security with the defendant Harris.

In January, 1896, the plaintiffs brought the above action to set aside the policy as obtained by misrepresentation.

On the 13th of July, 1896, Kekewich, J., made an order giving leave to the plaintiffs to deliver certain interrogatories to the defendants, and on the 29th of July, 1896, the same judge made an order allowing a further interrogatory to be added.

On the 2nd of November a third order was made for a further and better affidavit by Bywater as to two of the interrogatories.

The costs of all these orders were reserved.

The action came on for trial before Byrne, J., who, on the 14th of April, 1897, gave judgment for the plaintiffs. The plaintiffs' costs were to be taxed, and, in effect, paid by the defendants. No mention was made at the trial of the reserved costs, nor in the judgment as passed and entered.

When the matter came before the taxing-master he disallowed these costs.

The plaintiffs now made the present application for a direction that the reserved costs should be paid by the defendants.

F. Dodd, for the motion, contended that the taxing-master should have taxed these costs as included in the judgment: *Hodges* v. *Hodges*, 25 W. R. 162; *Fritz* v. *Hobson*, 28 W. R. 722, 14 Ch. D. 542; *Blakey* v. *Hall*, 35 W. R. 592, ord. 28, r. 11.

Disney, *Disturnal*, and *L. Rylands*, for the respective defendants.

Aug. 6.—BYRNE, J.—[After directing the costs reserved should be borne by the defendants:] As regards the costs of the present application they must be paid by the plaintiffs. It is true that I find that the practice in the offices of the registrars has varied with regard to such reserved costs, but the plaintiffs cannot excuse themselves on this ground, as they neglected to ask the registrar to include them in the judgment in drawing it up, as was done in *Hodges* v. *Hodges*, and allowed the judgment to be passed and entered without mentioning them. [His lordship then continued:] The judges of the Chancery Division have for the guidance of the registrars and taxing masters given the following directions in reference to the costs of interlocutory applications. "Where interlocutory applications have been ordered to stand to the trial and are not then mentioned to the judge, the costs of such applications are to be treated as costs in the action, and taxed accordingly, and need not be mentioned in the judgment. Where such applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or order, or allowed on taxation, without the special direction of the judge."

His lordship added: Speaking for myself I shall regard with much jealousy any application as to reserved costs made to me after the judgment has been passed and entered.

Solicitors, *Templer, Down, & Miller*; *A. H. Arnould & Son*, for *Bickley, Lynex, & Bickley*, Birmingham; *Belfrage & Co.*; *Frith Needham*, for *Dale & Co.*, Birmingham.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Q. B. Div.
(Lawrance and Collins, JJ.) Aug. 5.

REG. v. BURROWS AND ANOTHER (JUSTICES).
Ex parte WILSON. (a.)

Justices—Summary jurisdiction—Procedure—Order to have child vaccinated—Costs of complainant—Distress—Imprisonment—"Civil debt"—Summary Jurisdiction Acts, 1848 (11 & 12 *Vict. c.* 43), *s.* 18; 1879 (42 & 43 *Vict. c.* 49), *s.* 6.

An order was made by justices, under the Vaccination Act, 1867, *s.* 31, *ordering the parent of a child to have the child vaccinated within a certain time, and to pay* 8*s.* 6*d. costs to the informant. The order further provided that the payment of the costs should be enforced by distress and imprisonment.*

Held, the justices had power under section 18 *of the Summary Jurisdiction Act*, 1848, *to order that the payment of the costs should be so enforced, and that such power was not affected by section* 6 *of the Summary Jurisdiction Act*, 1879.

Rule *nisi* for a *certiorari* to bring up and quash an order made by the justices of Maidenhead.

Information was given to the justices under the Vaccination Act, 1867 (30 & 31 Vict. c. 84), s. 31, that the informant had reason to believe that the defendant's child had not been successfully vaccinated. The defendant was summoned to appear before the justices, who made an order that the child should be vaccinated within a specified time and that the costs of the informant to the amount of 8s. 6d, should be paid by the defendant to the informant. It was further ordered that the payment of the costs should be enforced by distress, and in default of distress, by imprisonment.

A rule *nisi* for a *certiorari* was granted to bring up and quash the order upon the ground that the justices had no power to order the payment of the costs to be enforced by distress and imprisonment.

The Vaccination Act, 1867, s. 31, provides: "If any registrar, or any officer appointed by the guardians to enforce the provisions of this Act, shall give information in writing to a justice of the peace that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated and that he has given notice to the parent . . . to procure its being vaccinated, and this notice has been disregarded, the justice may summon such parent . . . to appear with such child before him . . . and . . . may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time. . . ." The section further provides that upon disobedience of the order the parent shall be proceeded against summarily and shall be liable to a penalty.

The costs were awarded by virtue of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 18, which was incorporated by the Vaccination Act, 1867. That section also provides as follows: "The same (meaning the costs) shall be recoverable in the same manner and under the same warrants as any penalty or sum of money adjudged to be paid in and by such conviction or order is to be recoverable; and in cases where there is no such penalty or sum to be thereby recovered, then such costs shall be recoverable by distress and sale of the goods and chattels of the party and in default of such distress by imprisonment, with or without hard labour, for any time not exceeding one calendar month unless such costs shall be sooner paid."

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 6, provides: "Where under any act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily, is recoverable under this Act, and not otherwise; and the payment of any costs ordered to be paid by the complainant or defendant in the case of any such complaint shall be enforced in like manner as such civil debt, and not otherwise."

Macmorran, Q.C. (*McCarthy* with him), showed cause.—Under the provisions of the Summary Jurisdiction Act, 1848, the justices have power to deal with three kinds of matters: (1) Offences, in which case the procedure is by information followed by conviction; (2) proceedings to recover money, the procedure being by complaint followed by an order; (3) applications for an order against the defendant ordering him to do something other than the payment of a sum of money—*e.g.*, an order to give sureties. In this case also the procedure is by complaint followed by an order. Then comes the Act of 1879. It is suggested that the costs, power to order which is given by the Act of 1848, s. 18, are a "civil debt" within the meaning of section 6 of the Act of 1879. But section 6 only applies where there is a liquidated sum due—such as wages recoverable summarily under the Employers and Workmen Act. The words of the Act are: "A sum of money claimed to be due." These costs are neither a liquidated sum nor are they recoverable by complaint. The proceeding was by information. Therefore they are not a civil debt within the Summary Jurisdiction Act, 1879, s. 6, and the procedure under the Summary Jurisdiction Act, 1848, still applies: *Reg.* v. *Paget*, 30 W. R. 336, 8 Q. B. D. 151; *Reg.* v. *Kerswill*, 43 W. R. 59, [1895] 1 Q. B 1; *East London Waterworks* v. *Charles*, 42 W. R. 702, [1894] 2 Q. B. 730; *Kennard* v. *Simmons*, 50 L. T. Rep. 28.

Schultess Young, in support of the rule.—The power to order distress and imprisonment was intended to be confined to criminal matters. This proceeding is not a criminal matter. The order for vaccination is not, in the first place, a penal one. It is only after the order has been disobeyed that a penalty can be imposed. The costs ordered to be paid by the defendant are a civil debt within the Summary Jurisdiction Act, 1879, s. 6. They are a sum of money ascertained to be due when the order was made. [COLLINS, J.—Would not that argument equally apply in the case of a penalty?] It would. If the costs are not a civil debt within section 6, they are, at any rate, governed by section 47, which provides: "The provisions of this Act with respect to a sum adjudged to be paid by an order shall apply, so far as circumstances admit, to a sum in respect of which a court of summary jurisdiction can issue a warrant of distress without an information or complaint under the Summary Jurisdiction Act, 1848, in like manner as if the said sum were a civil debt. . . ." *Reg.* v. *Lord Mayor of London, Ex parte Boaler*, 42 W. R. 159, [1893] 2 Q. B. 146; *Allen* v. *Worthy*, 21 L. T. Rep. 665, 18 W. R. C. L. Dig. 99. The procedure is not in the strict sense by information. The words of the Vaccination Act, 1867, s. 31, are "give information" to a justice, not "lay an information."

Macmorran, Q.C., in reply.—Section 47 applies to two classes of cases only—(1) where costs are awarded to the defendant against the informant

or complainant on the dismissal of an information or complaint under section 18 of the Summary Jurisdiction Act, 1848; (2) where costs are awarded on an appeal from a conviction or order under section 27 of the same Act.

Cur. adv. vult.

The judgment of the court was delivered by COLLINS, J. (LAWRANCE, J., concurring.)

COLLINS, J.—(After stating the facts and after reading section 18 of the Summary Jurisdiction Act, 1848.) It is clear that under the provisions of that section the justices had power to make the order for the payment of the costs, and that they could enforce the payment of the costs so ordered by distress and imprisonment. Unless, therefore, the Summary Jurisdiction Act, 1879, took these costs out of the operation of section 18, the order is good. It is suggested that by reason of section 6 of the Summary Jurisdiction Act, 1879, the remedy for the recovery of these costs under section 18 is no longer applicable [reads section 6]. I have a difficulty in understanding how it can be suggested that the costs are a "sum of money claimed to be due" "recoverable on complaint." No doubt the costs did eventually become a sum of money payable to the informant, but it was not a sum of money antecedently due. There is no distinction in principle between the costs and a penalty.

Solicitor showing cause.—*B. Alabone*, Cheverton.

Solicitors in support of the rule.—*Ward & Thomas*, Maidenhead.

Q. B. Div.
(Lawrance and Ridley, JJ.) July 24.

WOOD *v.* MAYOR OF WIDNES. (*a.*)

Local government — Public health — Powers of local authority — Reconstruction of privies — Adoption of particular system of water-closet — Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 36.

The Public Health Act, 1875, *s.* 36, *provides that a local authority may, by written notice, require the owner or occupier of a house to provide a sufficient water-closet, earth-closet, or privy, as the case may require, and that, if the notice be not complied with, the local authority may do the work and recover the expenses.*

A local authority passed a resolution that in all future cases of nuisances requiring the reconstruction of privies, a particular kind of water-closet system should be adopted.

Held, that there was no power to adopt a general rule in all cases, and that the resolution was invalid. The local authority were bound in each case, before issuing the notice, to take into consideration the particular requirements of the house in question.

Case stated by justices of Lancashire.

On the 12th of February, 1895, the respondents, who were the urban sanitary authority of the borough of Widnes, confirmed the following resolution of their health committee: "That in all future cases of nuisances requiring the reconstruction of privies and ashpits the local authority of this borough do as far as practicable order that such privies and ashpits be converted into the waste water-closet system, or into such other water-closet system as the local authority may from time to time approve, and that the highway committee be requested to take steps for the adoption of the first-named system generally throughout the borough."

In April, 1895, the borough surveyor and the inspector of nuisances reported to the respondents that upwards of 300 houses in the borough, including Nos. 52 to 68, Terrace-road, of which houses the appellant was the owner, were respectively without a sufficient water-closet, earth-closet, or privy, and an ashpit furnished with proper doors and coverings.

On the 9th of April the respondents confirmed a resolution of the health committee "that the local authority do by written notice require the owner or occupier of each of the said houses . . . to provide a sufficient privy and ashpit furnished as aforesaid upon the waste water-closet system approved by the corporation."

A notice in the terms of this resolution was accordingly served upon the appellant, and the notice not having been complied with, the respondents did the work and declared the expenses incurred by them in so doing to be private improvement expenses under section 36 of the Public Health Act, 1875, payable by instalments.

The appellant having failed to pay £6 8s., the amount of the first instalment, the respondents laid a complaint before the justices, who made an order against the appellant for payment thereof, subject to this case.

The question for the court was whether the resolution confirmed on the 12th of February, 1895, was valid; or, if not, whether it invalidated the subsequent proceedings.

The Public Health Act, 1875, s. 36, provides that, "If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a water-closet, earth-closet, or privy, and an ashpit furnished with proper doors and coverings, the local authority shall by written notice require the owner or occupier of the house . . . to provide a sufficient water-closet, earth-closet, or privy, and an ash-pit furnished as aforesaid, or either of them, as the case may require."

C. A. Russell, Q.C., and *Rycroft*, for the appellant.—The local authority have no power to lay down, as they have done by the resolution of the 12th of February, a general rule prescribing that in every case a particular kind of water-closet shall be adopted. Under section 36 they can only insist upon the provision of "a sufficient water-closet," &c., "as the case may require." There was in this case no inquiry into the particular requirements of the case. The notice merely follows the resolution of the 12th of February, and the appellant was not bound to comply with it.

McCall, Q.C., and *Bonsey*, for the respondents.—The decision of the justices was right. The local authority have power to order what works shall be executed, and can require water-closets to be substituted for privies. It was so held in *St. Luke's Vestry* v. *Lewis*, 10 W. R. 249, 1 B. & S. 865, decided under section 81 of the Metropolis Local Management Act, 1855, which section is identical with section 36 of the Public Health Act, 1875. That case was followed in *Bogle* v. *Sherborne Local Board*, 46 J. P. 675; *Ex parte Whitchurch*, 29 W. R. 507, 6 Q. B. D. 545. The proper remedy of the appellant, if he had any grievance, was to appeal to the Local Government Board under section 268. The justices' duty was ministerial only, and they had no power to consider any question as to the character of the work ordered: *Hargreaves* v. *Taylor*, 11 W. R. 562, 3 B. & S. 613. [RIDLEY, J.—*Tinkler* v. *Wandsworth District Board*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

of Works, 6 W. R. 390, 2 De G. & J. 261, is in the appellant's favour.] At the time that case was decided there was no appeal to the Local Government Board. Moreover in that case there was a finding of fact that the local authority had decided to substitute water-closets for privies in all cases. Whereas here the resolution of the 12th of February only applies to cases of privies which require reconstruction.

Russell, Q.C., in reply.—All that was decided in *St. Luke's Vestry* v. *Lewis* was that the local authority could order the conversion of an insufficient privy into a water-closet. That is not disputed, but there is no case which says that a particular kind of water-closet can be ordered.

LAWRANCE, J.—The first question asked by this case is whether the resolution of the health committee confirmed by the respondents on the 12th of February, 1895, is valid. If that resolution is answered in the appellant's favour it seems to me that the other questions become immaterial. By the resolution in question the respondents determined that in all future cases of nuisances requiring the reconstruction of privies a system known as the waste water-closet system should be adopted. The question as to the validity of that resolution turns on section 36 of the Public Health Act, 1875, which provides that if a house is without a sufficient water-closet, earth-closet, or privy the owner or occupier may be required by the local authority to provide a sufficient water-closet, earth-closet, or privy. It is contended for the appellant that by the resolution of the 12th of February the respondents have laid down a general rule requiring the adoption of a particular kind of water-closet in all cases without any regard being had to the particular requirements of each house. In my judgment the local authority are not entitled to do that. It is not disputed that they may in every case within the section require a water-closet to be substituted for a privy, but in my opinion the local authority have no power to insist upon a particular kind of water-closet being furnished. All that can be required of the owner or occupier of the house by the notice under section 36 is that he shall provide a "sufficient" water-closet.

I therefore come to the conclusion that the resolution of the 12th of February was invalid, and the appeal must be allowed.

RIDLEY, J.—I am of the same opinion. The question is whether the respondents have been enforcing one general rule over the whole of their district or whether they have exercised their discretion in each individual case. If they were enforcing a general rule, then in my opinion it was not competent for them to do so. The local authority are empowered to give notice to each person requiring him to provide a sufficient water-closet, and then it is for the local authority to say whether the water-closet which is provided is sufficient or not; but that is a very different thing from saying that in every case a particular kind of water-closet must be adopted. When the facts of this case are looked at it is impossible not to say that in this case the respondents have adopted a general rule for all cases.

The resolution of the 12th of February says that in all future cases of converting privies into water-closets the waste water-closet system shall be adopted. Then a report having been made as to the condition of upwards of 300 houses in the borough it is resolved that in every case the owner is to be served with a notice requiring him to provide a waste water-closet. I have come to the conclusion that, however desirable uniformity of system may be, that is not the intention of the Act.

I think that in this matter the local authority have exceeded their powers by adopting a general rule and requiring a particular kind of water-closet to be provided in every case.

Appeal allowed; order of justices quashed; leave to appeal.

Solicitors for the appellant, *Grundy, Son, & Co.*, Manchester.

Solicitors for the respondents, *Sharpe, Parker, Pritchards, & Barham*, for *Oppenheim*, Town Clerk, Widnes.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) — May 31; July 3.

In re GORDON.
Ex parte NAVALCHAND. (*a.*)

Bankruptcy—Property of bankrupt—Money paid into court by defendant with denial of liability—Bankruptcy of defendant—Secured creditor—R. S. C., 1883, *ord.* 22, *r.* 6—*Bankruptcy Acts*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45.

Where the defendant in an action pays money into court with a denial of liability, and becomes bankrupt before the action can be tried, the plaintiff has a claim as a secured creditor upon the money paid into court to the extent to which the trustee in bankruptcy admits the claim in the action.

Motion by Navalchand, an Indian banker, that he may be declared entitled to two sums of money in court: the first being the sum of £48 5s. 11d., paid into court by the debtor Gordon prior to his bankruptcy in an action entitled *Navalchand* v. *Gordon*, in the Queen's Bench Division; the second being the sum of £110 10s., paid in to the credit of the same action by the applicant as security for costs.

The action of *Navalchand* v. *Gordon* was begun in February, 1896, to recover £118 19s. 2d., the amount, together with interest, of a dishonoured promissory note.

The defendant paid £48 5s. 11d. into court in respect of the claim in the action with a denial of liability. The applicant paid in £110 10s. as security for costs. The defendant presented his own petition on the 14th of December, 1896, and was adjudicated a bankrupt, the official receiver being his trustee.

Æneas Mackintosh, for the applicant.—The plaintiff has a claim as a secured creditor upon the money paid into court: *Ex parte Banner, In re Keyworth*, L. R. 9 Ch. App. 379, 22 W. R. Dig. 20; *Levy* v. *Lovell*, 27 W. R. 428, 11 Ch. D. 220; *Ex parte Bouchard, In re Moojen*, 28 W. R. 129, 12 Ch. D. 26. [VAUGHAN WILLIAMS, J.—How can the money be paid out? No order can be made until after the determination of the action: *Maple & Co.* v. *Earl of Shrewsbury and Talbot*, 35 W. R. 819, 19 Q. B. D. 463.]

Edward Clayton, for the official receiver.—This money was money of the bankrupt's at the commencement of the bankruptcy, and therefore passes to his trustee. Moreover, a creditor cannot have any security on money paid into court, it is not a mortgage, charge, or lien on the property of the debtor. Further, it is provided by ord. 22, r. 6, that money in court shall be subject to the order of the court or a judge; that means the court before

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

which the action will be tried, and the Bankruptcy Court has no jurisdiction to disturb this money. [VAUGHAN WILLIAMS, J.—I think section 102 of the Bankruptcy Act, 1883, gives me ample power to deal with the matter if you refuse to consent to my having jurisdiction.] I am willing to submit to the jurisdiction, but I contend that the plaintiff here can be in no better position than a person who has attached a debt: *Butler* v. *Wearing*, 17 Q. B. D. 182, 34 W. R. Dig. 17.

Æneas Mackintosh replied.

Cur. adv. vult.

July 3.—VAUGHAN WILLIAMS, J.—In this case the question is as to the right of the applicant to two sums of money paid into court before the date of the receiving order in an action against the bankrupt. The one is a sum of £48 5s. 11d., paid into court by the defendant with a plea denying liability. The other is a sum of £110 10s., paid into court by the plaintiff at the instance of the defendant as security for the defendant's costs of the action. The trustee has not been made, and declines to be made, a party to the action. He has not actually admitted the plaintiff's claim, but, as I understand, does not contest his right to prove for something. I have no jurisdiction, sitting in bankruptcy, to make an order for payment out of court of either of these sums, but both parties have requested me to decide the question of right, and will consent to the necessary order in the Queen's Bench Division to give effect to my decision.

As regards the sum of £110 10s. paid into court by the plaintiff as security for costs, I do not understand that it is seriously contended that he is not entitled to have that money paid out of court on admission of the proof, subject, of course, to deduction of costs if there be any in respect of which the defendant may, on interlocutory proceedings, have obtained orders for costs in any event.

As to the money paid into court with a denial of liability, I take it that the plaintiff, though out of time to accept in satisfaction the sum paid in with a denial, would apart from bankruptcy, be entitled to get an order to withdraw his reply, and to give notice accepting the money paid in as satisfaction. I see nothing in the bankruptcy proceedings to prevent his so doing; but if he does, he will not be entitled to prove for any balance of the debt. If, on the other hand, the plaintiff does not elect to take the money out of court in satisfaction, I think that his proper course is to tender a proof in bankruptcy for the full amount of his claim; then if the proof is admitted, or partially admitted—rejected I understand it will not be—the issue in the action will, in my opinion, have been disposed of, and an order may be made in the action in the Queen's Bench Division for the payment of the money out of court to the proper party, according to the result of the application to prove, under ord. 22, r. 6. It is quite true that in *Maple* v. *Earl of Shrewsbury* the Court of Appeal decided that no order could be made for payment of money out of court until the action had been tried or disposed of—that is, so long as the question of liability remains in any way undisposed of, but I think that in the case of an action for a mere money demand it has been disposed of and the liability determined, so soon as the proof has been dealt with in bankruptcy. The Court of Bankruptcy is the proper court to determine the liability in such a case, and I am clearly of opinion that if the proof is admitted, or to the extent to which it is admitted, the plaintiff is a secured creditor by reason of the payment into court. The money paid into court, even with a plea denying liability, has become subject to the plaintiff's claim by the act of the defendant, who thereby agrees that the sum paid shall remain in court subject to the condition of ord. 22, r. 6. It is not a question of execution at all, but of the effect of a conventional charge. It is in effect a conditional payment to the plaintiff; the money is to be the money of the plaintiff if he succeeds in establishing his title to it: *Ex parte Bouchard, In re Moojen.*

If the plaintiff's proof is admitted in full he can amend his proof immediately on the admission by deducting the amount of security which thereupon accrues to him by reason of his right to take the money out of court; or, if the proof is admitted for a less amount than the money in court, he can withdraw the proof and consent to an order that the balance shall be paid to the trustee.

Solicitor for the applicant, *E. W. Hurd.*

Solicitors for the respondent, *Rising & Ravenscroft.*

Prob. Div. & Adm. Div. Probate. } May 3, 6.

In the Goods of CHILCOTT (DECEASED). (*a.*)

Probate—Will—Revival of revoked will—Non-disclosure of revocation to solicitor—Codicil—Express "words of reference"—Wills Act (1 *Vict. c.* 26), *s.* 22.

In 1889 *the testatrix made a will. In* 1892 *she obtained from the same solicitors a draft codicil, which she took away, as they believed, to execute it; but, instead of executing it, she, with the assistance of another person, executed a new will revoking the first. In* 1893 *she asked her solicitors to prepare another codicil, and they, thinking she had executed the first codicil, and in ignorance of the execution of the will of* 1892, *in drafting it described it as a second codicil to the will of* 1889, *and concluded it by confirming the said will and codicil. This codicil the testatrix duly executed.*

The court, on motion to allow proof only of the will of 1892 *and codicil of* 1893, *ordered proof of all three documents.*

Motion on behalf of the executors for a grant of probate of a will dated the 14th of May, 1892, and a codicil dated the 7th of September, 1893, of Eliza Chilcott, who died on the 16th of January, 1897, and omitting a will of the 16th of July, 1889.

The testatrix made a will dated the 16th of July, 1889, which disposed of her property and appointed T. B. Mitchell and F. Spears executors.

Afterwards on the 14th of May, 1892, she made another will, by which she revoked her first will and then disposed of her property, and appointed the same executors as in the first will.

This second will was made under the following circumstances. She desired to make a codicil to her first will, and her solicitors, on her instructions, prepared a codicil, which they gave to her and she took away; but without her solicitors' knowledge, and with the assistance of another person she prepared and executed another will on the 14th of May, 1892; and the codicil was never executed.

On the 2nd of September, 1893, she executed a codicil. When she wished to execute it she went to her solicitors, who were ignorant of the execution of the will of the 14th of May, 1892, and thought she had executed the first codicil.

Under these circumstances they prepared a codicil which (*inter alia*) was in these terms: "This is a second codicil to the will of Eliza Chilcott, which

(*a.*) Reported by J. GERARD LAING, Esq. Barrister-at-Law.

bears date the 16th of July, 1889. . . . In all other respects I confirm my said will and the first codicil thereto."

Barnard, in support of the motion.—The will of 1889 was revoked, and is not revived by the codicil of 1893; by section 22 of the Wills Act it can only be set up again by "re-execution" or by "express words, &c., showing an intention to revive." There must be words in the codicil dealing with words in the will showing a clear intention to revive it: *In the Goods of Steele* (three cases), 17 W. R. 15, L. R. 1 P. & D. 575. In the cases *In the Goods of Stedham*, 29 W. R. 743, 6 P. D. 205, and *In the Goods of Dyke*, 6 P. D. 207, there were references to words in the previous will. In *In the Goods of Ince*, 25 W. R. 396, 2 P. D. 111, HANNEN, P., disregarded a reference by date, where shown to be wrong. The question is whether by the language of section 22 something more is not required than a simple reference to the will, which in this case is a mistake. I submit the mere reference to the will here is not enough. Consents of all the parties interested have been filed.

Cur. adv. vult.

May 6.—BARNES, J.—In this case the question to be decided is what documents shall be admitted to probate. [The learned judge here set out the facts as above.] Application is made to me that the will of 1892 and codicil of 1893 should be admitted to probate without the will of 1889. The point taken by counsel is that the testatrix, in signing the codicil of 1893, made a mistake, owing to the ignorance of the solicitors that she had executed the will of 1892, and that she intended to confirm that will. But a difficulty is presented by the language of the codicil, which in express terms refers to the first will, and in express terms confirms that will, and in express terms confirms the first codicil thereto, and I have no doubt that the solicitor intended to carry that out when he prepared this codicil. Therefore this case comes within the authority of the cases dealt with by Sir James Hannen, in *In the Goods of Stedham* and *In the Goods of Dyke*, and not within the case of *In the Goods of Steele*, cited by Mr. Barnard. In *In the Goods of Stedham*, Sir James Hannen in his judgment says: "The solicitor who was instructed to prepare this codicil, instead of making a codicil to the will of 1878, made a codicil to the will of the 21st of May, 1877, and I was asked to treat it as a mere mistake as to the date, and to allow probate of the codicil, together with the last will of 1878. I am unable to do so for this reason, that it was not a mere mistake as to the date of the will to which it was intended to append the codicil, but the mind of the solicitor, which must be treated as that of the testator, was actually applied to the provisions of the will of 1877," and so on. In this case there is no doubt that the solicitor, who only knew of the first will and believed that the testatrix had executed the first codicil, applied his mind to the first will and first codicil, and then drew the codicil of the 7th of September, 1893, which was duly executed, and which in express terms relates to the first will and first codicil; and I must deal with the documents as they stand. There is no doubt that they do not express the real intention of the testatrix, but I find nothing in the codicil indicating that intention. This seems to me a case where the same course must be adopted, as in the case before Sir James Hannen. All three documents must be admitted to probate, leaving it to a court of construction afterwards to construe them if necessary.

Terms of motion refused, and probate of all three documents ordered.

Solicitors, *Meredith, Roberts, & Mills.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Oct. 30.

PENTON v. BARNETT. (a.)

Landlord and tenant — Ejectment — Forfeiture — Continuing breach of covenant—Claim for rent—Waiver of forfeiture—Notice—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

The defendant was tenant to the plaintiff under a lease containing a general covenant to repair and also a covenant to repair upon notice. The premises having become out of repair, the plaintiff, on the 22nd of September, 1896, *gave notice to the defendant under section* 14 *of the Conveyancing Act*, 1881, *requiring him within three months to execute the repairs therein specified. The notice not being complied with, the plaintiff, on the* 14*th of January*, 1897, *commenced an action, in which he claimed possession of the premises and rent to the* 25*th of December*, 1896. *The defendant pleaded that the plaintiff, by claiming rent in the action, had waived the forfeiture, and was not entitled to recover possession.*

Held, that the plaintiff was entitled to recover possession, for (1) *the breach being a continuing breach, he could rely on the breaches between the* 25*th of December and the* 14*th of January; and* (2) *the premises being in the same state of disrepair at the commencement of the action as at the giving of the notice, the notice was sufficient.*

Appeal from the judgment of Ridley, J., at the trial of the action without a jury.

This was an action of ejectment brought by a landlord against a tenant. The premises were leased in 1873 by the plaintiff's predecessor in title to the defendant's predecessor in title for a term of years. By the lease the lessee covenanted that he would keep and preserve the premises in good and substantial repair and condition, and that during the term he would well and substantially repair and maintain the premises with all manner of needful and necessary reparations when and where and as often as need or occasion should require. He also covenanted that he would well and sufficiently repair the premises within three months after notice from the lessor so to do. The lease provided that if the lessee did not observe and keep all the covenants and conditions to be on his part performed and fulfilled, it should be lawful for the lessor to re-enter upon the premises. The defendant failed to repair and maintain the premises in accordance with the above covenants, and on the 22nd of September, 1896, the plaintiff gave the defendant notice, under section 14 of the Conveyancing Act, 1881, requiring him within three months to execute the repairs specified in the schedule thereto, and to make compensation by payment to the plaintiff of the sum of £20.

The defendant failed to comply with the requirements of the said notice.

The plaintiff commenced this action on the 14th of January, 1897, and by his statement of claim he claimed (1) possession of the premises; (2) a quarter's rent for the quarter ending the 25th of December, 1896; (3) mesne profits from the 25th of December until judgment.

The defence was, that the plaintiff, by bringing this action to recover rent which accrued due after the alleged causes of forfeiture, had waived the alleged

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

forfeiture, and was not entitled to recover possession of the premises.

At the trial Ridley, J., following the case of *Bevan* v. *Barnett*, 13 Times L. R. 310, gave judgment for the defendant on the claim for possession.

The plaintiff appealed.

R. Wallace, Q.C., and *J. D. Crawford*, for the plaintiff.—This is a case of a continuing breach, and the plaintiff is entitled to recover in ejectment on the ground of the breaches between the 25th of December and the 14th of January: *Hartshorne* v. *Watson*, 4 Bing. N. C. 178; *Fryett ex dem, Harris* v. *Jeffreys*, 1 Esp. 393; *Jones* v. *Carter*, 15 M. & W. 718.

H. D. Greene, Q.C., and *Poulter*, for the defendant.—The case of *Dendy* v. *Nicholl*, 6 W. R. 502, 4 C. B. N. S. 376, which was followed in *Bevan* v. *Barnett*, shows that the plaintiff, having elected to treat the defendant as his tenant up to the 25th of December, cannot maintain an action for ejectment for a breach committed before that date. Secondly, if the plaintiff can distinguish between the breaches before that date and the subsequent breaches, the defendant has received no notice under the Conveyancing Act with respect to the subsequent breaches.

A. L. SMITH, L.J.—I am of opinion that this appeal should be allowed. A lease was granted in 1873 containing a general covenant by the lessee to repair, and also a covenant to repair on notice. In 1896 the premises were out of repair, and on the 22nd of September the landlord gave the tenant notice, under section 14 of the Conveyancing Act, to execute certain repairs therein specified within three months, and to make compensation by payment of the sum of £20. On the 14th of January, 1897, more than three months having elapsed—and it must be admitted that that was a reasonable notice—the landlord issued the writ in this action. By his statement of claim he claims the right to re-enter and eject the defendant, and he also claims rent to the 25th of December.

It is conceded that the notice under the Conveyancing Act was never complied with, and at the date of the writ the premises must have been in the same state of disrepair as they were in at the time when the notice was given. It is said that an action of ejectment is not maintainable, because by claiming rent up to the 25th of December the landlord has affirmed the tenancy up to that date, and therefore cannot now insist on a forfeiture for a breach committed before that date. It seems to be well settled law that a landlord by bringing an action of ejectment thereby declares an intention to treat the defendant as a trespasser, and on the other hand by bringing an action for rent declares an intention to treat the defendant as his tenant. But it is pointed out by the plaintiff that when he brought his action on the 14th of January he at the utmost only evinced an intention to treat the defendant as his tenant up to the 25th of December, and that he was entitled to maintain ejectment for the breach which continued between the 25th of December and the 14th of January. This appears to me to be unanswerable, and apart from the Conveyancing Act I should think that the plaintiff was clearly entitled to judgment.

But the defendant says we must take into consideration section 14 of the Conveyancing Act, which enacts that before an action of ejectment can be brought notice of the particular breaches complained of must be given to the lessee, so that he may have an opportunity of remedying them within a reasonable time. The defendant says that he has not received any notice of the breaches between the 25th of December and the 14th of January. But the breaches between those dates were the same as those specified in the notice, and in my opinion the notice is one which satisfies the statute. With regard to the case of *Bevan* v. *Barnett*, which the learned judge seems to have followed, I will only say that it is not clear to me what the facts of that case were. I am of opinion that the appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. The lease contains two covenants as to repairs. One is a general covenant to repair when and where and as often as need or occasion should require. The other is a covenant to repair within three months after notice. And there is a power of re-entry on breach of either covenant. Independently of the Conveyancing Act the landlord had a right to bring an action of ejectment directly the premises were out of repair. But he was not bound to determine the tenancy at any particular time while a breach was continuing. He did not in fact determine the tenancy till he issued the writ on the 14th of January, and when he did so he had a right to sue in respect of anything that had occurred during the tenancy.

But the Conveyancing Act says that a right of re-entry for breach of covenant shall not be enforceable by action unless the lessor serves on the lessee a notice specifying the particular breach complained of. It seems to me that the notice which was given in this case clearly referred to the covenant to repair as and when occasion required, and I think that the terms of the Conveyancing Act have been complied with.

COLLINS, L.J.—I also am of the same opinion. I say nothing as to what would have been the rights of the parties if this had not been the case of a continuing breach. It is not denied that it is a continuing breach, and but for section 14 of the Conveyancing Act I do not see that there could have been any answer to the plaintiff's case. But the defendant says that the breach in respect of which the ejectment is brought is not the breach in respect of which the notice was given. I think that the intention of the section is to secure that the tenant should know what he has to do, what is the physical condition of the premises which he is required to remedy. The word "breach" is used to indicate the thing which is left undone, not the obligation on the tenant which accrues from time to time. In this sense the defendant has received notice of the particular breach now complained of, and the requirements of the Conveyancing Act have been complied with. In the case of *Bevan* v. *Barnett* the point which has been raised here seems not to have been taken.

Appeal allowed.

Solicitors for the plaintiff, *Lee & Pembertons.*

Solicitors for the defendant, *Finch & Turner.*

From Q. B. Div. (Lord Halsbury, L.C., and Rigby and Collins, L.JJ.) — Oct. 25.

JAY AND ANOTHER v. BUDD. (a.)

Practice—Writ—Substituted service—Defendant out of jurisdiction—Ord. 9, r. 2.

A person who was in England at the time when a writ for service within the jurisdiction was issued against him went out of the jurisdiction before the writ was served upon him, but not in order to evade service.

Held, by Lord Halsbury, L.C., *and* Collins, L.J.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

(Rigby, L.J., *dissenting*), *that an order for substituted service of the writ could be made.*

Appeal from the refusal by a judge at chambers to order substituted service of the writ in the action.

The writ for service within the jurisdiction was issued against the defendant, a British subject, to recover a sum of money.

It appeared from the affidavits filed on behalf of the plaintiffs that on the afternoon of the 5th of October, 1897, the defendant, in answer to a letter from the plaintiffs asking for payment of their claim, had an interview with one of the plaintiffs at their office in the City of London, when the latter informed the defendant that he had heard that the defendant was leaving England for Jamaica and that his firm would require payment of their account.

The defendant thereupon offered to discharge the account by giving a cheque post-dated six months, but this the plaintiff refused, stating that his firm would in all probability accept the defendant's bills at three months' and six months' date, whereupon the defendant left the office without making any arrangement for payment.

The plaintiffs thereupon communicated with their solicitors, and on the following day, the 6th of October, the writ in the action was issued. On the same day a clerk of the plaintiffs' solicitors, being instructed to do so by telegraph, served a copy of the writ upon the defendant on board the steamship *Don* at Southampton Docks, when a gentleman, who was present, and who stated that he was the defendant's solicitor, asked the clerk to produce the original writ, but the clerk said that he was unable to do this as the writ was only issued in London that morning.

The defendant's solicitor thereupon said that the service was not complete without it.

The clerk then asked the solicitor if he would accept service for the defendant, but he stated that he would not.

The defendant sailed the same day in the steamship *Don* for Jamaica, and the plaintiffs did not know of any address in Jamaica where he could be found or communicated with, nor did they know when he would return to England.

It was stated in a letter from the defendant's solicitor to the plaintiffs' solicitors that the defendant before leaving England had delegated all matters of business to his manager in London.

It was not suggested that the defendant had left England in order to evade service of the writ.

The plaintiffs thereupon applied *ex parte* for an order for substituted service of the writ, which the judge refused.

The plaintiffs thereupon applied *ex parte* to the Court of Appeal.

Macaskie, for the plaintiffs.—This is a writ for service within the jurisdiction, and it was issued before the defendant left England. The writ was capable of being personally served upon the defendant before he left England, and therefore an order for substituted service can now be made. In *Fry* v. *Moore*, 37 W. R. 565, 23 Q. B. D. 395, and *Wilding* v. *Bean*, 39 W. R. 40, [1891] 1 Q. B. 100, the defendant was out of the jurisdiction when the writ was issued, and therefore the writ could never have been personally served. In *De Bernales* v. *Bennett*, 10 Times L. R. 419, a doubt was expressed whether an order for substituted service could be made in the case of a writ for service out of the jurisdiction. But this is a writ for service within the jurisdiction, and that doubt is not applicable.

He also referred to *Adler* v. *Benjamin*, 1 Times L. R. 308.

Lord HALSBURY, L.C.—I regret that we are not unanimous as to the true meaning of the rule. As my brother Rigby is not able to concur in the decision at which we have arrived, I think it right to express as distinctly as I can my view of the rule. The old practice, where personal service could not be effected, was attended with expense and inconvenience, and the rules made under the Judicature Acts were intended to abolish the expense and difficulty which stood in the way of honest litigants bringing reluctant opponents into court. The great object of all such provisions is on the one hand to enable a person who has a claim against another to bring his claim into court, and on the other to enable the person against whom the claim is made to bring before the court anything which he has to say in answer to it. These two rights have been jealously guarded. It may usually be the case that the person against whom the claim is made knows all about the litigation. But whether he knows it or not it has been provided that he must be properly summoned before the court.

By ord. 9, r. 2, "if it be made to appear to the court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the court or judge may make such order for substituted or other service . . . as may seem just." Those are the words which we have to construe. The words "from any cause" are very general. I cannot import into those words an exception in the case of a person leaving the country upon hearing that litigation has been commenced against him. The simple question is, whether prompt personal service cannot be effected. If that is so, substituted service can be ordered. But the rule does not stop there, because it provides that the court or a judge may make such order as is just in the circumstances of the case. The court, therefore, would not order substituted service unless it were satisfied that the requirements of justice demanded it. It seems to me that every element exists in this case to entitle the court to act under that rule. The debtor and creditor know each other well. The debtor has practically admitted that he owes the debt, and he has offered to pay it in a particular way. He received a copy of the writ which had been issued, and he left the country without giving any information as to his movements and leaving no address, knowing that he would thereby, in fact, evade—I do not suggest that he intended to evade—service of the writ, and the plaintiffs have no knowledge where he is to be found. In these circumstances every element which is contemplated by the rule exist, and in my opinion an order should be made for substituted service. That is my view of the case, and I should regret if I were compelled to put a narrow construction upon the rule. I should suggest that the service should be upon the solicitor who acts for the defendant and upon the gentlemen to whom he has entrusted the management of his business affairs during his absence, and that the defendant should have two months for entering an appearance.

RIGBY, L.J.—I regret very much that a question of such importance as this should have to be determined upon the evidence and arguments of one side alone. It seems to me important to observe that, as far as I know, since the Judicature Acts there has been no case in which substituted service has been ordered in the case of a person who is at the time out of the jurisdiction. I should suppose that there must have been some such cases in which an order for substituted service might have been applied for. But from the authorities which have been referred to I do not think that the judges would have ordered substituted service unless the defendant had left

England to evade service of the writ. The defendant did not leave England to evade service. The facts here are that the debtor was going abroad, and the plaintiffs then asked him for payment of the debt. The debtor offered to pay by a post-dated cheque, but the plaintiffs refused this. The plaintiffs thereupon, knowing that the debtor was going abroad, at some time on the 6th of October issued the writ, and the plaintiffs' solicitors by telegraph on the same day instructed their clerk at Southampton to serve a copy of the writ on the defendant. A copy of the writ was served upon him on board the steamer, whereupon the defendant's solicitor, who was present, asked to see the original writ, but this could not be produced. The affidavits before us do not specify precisely the time when the writ was issued. The ship then sailed. What is the court to do when an application for an order for substituted service is made at a time when personal service cannot be legally effected? It seems to me that *Wilding* v. *Bean* and other cases in this court lay this down, that substituted service cannot be ordered when the defendant cannot, at the time, as it seems to me, of the application being made, be personally served. If in any case there can be personal service, then the court may order substituted service if it thinks it proper to do so. It is clear that the defendant in this case could not have been served with this writ at the time when the application for an order for substituted service was made. In my opinion, though I express it with diffidence owing to the views of the other members of the court, this is not a case for an order for substituted service.

COLLINS, L.J.—I think that this appeal should be allowed. I do not see that any technical rule of law debars us from doing justice in this case. The writ was issued before the defendant left the country, and notice of it was given to him. An attempt was made to serve him with it, and the service was disputed by his solicitor, who insisted upon the original writ being produced. The clerk who served the copy was unable to do this. The service would have been effectual if the original writ had not been required to be produced. Upon these facts is there any decision which debars us from making an order for substituted service? I think not. There are two classes of writs—one for service within the jurisdiction, and the other for service out of the jurisdiction. This is a writ for service within the jurisdiction, and we are unfettered by the law as to writs for service out of the jurisdiction. If the defendant had not had his solicitor beside him when the copy was served, service within the jurisdiction would have been effected. Is it made to appear to the court that the plaintiff is "from any cause unable to effect prompt personal service"? In my opinion it is. The case, therefore, falls within the terms of ord. 9, r. 2. Next, is there any decision which debars us from giving effect to the words of the rule? In my opinion there is not. It is idle to cite cases as to writs for service out of the jurisdiction. I agree that if the writ had been issued after the defendant had left the country, the only mode of reaching him would be by means of a writ for service out of the jurisdiction. It was so held in *Wilding* v. *Bean*, unless indeed the plaintiff could show that the defendant left the country to evade service of the writ. *Fry* v. *Moore* was to the same effect. In my opinion there is no reason why we should not give effect to the words of the rule. The order should therefore be made.

Appeal allowed.

Solicitors for the plaintiffs, *Francis & Johnson.*

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) July 26.

REG. (ON THE PROSECUTION OF THE REV. DAVID EVANS) v. BISHOP OF DURHAM. (a.)

Ecclesiastical law—Clergy—Offence against morality—Deprivation — Subsequent sentence of deposition—Clergy Discipline Act, 1892 (55 & 56 *Vict. c.* 32), *s.* 8.

Where a clergyman is convicted of an offence specified in the Clergy Discipline Act, 1892, *and the bishop of the diocese passes sentence of deprivation, the bishop may, under section* 8 *of the Act, on a subsequent occasion pass the further sentence of deposition from holy orders.*

Appeal from the judgment of the Divisional Court (Day and Lawrance, JJ.) discharging a rule *nisi* for a prohibition to the Bishop of Durham to restrain him from deposing the applicant, the Rev. David Evans, from holy orders.

On the 29th and 30th of May, 1896, the applicant, who was a clerk in holy orders holding preferment in the diocese of Durham, was tried under the Clergy Discipline Act, 1892, in the Consistory Court of the diocese upon certain charges of immorality. The Chancellor of the diocese presided in the court, and notified to the bishop that the court found the applicant guilty and that he should be deprived of his preferment. An application to the Privy Council for leave to appeal having been refused, the bishop, on the 6th of August, 1896, acting under order 31 of the rules made in pursuance of section 9 of the Act, pronounced sentence of deprivation. On the 17th of December, 1896, the bishop notified his intention to depose the applicant from holy orders,* and the applicant thereupon obtained a rule *nisi* for a prohibition as above, which the Divisional Court discharged.

The applicant appealed.

Sir W. Phillimore and *Yelverton* (*W. T. Lawrance* with them), for the applicant.—The bishop has no jurisdiction now to pass a sentence of deposition. He could have done so at the same time as he passed sentence of deprivation, or he might have adjourned the court for the purpose of considering whether he would pass sentence of deposition. He cannot upon a subsequent and independent occasion pass a further sentence of deposition. The words of section 8, "where the preferment of a clergyman becomes vacant," refer to the time when the preferment becomes vacant—that is, when the sentence of deprivation is pronounced, and shows that the sentence of deposition must be pronounced at the same court. It would be contrary to natural justice to allow the bishop to hold the sentence over the head of a clergyman for years, when perhaps the clergyman might have obtained a new preferment.

C. A. Russell, Q.C., and *Errington*, for the bishop, were not called upon.

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* Section 8 of 55 & 56 Vict. c. 32.—"Where by virtue of this Act, or of any sentence passed in pursuance of this Act, the preferment of a clergyman becomes vacant, and it appears to the bishop of the diocese that such clergyman ought also to be deposed from holy orders, the bishop may by sentence, and without any further formality, depose him, and the sentence of deposition shall be recorded in the registry of the diocese; provided always that such clergyman may appeal against the said sentence within one month from the date thereof to the archbishop of the province, whose decision shall be final."

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Lord ESHER, M.R.—The Consistory Court had to inquire into the truth of the charges against this clergyman, and the Chancellor of the diocese presided in that court. Those charges were found to be proved. The rules made under the Act specify the procedure that is to be adopted in such circumstances. The Chancellor notified to the bishop that the clergyman had been found guilty, and that the sentence should be deprivation. The bishop then in the Consistory Court pronounced the sentence of deprivation. It was not suggested that that act of the bishop was not in all respects legal and regular. It was argued, however, that that sentence must be taken as the final sentence, not only with regard to the question of deprivation, but also with regard to the question of deposition, and that, therefore, the sentence of deposition could not be passed afterwards, unless indeed the bishop adjourned the court for the purpose of considering the question of deposition. I cannot see any colour for that argument. The question of deposition was not and could not be before the Consistory Court. That court had nothing to say to it. Section 8 does not say that the sentence of deposition is to be part of the original sentence. It says, in almost plain terms, that the sentence of deposition may be a new sentence. The words "ought also to be deposed from holy orders" seem to show that the sentence of deposition may be something in addition to and beyond the sentence of deprivation. The contention must go this length, that the bishop cannot, after the court has been closed, retire to his library and there consider, even for half-an-hour the question of deposition. The question of deposition is quite apart from the trial in the Consistory Court. It is then said that it is contrary to natural justice to keep the question of deposition in abeyance for some months. I cannot see that it is. For the good of the church and of the parishioners it may be right that a clergyman who is guilty of offences aimed at by the Act of 1892 should be deposed from holy orders, even after the expiration of some months. But even if it could be said to be contrary to natural justice, the Act of Parliament is clear in its terms, and we must give effect to it. The bishop in exercising this power exercises a discretionary jurisdiction, and there is no limit of time specified in the Act within which he must exercise his discretion. Even if the bishop is subject to prohibition, as to which I express no opinion, there is nothing to show that he exceeded his jurisdiction. The appeal must therefore be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. The bishop did not come into the matter until after the sentence of deprivation had been pronounced. The act of the bishop in pronouncing sentence of deprivation was a merely ministerial act. After that the jurisdiction of the bishop comes in. It was said that the bishop had no jurisdiction to pass any further sentence, and even if he had, he was too late in passing sentence in December, 1896. It seems to me clear that the appellant is wrong upon both points. The sentence of deprivation is entirely different from that of deposition. The argument that the sentence of deprivation finishes up the whole matter is untenable. When the sentence of deprivation is passed the jurisdiction of the bishop arises, and there is no limitation of time in the Act within which the bishop must exercise his jurisdiction. It is said that this construction of the Act is contrary to natural justice. The Legislature may well have entrusted this power to the bishop, with an appeal to the archbishop. I desire merely to throw this out, that I am not at all sure that the bishop is a court to which prohibition will go. I do not, however, found my judgment upon this ground. I found my judgment upon the ground given above.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitor for the applicant, *J. R. Philpots.*

Solicitors for the bishop, *Cunliffes & Davenport*, for *J. Wilson*, Durham.

From Chan. Div. (Lindley, Lopes, and Chitty, L.JJ.) [and Chan. Div.] — July 19, 20.

In re KARASKHOMA EXPLORING AND PROSPECTING SYNDICATE (LIMITED). (*a.*)

Company—Winding up—Shares issued as fully paid—Registration of subsidiary contract only—Companies Act, 1867 (30 & 31 *Vict. c.* 131) *s.* 25.

The contract to be registered under section 25 of the Companies Act, 1867, *prior to the issue of shares as fully paid must, in order to comply with that section, set forth all the material terms of such contract.*

Therefore, where a subsidiary agreement only was filed, which recited merely that by another specified agreement, "for the considerations therein mentioned," it was agreed that certain shares should be allotted as fully paid up,

Held, that such registration was insufficient to protect the allottees.

Summons.

Pyke and Gibson held 163 shares of £10 each in the company.

The liquidator sought to make them liable to pay the full call of £10 a share on these.

Pyke and Gibson on the other hand claimed that these shares were issued as fully paid up, and that they were protected by section 25 of the Companies Act, 1867.

In 1892 the Karaskhoma Syndicate being in need of money entered into an arrangement with the Concessions Development Co. that the latter should take up debenture bonds and so lend money to the syndicate.

Accordingly, on the 17th of August, 1892, the syndicate entered into an agreement with the company embodying the above arrangement, and containing clauses whereby the syndicate bound itself against incurring further liabilities and in other ways.

Clause 8 of the agreement was as follows: "By way of further remuneration to the company for the work it will do in connection with the management of the affairs of the syndicate, the syndicate agrees to allot to the company 163 preference shares, being the balance of its unissued capital, as fully paid, such allotment to be protected by a duly registered agreement under the 25th section of the Companies Act, 1867."

A contract was accordingly filed, dated the 31st of August, 1892, and made between the syndicate and the company. It recited that by an agreement dated the 17th of August, 1892, between the same parties "it was agreed for the considerations therein mentioned that the syndicate should allot to the company 163 fully paid-up £10 preference shares of the syndicate, being the balance of the syndicates' un-

(*a.*) Reported by C. W. MEAD and W. SCOTT THOMPSON, Esqs., Barristers-at-Law.

issued capital, such allotment to be protected by a duly registered agreement under the 25th section of the Companies Act, 1867, being this present agreement."

These 163 shares were allotted to Pyke and Gibson as nominees of the company.

The syndicate was now being wound up, and the liquidator sought to make them liable to pay the full amount of £10 per share on these shares.

The case was argued before Vaughan Williams, J., on the 7th and 8th of April.

Eve, Q.C., and *Hamilton*, for the liquidator.

Buckley, Q.C., and *Napier*, for Pyke.

Jenkins, Q.C., for Gibson.

May 27.—Vaughan Williams, J.—The question I have to decide is whether there has been such a filing of a contract as to comply with section 25 of the Act of 1867, which is as follows: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of Joint-Stock Companies at or before the issue of such shares." It is common ground that a contract has been filed, but it is said the contract which has been filed is not a sufficient contract to satisfy the terms of the section. This is one of the cases where there is a principal contract, one term of which is that fully-paid shares shall be issued, and then a sub-contract is entered into, and that sub-contract is the one which is filed. I will presently inquire how far this sub-contract is a contract within the meaning of section 25 so as to protect the shareholders from liability to pay for the shares in cash. Before doing so, I have to deal with the more substantial question raised.

It is said that even if the contract be a sufficient one for filing, the filing will not assist, because there was in truth and in fact no consideration, and the shares were only bonus shares or a present. It is settled that in such a case section 25 will not avail to protect the shareholders from liability. I do not propose to go at any length into the authorities on this point, the leading case on the subject is *In re Eddystone Marine Insurance Co.*, 41 W. R. 642, [1893] 3 Ch. 9; but here, in my opinion, it is not true in substance and in fact to say that these shares were a present and that no consideration was given for them. The syndicate entered into an agreement with the Concessions Development Co. on the 17th of August, 1892. The syndicate wished to raise money and entered into a bargain with the company that the latter should take up debenture bonds and should pay money on the debentures or lend it to the syndicate. The amount was a matter to be ultimately settled between the parties, £10,000 being the limit and £3,000 the amount to be immediately raised. The agreement contains many unusual, but very proper, provisions to protect the company. The syndicate binds itself with regard to incurring further liabilities and also as to the execution of charges, and in many ways it accepts such a position that the company would have the opportunity of supervising the business of the syndicate and so incur expense in that supervision. That being the mode in which the money was to be raised and lent, clause 8 provides as follows: "By way of further remuneration to the company for the work it will do in connection with the management of the affairs of the syndicate, the syndicate agrees to allot to the company 163 preference shares, being the balance of its unissued capital, as fully paid, such allotment to be protected by a duly registered agreement under the 25th section of the Companies Act, 1867." In my judgment it is impossible to say that shares issued under that clause are bonus shares, or shares issued without valuable consideration. I come to the conclusion on the evidence that the transaction was honest and that there was nothing in it which the parties to it wished to conceal.

But the objection is taken that the contract which has been filed is not a sufficient contract or that the filing of it is not sufficient to satisfy the section. The contract which has been filed is dated the 31st of August, 1892. It is made between the syndicate and the company, and recites that by an agreement of the 17th of August, 1892, between the same parties, "it was agreed for the considerations therein mentioned that the syndicate should allot to the company 163 fully-paid up £10 preference shares of the syndicate, being the balance of the syndicate's unissued capital, such allotment to be protected by a duly registered agreement under the 25th section of the Companies Act, 1867, being this present agreement." It also recites that the previous agreement has been adopted by the company; and it witnesses that it is agreed that the syndicate shall procure this agreement to be filed and shall allot to the company or its nominees 163 preference shares in the syndicate which shall be deemed to be fully-paid up, and which shall be numbered in the books as therein mentioned, 129 of the shares carrying no voting power and the remaining 34 shares having voting power. That is the only contract which has been filed. It is said not to be sufficient, but that the real contract was that of the 17th of August; that that contract ought to have been filed; and that even if the document of the 31st of August was the contract to be filed the consideration ought to have been specifically stated. Now, all this argument is very well set out in Mr. Palmer's book on Company Precedents, 6th ed., vol. 1, p. 133, and the learned author provides a precedent in form 25 and in his note to the form. Now, when the case was argued before me Mr. Buckley mainly argued the question whether the shares were issued for a valuable consideration, or were bonus shares. I have already dealt with that part of the case. Mr. Jenkins, in addition, argued that the document of the 31st of August was really a new contract with new consideration and that it was, therefore, the proper document to file, for it set out the date and the parties and the consideration. But it seems to me that all these matters had been arrived at in the original contract, and I am not disposed to hold that this second contract, the one filed, was a new one. At the same time there are considerations here which make me think that the filing of the sub-contract was sufficient.

The question is whether, within the words of the section, it is "otherwise determined by a contract duly made in writing and filed." What one expects to be filed is the contract of partnership or membership, and clause 8 of the earlier agreement is not a contract which would have justified the syndicate in putting the company on the register as a shareholder; it is only a clause which enables the company to call on the syndicate to allot the shares. It seems to me that the second contract—quite apart from the question of protection under section 25—was a contract which it was right and necessary to enter into, and the earlier contract contemplated that such a further contract should be entered into. If that is so, the only question is whether the second contract sufficiently sets out the material provisions of the arrangement. If the second contract is the right one to be filed I do not think the observations of Mr. Palmer apply. I have nothing to do with the principal contract as such. Is the contract of the 31st of

August sufficient within section 25? It is necessary to state the names of the parties and the number of shares—I am not referring to the denoting numbers—and the consideration must be identified, for that is part of the contract. The only question here is whether this contract, which does identify the parties to it and the shares affected, sufficiently identifies the consideration. On the whole I think it does as sufficiently as if it had recited the actual consideration of the principal contract. I do not understand that anyone argued, nor does Mr. Palmer say, that it is necessary to file the principal contract. In my judgment it is sufficient, if you need not place the principal contract on the file, if you sufficiently identify the consideration in the document filed; and you do not really identify the consideration more fully by setting out the words of the principal contract than you do by identifying the principal contract. In either case you might either recite a false consideration or there might be no original contract in existence; and I think so the more because the contract to take shares is a collateral contract, the consideration for which is the entering into the principal contract, not the performance of the services mentioned in that contract.

Without laying down a general rule, I hold that in this case the statute has been complied with. The application therefore fails.

From this decision the liquidator appealed.

Eve, Q.C., and *W. F. Hamilton*, for the liquidator.—The filed contract is not a sufficient compliance with section 25, and even if it was sufficient there was in fact no consideration for the agreement. This agreement is insufficient because it does not show the consideration. "Unless the same" in section 25 means "unless the terms." [LINDLEY, L.J.—Is not that controlled by the words "unless the same is otherwise determined"?]

They cited *Crickner's case*, 24 W. R. 219, L. R. 10 Ch. 614; *In re Almada and Tirito Co.*, 36 W. R. 593, 38 Ch. D. 415; *Ooregum Gold Mining Co. of India* v. *Roper*, 41 W. R. 90, [1892] A. C. 125; *Fothergill's case*, 21 W. R. 301, L. R. 8 Ch. App. 270; and referred to Palmer's Company Precedents, 6th ed., vol. 1, pp. 133, 173.

Buckley, Q.C., and *Napier*, for Pyke.—The registered agreement shows what the consideration in substance was; the section does not require you to expressly disclose the details.

Jenkins, Q.C., and *Ward Coldridge*, for Gibson.

Eve, Q.C., replied.

LINDLEY, L.J.—The question raised by the appeal in this case is one of very considerable importance, not only to Messrs. Pyke and Gibson, but also to all those persons who take fully paid-up shares in a company upon the faith that they are protected by registered contracts. The question turns on the 25th section of the Companies Act of 1867. [His lordship read the section.] Now, without criticizing the somewhat awkward expression there, "unless the same," and finding out exactly what it means, that section requires that if the shares issued are not to be held subject to the payment of the whole amount thereof in cash, there must be a contract duly made in writing, and that contract must be filed with the Registrar of Joint-Stock Companies at or before the issue of such shares. That is the plain language of the Act without adding a word to it.

What we have to consider is whether the document which was registered in this case for the purpose of protecting these shares, the document dated the 31st of August, 1892, was a "contract in writing," and whether there was a contract in writing filed with the registrar. Now, what is meant by "a contract in writing"? I take it that nothing answers that description—I do not care whether it is a deed or a simple contract—which does not show the consideration in writing. And if you have a document in writing which does not show in writing what is the consideration, there is no contract at all in writing. In other words, a document which only discloses part of the contract is not a contract in writing at all. Now, in this particular case, the document in writing which was registered referred to another document, also in writing, for the consideration. I will read the language. The recital shows that the consideration for what I will call the contract of the 31st of August, 1892, was the consideration mentioned in an agreement dated the 17th of August, 1892. If you put these two documents together you do get a contract, because in the two the consideration does appear. Now we come to the question, Is there registered a contract in writing? Upon the best consideration I can give to that question it appears to me that there is not. What is registered is a document which is not a contract, but which is part of a contract; it does not state in the registered document what the consideration is. It appears to me that, without forcing the language of the section at all, you have not got in the registered document a contract, but only part of a contract, the other part not being registered. That appears to me, I confess, to be the true view of this section, and the true view of its application to the document in question.

That being the case, it is unnecessary to consider the other point which has been discussed, whether the contract of the 31st of August, 1892, disclosed a sufficient consideration or not. I will assume that it did. If the two had been registered, I should say myself that there would have been no difficulty about the case. But, when you have only got a document registered which is not a contract but only part of a contract, in my opinion the statute has not been complied with. If the registered document had disclosed the consideration, so that the register showed it, that would do, in my judgment. But the registered document must be a contract in writing, and the thing registered must disclose the consideration, whether it is a deed or a simple contract.

Then, as regards the authorities, it is quite obvious that this construction gives full effect to the object of this section as stated in all the cases that have been referred to, more particularly in the *Ooregum case*. Lord Watson and Lord Herschell and the other learned lords all point out what the object of the section is. The object of the section would be entirely defeated if we were to assent to the contention of the respondents in this case; because it is quite obvious that you would not get the object, as explained by those learned lords, carried out at all. But then the answer to that might be, that the language of the section does not say anything about the object. Therefore it is that I lay stress on the language, without altering a word of it, and say that this is not a registered contract at all. Now it follows from that that these two gentlemen must be put on the list of contributories. But Mr. Eve asked for some declaration that they were jointly and severally liable for these calls. That does not appear to me at present to be right; and if he insists upon it, we must hear him further about it. It may be that the articles say that the joint holders of shares shall be jointly and severally liable for the calls if the calls are made under the articles. But the liquidator makes the calls under the Companies Act, 1862, and I am not aware that the articles say, or that there is any authority

for saying, that where shares stand in two persons' names they are jointly and severally liable for calls. But, if that point becomes important, we will hear counsel after the other lords justices have given their judgment. I say nothing as to the particularity of the consideration; that is not before us. The respondents must pay the costs both here and in the court below.

LOPES, L.J.—I am of the same opinion. And I think I may venture to say that I have entertained this opinion somewhat strongly throughout the case. There were two points taken before the learned judge in the court below. Perhaps it is scarcely necessary to notice the first point, which was that the shares were bonus shares, that there was no consideration for them, and that they were a present. The learned judge has arrived at the same conclusion at which I arrive with regard to that agreement. In my judgment it would be difficult to say that the shares were issued without consideration, or that they were bonus shares, or were a present. Though it may not be necessary for the purposes of this case to say it, I am of opinion that there was good and valid consideration for them. I think if the agreement of the 17th of August, 1892, had been registered it could not have been said that the requirements of section 25 had not been complied with. But in point of fact that agreement was not registered at all, and it cannot be called in aid in any way to assist the subsequent agreement of the 31st of August, 1892, which is called a subsidiary agreement. Anything contained in the agreement of the 17th of August, 1892, cannot be called in aid to assist and make the agreement of the 31st of August a compliance with the statute unless *per se* it is a compliance. Now, the agreement of the 31st of August, 1892, was the agreement which was registered, and the only agreement. The question which we have to consider is whether that agreement is a compliance with section 25 of the Companies Act, 1867. I will not read that section again, but I will just call attention to a few words in the agreement of the 31st of August, 1892, which are these. It recites as follows: "Whereas by an agreement dated the 17th of August, 1892, and made between the syndicate of the one part and the company of the other part, it was agreed for the considerations therein mentioned." Now, that is the only mention of any consideration that occurs in that agreement at all, and when we have to consider whether that form of agreement is a compliance with the statute, I am clearly of opinion that it is not. What was the object of the 25th section, about which there has been so much discussion for a great number of years past? The object of it, I think, has never been doubted. The object of it was to disclose to shareholders and creditors and persons interested, the true state of the assets of the company and to give them information as to whether the consideration was a consideration paid in cash or whether it was a consideration which took another form. The object of it was, by disclosing the real assets of the company, to give information to the shareholders and to the creditors to enable them to form some opinion of what the position and the capital of the company might be. Now, the important words are "the payment of the whole amount thereof in cash unless the same shall have been otherwise determined by a contract duly made in writing." Now, whether "the same" means the mode of payment or the payment, I think is immaterial. It must mean one or the other — say it means the payment, although Fry, L.J., in *In re The Almada and Tirito Co., Allen's case*, thought that it meant the terms or mode of payment. The phrase "unless the same shall have been otherwise determined by a contract duly made in writing" means shall have been declared by a contract in writing to be something otherwise than in cash. And, looking at this agreement, how can that information be conveyed to anybody? In my opinion what was intended was that the consideration should be disclosed and should appear in writing, and that the contract should show what the consideration was. I do not mean that it would be competent to go into the value of the consideration or anything of that kind, but I will illustrate it in this way: Supposing the consideration was goods purchased and sold, it may be that it would be sufficient to state that; if it were money lent, it may be that that would be sufficient; or money received, it may be that that would be sufficient. What I mean is that the kind of consideration ought to be disclosed, so as to give proper information to those concerned; because, otherwise there would be no statement of the consideration at all. In point of fact, as has been said by my lord, having regard to the form of this agreement, it was only part of the agreement that was registered, and not the whole agreement, as it ought to be. The document to be registered must, in my opinion, disclose the consideration, and I do not think it makes the least difference whether it assumes the form of a deed or of a simple contract. That being so, the result will follow which has been already stated. I wish to add that I do not mean to determine anything as to with what degree of particularity the consideration should be stated.

CHITTY, L.J.—The 25th section has been before the courts for some thirty years, and it seems that all questions upon its construction and meaning are not yet settled. But I entertain no doubt in this case. The question is, whether the document of the 31st of August, 1892, which is the only contract that has been registered, is a compliance with the 25th section? I think that it is not, and in arriving at that conclusion I am merely giving effect to the words as they stand, without permitting any strain upon them one way or the other. The thing to be registered at or before the issue of the shares, is a contract duly made in writing. A contract in writing must express, as part of the contract, the consideration. I am not saying with what particularity it must be expressed. The consideration forms part of the contract, and therefore must be on the face of the contract itself. Now, in the case before us the mode of stating the consideration is this: It is agreed that the shares shall be allotted "for the considerations therein mentioned," meaning the considerations which are mentioned in a document which is not registered. In my opinion the contract, which includes the consideration, consists of the two agreements. It is not necessary to enter into the question whether a proper consideration was shown on the face of the first instrument—that is, the document of the 17th of August, 1892. In my opinion, I repeat, the contract here is made up of the two instruments, and therefore, to comply with the 25th section, the two instruments ought to have been put upon the register. This is in accordance with the *dicta* on the subject, and with the view apparently entertained by Lord Herschell and others in the House of Lords in *The Ooregum Gold Mining Co. of India (Limited)* v. *Roper*. Now, what is the object of the section? Publicity; to give information, by registering the contract, to any person who proposes to deal with the company either by way of becoming a shareholder or by lending money, or the like. He is to go to the register to find—what? To find the contract. He goes to the register in this case,

but he does not find the contract; he finds part, half as it were, of the contract. He has no right to see the unregistered part—that is, the document of the 17th of August, 1892—and he would be at the mercy of the company whether they showed it or not. If the company were in difficulties and wanted money, probably they would show it, but otherwise they would say, "No, that does not concern you—we have registered all that we are required to register, and you may get the 'full information,' which Lord Herschell speaks of in the *Ooregum case*, by reading the thing we have registered." In my opinion that does not give the full information that the statute requires; and I base it on the simple ground that "a contract in writing" includes the consideration as part of it, just as much as it does anything else in the contract. This judgment of ours will not in any way affect cases where the consideration is stated, as to the particularity with which it must be dealt with in the contract. If the consideration is, for instance, a concession in South Africa, the person who reads the registered document will see that it is a concession in South Africa and will form his own opinion about it. So if it is furniture supplied to an hotel company, he may be able to go at once and see what that furniture is, or he may not, because after a lapse of time the furniture may be worn out. Again, if it is the sale of a goodwill, the consideration stated being the goodwill and the stock-in-trade, he sees what it is; he sees the nature of the consideration, and he sees it stated. As I say, our judgment does not involve any question, in my opinion, of the particularity with which the consideration is to be stated. I am repeating myself when I say it, but I say it emphatically, that this document that was registered is not a contract in writing which "otherwise determines" within the meaning of the section.

Appeal allowed.

Solicitors, *Chester & Sons; Hodges & Pyke; Henry P. Spottiswoode.*

High Court of Justice.

Chan. Div. } Stirling, J. } July 6, 7, 8; Aug. 5.

In re STUART.
SMITH *v.* STUART. (*a.*)

Trustee—Breach of trust—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3—*Trustee Act*, 1883 (56 & 57 *Vict. c.* 53), *s.* 8.

An inquiry having been directed and a certificate made thereunder before the passing of the Judicial Trustees Act, 1896, *a trustee who had by such certificate been found liable to make good a loss caused by an improper investment, on the matter coming on for further consideration, claimed relief under the Act.*

Held, that, as attention had not been directed to the circumstances which would afford relief under the Act, the trustee was not too late in making his application, and ought to be afforded an opportunity of producing any fresh evidence he might desire to put in.

A trustee seeking relief under the Judicial Trustees Act, 1896, *must show that he has acted, not only honestly, but also in a reasonable manner, and the burden of proof lies on the trustee.*

Barker *v.* Ivimey, 45 *W. R.* 495, [1897] 1 *Ch.* 536, *followed.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

This case gave rise to two questions—first, whether a trustee who had by a certificate made before the Judicial Trustees Act, 1896, been found liable for a breach of trust, could claim relief under the Act on the matter coming on for further consideration; secondly, whether the trustee's conduct had been such as to disentitle him to any relief.

The facts were as follows:

On an originating summons there was directed on the 25th of March, 1893, this special inquiry: "What are the respective values of the mortgage securities forming part of the said trust estate, and whether they are sufficient securities for the moneys advanced, or for any and what part of such moneys respectively, and whether in each case it was desirable to call in and realize or retain such securities, and in case the said securities or any of them appeared to be insufficient, under what circumstances and by whom the moneys owing thereon were advanced, and what valuations were taken by the persons advancing such money, and whether such investments were proper?"

Upon that, in answer to the inquiry, the chief clerk made his certificate, which was in this form, as to a mortgage of £800. All the mortgages were framed in the same way. "The sum was advanced by the defendants A. M. Stuart (since deceased) and the Rev. J. Box, as the trustees of the testator's will, on the 1st of January, 1890, to Geo. Allen, upon the security of two leasehold messuages. . . . A letter dated the 27th of November, 1884, from one John Oliver Cooke, an architect and surveyor employed by the said trustees, has been produced, which states that he considered the property a good security for £800, without stating the value of the property; but, with that exception, no valuation in respect of that security was obtained by the said trustees. I find that the investment was not a proper investment for the sum of £800 so advanced, on the ground that no proper valuation of the said property was obtained, and the estate of the defendant A. M. Stuart and the said defendant the Rev. J. Box are liable for part of the loss on this investment—viz., the sum of £54 and interest thereon at £4 per cent. from the 22nd of September, 1893, being the date of the death of the tenant for life, the said A. M. Stuart."

That certificate came before the judge on the 16th of May, 1896, on a summons to vary, and an order was made striking out the finding of the chief clerk as to the liability of A. M. Stuart and the Rev. J. Box, and subject thereto the summons was to be proceeded with, having regard to the findings as varied.

The grounds of the order were as follows:

His lordship was of opinion that in reality it was not a matter to be dealt with on originating summons, but as the inquiry had been made and submitted to by the defendants, they were bound by the result so far as the inquiry was directed to go, and that they must be bound by the fact that they had accepted the inquiry in that form. That, however, the certificate went beyond the inquiry directed, and that so far as that was concerned it ought to be struck out. Then came the question, What was to be done? And an account was therefore directed to be taken, having regard to the existing certificate, which order bound the personal estate of the testator. It was inevitable on that (his lordship said) that the chief clerk should disallow a certain portion of these mortgages, and accordingly by his further certificate he had done so. No objection was taken to the finding, and the result was that a liability was found on the part of the late defendant A. M. Stuart and the defendant Box.

On the matter coming on for further consideration it was proposed to insert in the minutes an order that

the defendant Box make good the amounts so disallowed, and that he should be deprived of his costs.

Buckley, Q.C., and *E. Ford*, for the trustee.—We ask, with reference to the Judicial Trustees Act, 1896, s. 3 (1), that the defendant may be relieved from payment of these sums and costs. The defendant is entitled to say that, although there has been a loss, yet, having regard to the Act, he ought to be relieved. [STIRLING, J.—The judgment was given long before the Act was passed. No evidence has been directed to that issue down to the present.] The defendant is entitled to get the protection in some way or another.

Hastings, Q.C., and *Macnaghten, Q.C.*, for the plaintiffs.—The matter is settled by the certificate, which finds a certain sum due from the trustee. You cannot go behind that. The Act was not intended to deal with any such set of circumstances: *In re Turner, Barker* v. *Ivimey*, 45 W. R. 495, [1897] 1 Ch. 536, at p. 542. No case is made for the exercise of the discretionary jurisdiction. [STIRLING, J.—Down to the present the trustee appears to have had no opportunity of raising the point.]

Willis-Bund, W. C. Fooks, A. E. Randall, and *G. F. Hart*, for other parties.

STIRLING, J.—All that I am going to decide now is to express a view as to how the beneficial conditions of that section of the Judicial Trustees Act, 1896, which it is to be remembered was only passed on the 14th of August last, are to be applied in the circumstances of the present case. It may be that, having regard to the wide provisions of that section in future in directing inquiries and accounts in chambers with a view to saving expense, it will be necessary to add something, not hitherto usual to add, to provide for the case that the hearing may possibly result in a finding of a breach of trust. But in the present case every order was made long before the Act passed, and therefore the orders which have been made are in no way directed to the circumstances which give the trustee title to relief under this section. I desire briefly to recapitulate how the matter stands. [His lordship here stated the facts as above set out, and continued:] No inquiry, however, was directed, nor, considering the dates of the orders, could have been directed to the question which the Act of Parliament which was recently passed directed the court to take into consideration with reference to the liability of these defendants. The certificate found and established a liability against them to the amount of over £1,000. The Act says: "If it appears to the court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve the trustee either wholly or partly from personal liability for the same." This enactment, which is one passed for the benefit of trustees, ought to be fairly administered by the court. I cannot think, having regard to the circumstances under which the orders were made, that the trustee is too late at the present moment in coming and asking the opinion of the court whether the court ought not to relieve him from a portion or the whole of the liability to which he is found liable. There is nothing inconsistent with the certificate as it stands. The Act assumes that the liability is either actually existing or possible, and upon that the court may relieve the trustee wholly or partly from the same. It seems to me that the application is one which I am bound to attend to under the Act, and it appears to be admitted on both sides, that if the question be gone into the evidence filed on the certificate is all that it is necessary to consider. I think, therefore, that I ought to consider and hear the evidence on this question. But if the parties wish to adduce further evidence they can have a further opportunity of doing so. This Act, which has now been passed, was not passed at the date of the order. It would be right for any trustee who thinks that probably he may desire to ask the court to relieve him from the whole or a portion of the liability which may be found against him in a matter pending before the court, when the order is made directing inquiries which may result in that liability, or at all events in some, being established at a later period, to apply to the court before the certificate is made in order to ensure the proper evidence being before the court when it comes to be enforced. In the present case, seeing the dates of the orders, I think that I ought not to abstain from going into the question, as all the evidence is here. Of course, it is for the present trustee to bring himself within the terms of the Act.

Buckley, Q.C., and *E. Ford*, read the evidence on which they relied. The only ground on which it can be said we are not to have the benefit of the Act of 1896 is that we have not observed the regulations laid down by the Trustee Act of 1888. But this Act must cover such a case: *Wynne* v. *Tempest*, 45 W. R. 183, [1897] 1 Ch. 110; *In re Roberts, Knight* v. *Roberts*, 76 L. T. Rep. 479, 45 W. R. Dig. 55.

Hastings, Q.C., and *Macnaghten, Q.C.*—The point is a very important one, as it concerns not only this case, but the true construction of the section. The cases cited are distinguishable. The latter was one where the question was whether an executor was liable for not getting in costs where an action to recover them would have failed.

Ford, in reply.

STIRLING, J.—Having regard to the novelty of the application and the manner in which it affects other parties, I shall take time to consider the point.

Cur. adv. vult.

Aug. 5.—STIRLING, J. (after recapitulating the facts), continued: Now, the ground on which I am asked to give relief in this case is found in the affidavit of the defendant Box, filed on the 17th of January, 1896. [His lordship read the material portions and section 3 of the Act, and continued:] The effect of that section I take to be this—that the law, as it stood at the passing of the Act with reference to breaches of trust, is not altered, but that jurisdiction is thereby given to the court under special circumstances, upon the court being satisfied of the several matters mentioned therein, to relieve a trustee from the consequences of a breach of trust as far as regards his personal liability. The court has first to be satisfied that he "acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court." As to honesty, there is no question at all. That is admitted. But that is not the only condition, and the question arises whether the other conditions are satisfied. I quite admit that it seems beyond question that that section applies to the case of a trustee making investments of trust funds, as well as to any other matter arising in the administration of the trust.

The application of section 3 of the Judicial Trustees Act, 1896, to the case of investments made by trustees has been considered by Byrne, J., in *In*

re Turner, Barker v. *Ivimey*, and has subsequently been approved in the Court of Appeal, and I willingly adopt as a guide what is laid down there. The burden lies on a trustee asking the court to exercise its jurisdiction to show that he acted reasonably; and it is certainly fair to consider whether it is probable that Mr. Box would have acted with reference to these investments as he did if he had been lending money of his own.

Now, in his affidavit Mr. Box states that these mortgages are assented to by him, "partly by reason of the confidence I placed in Mr. Muskett as the long-trusted solicitor of the testator, and by reason of the valuations of the surveyors employed by Mr. Muskett." No blame attaches to Mr. Box for employing Mr. Muskett as his solicitor. It is fair to say that Mr. Muskett appears to have been employed by the trustees in a large number of mortgage transactions, twenty-seven in all, and of these only four have been challenged. Still, I think a man dealing with his own money would not rely on a question as to the value of property proposed as a security on the opinion of his solicitor, though doubtless he might do so as to any question of title or of law involved. However, Mr. Box does not tell us what advice either as to questions of value or as to questions of law was given to him by Mr. Muskett. For aught that appears in Mr. Box's affidavit he may have had full advice as to the rules laid down by the court with reference to investments by trustees; and he certainly was not entirely ignorant of how the duties of a trustee ought to be performed, for he tells us that in 1889 he had a proper trust account opened in the joint-names of himself and his co-trustee, and that on discovering about the same time that Mr. Muskett had negotiated mortgages in his own name as mortgagee for sums amounting to £1,800, he called the mortgages in and obtained judgment for what was owing.

The valuations of the surveyors employed by Mr. Muskett are produced as regards three of the mortgages; as to the fourth no valuation is produced, and it really was not contended that Mr. Box could be relieved as to it.

As to the three valuations produced, none of them satisfy the requirements of section 4 of the Trustee Act, 1888, now replaced by section 8 of the Trustee Act, 1893. It was contended, and in my opinion rightly, that this is not necessarily a fatal obstacle to the application of the section. Still I think that those requirements cannot be left out of consideration. The Legislature in 1888 had under its consideration the duties of trustees as regards investments, and laid down for their guidance certain rules which in some respects relaxed those previously existing, and are in themselves reasonable, and constitute a standard with reference to which reasonable conduct is to be judged.

One of the requirements of these Acts is that in making a loan the trustee shall act on a valuation made by a person whom the trustee "reasonably believes" to be an able practical surveyor or valuer "instructed and employed independently of any owner of the property."

In point of fact Mr. Muskett acted in respect of these mortgages on behalf of the mortgagors, and the surveyors on whose valuations Mr. Box acted were not employed independently of the mortgagors. Apparently Mr. Box was not aware until 1889 that Mr. Muskett had acted for the mortgagors; but it is remarkable that in an affidavit intended to be used for the purpose of defending himself against the claims of the plaintiffs he does not state that at the dates of the advances he believed the surveyors were instructed or employed independently of the mortgagors, still less does he give his reasons for such belief if it existed. The proper inference seems to be that he did not so believe, and if so he does not explain why he nevertheless acted on the valuations. I confess that I do not think that if Mr. Box had been dealing with money of his own he would under these circumstances have advanced it without further inquiry.

Another requirement prescribes that the amount of the loan does not exceed two-thirds of the value of the property stated in the valuation.

In two out of the three valuations no value is stated; all that is given is the amount for which the valuer considered the property a good security. In the third the value is given, but the amount lent exceeded by £200 that value. No special circumstances are put forward in explanation.

Here again, the rule seems not to have been complied with, and having regard to those circumstances I feel that there is not enough laid before me to enable me to relieve the trustee from the breach of trust which he has committed, according to the finding of the chief clerk. There is another matter as to which a question has also been raised. [His lordship here referred to the evidence, from which it appeared that after considerable negotiations between the solicitors to the various parties, it was agreed that the beneficiaries should accept £800, provided payment was made by the defendant within a week from the date of the agreement. In the meantime an order was made by the chief clerk in the presence of all parties that the defendant should transfer into court the investments in his hands, and further, within a limited time pay £1,050 into court.] This order having been made, it was clear if it were complied with that it would deprive the defendant of the power of paying the £800 within a week. Further negotiations between the solicitors took place, and the defendant proceeded to sell the investments. Later a summons was taken out by his solicitor asking for further time in which to pay the money into court, but which did not ask that the order for payment of the funds in the trustee's hands into court should be stayed, or for amendment thereof by an order for sale and distribution of the funds. It came before the chief clerk and was refused, but ultimately the order made was amended on the terms that the defendant should pay £550 into court at once, and give security for the balance, further time being allowed. On the 5th of November, 1894, an inquiry was directed as to any and what loss had been occasioned by the sale of the securities, and the chief clerk certified that that loss amounted to £273, and the trustee now comes and asks that he should be relieved in respect of this loss. As regards him there is no affidavit as to what had taken place, and the only evidence was that which was contained in the affidavit of the solicitor, which I have read. It seems to me that he relied on the advice of his solicitor, but I do not think that can excuse him. He may have a remedy over against the solicitor, and I hope he has, but I cannot say that when he knew that an order had been made upon him for payment of certain funds into court it was reasonable for him in the face of the order, without making any application in the action or at the same time bringing the matter before the court and asking for an extension of time, to sell these securities. The solicitor and the defendant appeared to have speculated on what they thought would be the views of the various *cestuis que trust*, views which, unfortunately, were not entertained by them. In these circumstances it appears to me that no case is made out for relief by the trustee.

Solicitors, *Mear & Fowler; Ivimey; Withalls & Belton; Goddard & Aldridge; J. & E. T. Randall; Woodbridge & Sons.*

Q. B. Div.
(Pollock, B., and Ridley, J.) July 28.

ATTORNEY-GENERAL v. BEECH. (a.)

Inland Revenue—Estate duty—Property passing on death—Settlement—Assignment of life interest to remainder-man—Death of tenant for life—Liability to duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 5, 7.

A lady was entitled under her marriage settlement to the income of real and personal estate for her life. In 1894 *she by deed surrendered her life interest in this property to her son, who was then, by virtue of the settlement and an appointment made under it, absolutely entitled to the property subject to his mother's life interest. The surrender was expressed to be made to the intent that the life interest might merge in the interest in remainder. The lady died in* 1896.

Held, that the son was a person having an interest in the property which ceased on the death of his mother, and that the property passed on the death of the mother within the meaning of section 2 (1) *of the Finance Act,* 1894, *and that estate duty was payable upon the principal value thereof.*

Information by the Attorney-General.

The defendants were the present trustees of an indenture of settlement of the 13th of July, 1852, made in contemplation of the marriage of Mrs. Eliza C. P. Beech and her husband. That settlement contained a covenant that any real or personal estate to which Eliza C. P. Beech or her husband in her right should become entitled during the coverture should be transferred to the trustees of the settlement and held by them on trust for sale and conversion, and that the proceeds should be applied and disposed of upon certain trusts, which were so far as material as follows:

Upon trust during the joint lives of the husband and wife to pay the income of the trust funds to the wife for her separate use without power of anticipation, and in case the wife should survive the husband (which event happened) then after the death of the husband upon trust to pay the dividends and annual income or the said trust funds unto the wife and her assigns during her life, she maintaining and educating as well the then present children of the husband as her own children by him during their respective minorities, and from and after the decease of the wife (as to as well the capital of the said trust funds as the dividends and annual income thereof) upon trust for the then present children of the husband and their issue, and the children or more remote issue of the intended marriage or for any one or more exclusively of the others or other of such children and issue at such age or times on such events and in such shares and proportions and with such restrictions and in such manner as (in the events which happened) the wife after the death of the husband should by deed or will appoint, and in default of appointment upon trust for the then present children of the husband and the children of the said intended marriage who, being sons, should attain the age of twenty-one, or, being daughters, should attain that age or marry, in equal shares.

During the coverture Mrs. Eliza C. P. Beech or her husband in her right became entitled to various interests in property which were duly transferred to the trustees according to the covenant above set out.

The husband died in the year 1885.

There were only two children of the marriage—Mrs. Greig, and the defendant Howard Beech.

By a deed of appointment of the 21st of December, 1886, after recitals showing that all the children of the husband had attained the age of twenty-one years, and that the sums of £3,000 and £700 had been raised out of the settled funds and paid to Mrs. Greig, and that the trust funds representing the interests of Mrs. E. C. P. Beech acquired by the trustees under the covenant (except the £3,700 so raised) consisted of the particulars specified in the schedule, it was witnessed that in pursuance of the power in the settlement Mrs. E. C. P. Beech appointed that the said sums of £3,000 and £700 and the trust funds out of which or by the sale whereof the said sums respectively were raised should be deemed to be held in trust for Mrs. Greig within the meaning and intent of the settlement and as a part or share of the trust funds thereby given or appointed to her under or by virtue of the said power. And, further, Mrs. E. C. P. Beech in exercise of the aforesaid power appointed that the residue of the said trust property should be held in trust for the said Howard Beech absolutely and exclusively of all other persons who, but for the exercise of this power, might be entitled to share therein, but subject to the life interest of Mrs. E. C. P. Beech therein. Provided always that that appointment should not extend to any funds subject to the trusts of the settlement other than those to which Mrs. E. C. P. Beech or her husband in her right became entitled.

By an indenture of the 18th of December, 1894, Mrs. E. C. P. Beech surrendered to the defendants William Beech and Howard Beech (the trustees of the settlement) all that her life interest under the settlement in the moneys and investments specified in the schedule thereto, and in any other real and personal property to which the said Howard Beech was then or might thereafter become entitled by virtue of the deed of appointment, to the end and intent that such life interest might merge in the interest in remainder of the said Howard Beech, and that accordingly the trustees might thenceforth hold the aforesaid moneys, investments, and property in trust for the said Howard Beech, his heirs, executors, administrators, and assigns, according to the nature thereof, and to be disposed of as he or they should direct. The schedule to this deed contained particulars of various mortgage securities and shares in real property.

Mrs. E. C. P. Beech died on the 27th of August, 1896, and thereupon the Commissioners of Inland Revenue applied to the defendants to deliver an account of the property mentioned in the schedule to the deed of the 18th of December, 1894, and to pay duty thereon, alleging that that property passed on the death of Mrs. E. C. P. Beech. The defendants refused to do so.

The information prayed that it might be declared that upon the death of Mrs. E. C. P. Beech estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value of the trust property specified in the schedule to the indenture of the 18th December, 1894; that the same passed on her death within the meaning of the said Act; and that accounts might be directed and other consequential relief given.

The defendants by their answer contended that by reason of the indenture of the 18th of December, 1894, having been executed, no duty in respect of the property in question became payable under the Finance Act, 1894, on the death of Mrs. E. C. P. Beech.

Sir R. E. Webster, A.G., Sir R. B. Finlay, S.G., Sir Robert Reid, Q.C., and *Vaughan Hawkins,* for the Crown.—The property in question is property which

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

passed on the death of Mrs. Beech, and estate duty is payable on the principal value. Even if it did not actually pass on her death within the meaning of section 1 of the Finance Act, 1894, it at all events is to be deemed to have passed under section 2 (1). Under that sub-section property passing on the death is to be deemed to include "(*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased." This means property in which the deceased or any other person had at any time an interest ceasing on the death; it is not to be read as relating only to interests existing at the time of the death of the deceased. And where, as here, the interest ceasing on the death extended to the whole income of the property the duty is to be paid on the principal value of the property: section 7 (7). Whether a person having a life interest in property retains it till death, or assigns it during life to another, estate duty is equally payable on the death on the principal value of the property: sections 2 (1) (*b*), 7 (7). It makes no difference that the assignment (as in the present case) is to the person entitled in remainder expectant on the determination of the life interest, nor that the deed of assignment contains words purporting to effect a merger of the interest for life and the interest in remainder. No mere form of conveyancing can prevent the liability to duty from attaching to property; the assignee of the life interest, whether he be the remainderman or a stranger, and whether there be in conveyancing language a merger or not, is a person other than the deceased having an interest ceasing on the death of the deceased within the meaning of section 2 (1) (*b*). There is no reason why an assignment to the remainderman should be differently treated for the purposes of estate duty from an assignment to a stranger, and to do so would affect the whole scheme of the Act, which is to levy a property tax on property payable on death, and would be at variance with the special provisions contained in section 5 as to the payment of the duty in the case of settled property.

Levett, Q.C., and *W. M. Spence*, for the defendants.—No estate duty became payable in respect of this property on the death of Mrs. Beech. On the surrender of her life interest to the remainderman her life interest absolutely ceased to exist; the estate for life and the estate in remainder in the same property cannot co-exist. According to the argument for the Crown, if property be limited to A. for life, remainder to B. for life, remainder to C. in fee, and A. surrenders his life estate to B., A.'s life estate still exists, and if B. dies in the lifetime of A., B.'s life estate never comes into possession at all. The true view is that A.'s life estate is gone, being merged in B.'s life estate, which has been accelerated. This is not a mere quibble of conveyancers; it is a doctrine of the common law: Shep. Touch., p. 300, "Surrender"; the estate of the surrenderor is "drowned and extinct." It is for this reason that in the Succession Duty Act, 1853, s. 15, the Legislature dealt with the case of the acceleration of the interest of a remainderman by surrender, and while it recognized that the prior estate would be extinguished, enacted that the duty should still be payable. The Finance Act contains no such provision. It is an Act to levy a duty upon the devolution of property upon death, and if (as in the case of a surrender of a life interest) no devolution takes place by reason of the death no duty is payable. The fact of the death is immaterial. The effect of a surrender is well illustrated in *In re Radcliffe*, 40 W. R. 323, [1892] 1 Ch. 227. In the present case Howard Beech had no interest ceasing on the death of Mrs. Beech; he had the whole property irrespective of her death. Section 7 (7) of the Act shows that if duty is to be paid there must be some benefit arising from the cesser of the interest ceasing on the death; but where there was no interest ceasing on the death no benefit arises and no duty can be payable: *In re Earl Cowley*, 45 W. R. 538, [1897] 2 Q. B. 47. This case is similar to that of an absolute gift of property where the donor lives for a year after the death, and duty is, therefore, not payable.

POLLOCK, B.—We need not trouble you, Mr. Attorney, to reply upon this case, which is no doubt one of very great importance.

Now, the first question we have to consider is this: That the object of this Act is to levy upon all property, real or personal, settled or not settled, estate duty. The time at which that estate duty should be payable is fixed, and fixed by the death of a person who up to the time of his death has been the owner of or has enjoyed the property in question. That being so, you start with the proposition (laid down again and again, and especially by Lord Westbury) that Acts of this kind are not to be construed in accordance with the ordinary language of conveyancers or in accordance with what is supposed to give effect to the principles upon which conveyancers would act, but they are to be construed, as indeed all other Acts are, with a view to carrying out what is supposed to be the intention of the Act and its provisions as expressed by the language. That being so, the language of the Act, to my mind, is not at all difficult to construe. It may be that it disturbs the old idea in the mind of conveyancers upon particular points, but, in construing an Act of Parliament which creates a tax upon property and then goes on to say at what time that tax shall be paid, I do not feel any difficulty in dealing with the matter. Section 2 says, "Property passing on the death of the deceased shall be deemed to include the property following, that is to say"—the very language of the Act in itself shows that there is something wholly different from the ordinary rules by which the devolution of property is governed. The first class (*a*) is "Property of which the deceased was at the time of his death competent to dispose." There is no difficulty about that. Then (*b*) is "Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest." Now, that obviously includes not merely property in which the deceased alone had an interest, but property in which "the deceased or any other person" had an interest, which means, to take a common case, that though a person had under a settlement an interest for life only, or apart from the settlement an interest for life only, if he has dealt with that interest by way of sale or mortgage, then the death of that person is to be fixed as the date at which the duty is to be payable, although the other person to whom the property has been assigned, and to whom the legal interest has been given, may not be liable. That in itself seems to me to show that, in using this language, the Act merely means to fix what is supposed to be a fair and reasonable period at which the incidence of taxation must take place. Now, if these words were alone, and were construed without any argument, it seems to me clear that the present case would be included within these words, and that this was property in which, not the deceased, but some "other person had an interest ceasing on the death of the deceased." That is to say, that the words include a case where the life interest was conveyed to that other person, and became not the property of the deceased, but the

property of that other person; there is no limitation. Then it is said: Why cannot you read into that section, as an addition to the words "or any other person" the words "other than the person to whom, under the devolution of the settlement, the property would come, apart from any deed or contract or conveyance"; speaking for myself I must decline to do so, for if I did I should be dealing with an Act of Parliament in a manner in which I am not entitled to do. I should be expressing an opinion upon a matter which has already been expressly dealt with by the words of the Act—words which I think are very plain and obvious, and show what is the proper method of dealing with this matter; and once we admit that that is the mode of dealing with it under the statute, then it is only necessary to see whether the adoption of that view involves anything which obviously clashes with the general intention of the statute or with the particular language that is used elsewhere. I find nothing of the kind; on the contrary, I think that section 5, which has been alluded to several times, shows how settled estates are dealt with, and that it is a section which is drawn, to my mind, in accordance with the view I have taken of the Act of Parliament.

Then, with regard to the mere amount to be paid, that is really not a matter for us to discuss at all; that is settled by another section, the principle of which is perfectly applicable to the construction of the Act which I am placing upon it. It seems to me, therefore, without reference to a great many arguments which one might balance upon one side or upon the other, that the conclusion to which I have come is the only one to which this court ought to come under the circumstances of this case; and that that conclusion can be worked out fairly and in accordance with what has always been conceived to be the intention of this Act generally there can be no manner of doubt, and therefore I hold that the Crown is entitled to our judgment in this case.

RIDLEY, J.—I am of the same opinion. The Act of Parliament was passed for the purpose of placing a duty upon property passing on the death of any person, and, as was suggested by Sir Robert Reid in the argument, it is not always clear what property passes on the death of a person, because there are cases in which a settlement comes into question, and all the property, therefore, is not entirely in one person to the exclusion of everybody else. When you therefore came to deal with property under settlement it was necessary to pass some clause relating especially to such property, and we find it in section 2 of the Act of Parliament, the terms of which have been referred to. I have very little to add to what has been said by my learned brother Pollock upon that section. It appears to me that it begins by defining property passing on the death of a deceased person so that it shall be deemed to include certain heads of property, one of which is "property in which the deceased or any other person had an interest ceasing on the death of the deceased." Now, according to the argument for the defendants, it is not easy to read these words as exempting the property in question in this case without putting some other words into the section. According to their contention it should be "property in which the deceased or any other person had, at the time of the death of the deceased, an interest ceasing on the death of the deceased," or it should be "property in which the deceased or any person other than those who were to benefit by the death of the deceased had an interest ceasing on the death of the deceased"; and if those words were there it would have this effect, that it would exclude from duty the property which it is, to my mind, the specific intention of the Act to include. The words as they stand include all property in which the deceased "or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest," including in every particular the property which is the subject of this appeal. The only point is that here the interest of the deceased has been disposed of by an intermediate deed to one of the persons who is the remainderman, but he is an "other person" within this section, and I think it is fair and proper to read the words with that meaning, because the whole intention and scope of the Act of Parliament is that he should be included. It would have been easy, if it had been intended that by transfer of interest the property should have been exempted from estate duty, to have said so, and it is observable that the 3rd sub-section of section 2 deals with one particular exception, which was put in by the Legislature when they were dealing with this property; but the exception does not affect this case. If we were to allow that this had been contemplated as a possible mode of escaping from the duty of the Legislature, we should, I think, be going completely in the face of the intention of the Legislature, not only as expressed in this section, but as it is to be found in the 5th section, relating to settled property, and also in the 7th section, which alludes to the calculation of the benefit that arises.

I do not find that the authorities quoted relating to conveyancing, or with regard to the effect of the surrender of one interest and its merging or not merging into another, have much bearing upon the matter; the question is, What is the meaning of the Finance Act? and that is to be judged of by its intent and by its clear and expressed object, and not by the rules of conveyancing.

For these reasons I agree that the estate is liable to the duty.

Judgment for the Crown.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Carpenter & Sons.*

Q. B. Div.
(Hawkins, Vaughan Williams, and Wright, JJ.) — May 14; July 21.

KERR v. KERR. (a.)

Bankruptcy—Maintenance order—Arrears—Debt provable in bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-sections* 1, 2, 3, 8.

Arrears payable under a maintenance order, and due at the date of a receiving order, are not debts provable in the bankruptcy.

Linton *v.* Linton, 33 *W. R.* 714, 15 *Q. B. D.* 239, *followed.*

This was an appeal by William H. Kerr from an order of commitment made by His Honour Judge Lumley Smith, sitting at the Westminster County Court.

On the 2nd of May, 1893, Mrs. Kerr obtained an order in the Probate, Divorce, and Admiralty Division against her husband, the appellant, for payment by him to her of the yearly sum of £108 for maintenance, payable by monthly instalments. The appellant failed to keep up the payments, and Mrs.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Kerr, on the 29th of June, 1896, issued a judgment summons in the county court under ord. 25, r. 17, to enforce payment of arrears to the extent of £45.

On the 13th of October, 1896, the judge made an order committing the appellant for fourteen days and suspending the issue of the warrant until the 1st of December.

On the 5th of December, Mrs. Kerr not having yet applied for issue of the warrant, the appellant filed an affidavit stating that on the 30th of November, 1896, a receiving order was made against him, on his own petition, and that the debt in respect of which the order of commitment was made was provable under the bankruptcy. Thereupon the registrar, pursuant to ord. 25, r. 30, of the County Court Rules, made an order on the same day staying the issuing of the warrant of commitment.

Mrs. Kerr then applied to the judge to rescind the registrar's order and to be at liberty to have the order of commitment executed, on the ground that the debt in respect of which the order of commitment was made, being for arrears of alimony, was not provable under the bankruptcy, and the learned judge being of opinion that he was bound by *Re Hawkins, Ex parte Hawkins*, 42 W. R. 202, [1894] 1 Q. B. 25, which decided that the wife could not prove in the bankruptcy for arrears of alimony due before the husband commenced his proceedings in bankruptcy, made an order taking off the stay, but further staying proceedings pending an appeal.

From this order W. H. Kerr now appealed, on the ground that since the instalments of maintenance money, in respect of which the commitment order was made, accrued due, a receiving order had been made against him and he had been adjudicated bankrupt, and that the said instalments formed part of a debt provable in the bankruptcy, and that his property had become vested in the official receiver.

Powles appeared on behalf of the appellant.

Montague Lush, for the respondent.

Cur. adv. vult.

July 21.—HAWKINS, J.—The judgment which is about to be read has been prepared by my brother Vaughan Williams; I entirely concur in it. My brother Wright has written a separate judgment.

VAUGHAN WILLIAMS, J.—This is an appeal against the order of His Honour Judge Lumley Smith discharging the order of the registrar staying an order for commitment for non-payment of arrears of maintenance payable by a husband to a divorced wife. We think the order of the county court judge right.

The order for maintenance made by the Divorce Court was an order made under section 1 of 29 Vict. c. 32. It was an order for payment of £9 a month for maintenance.

It was decided by Cave, J., in *Linton* v. *Linton*, 33 W. R. 714, 15 Q. B. D. 239, that arrears of alimony accruing after the adjudication were not provable in bankruptcy and that an order under the Debtors Act, 1869, might be made, in a proper case, to enforce payment of such arrears. As a fact in that case the wife had proved for the arrears of alimony due at the date of adjudication, but there was no judicial decision as to her right so to do. The decision purports to be a decision under 29 Vict. c. 32, s. 1. I do not understand how that section applied to a case of judicial separation, but this is unimportant, for the judgment undoubtedly was a judgment on the question of proof of debt for a sum payable under that section *quâ* alimony—*i.e.*, *quâ* an allowance payable to a wife under a judicial separation, and *Watkins* v. *Watkins*, 44 W. R. 677, [1896] P. 222, shows that it makes no difference if the sum is a periodical sum payable *quâ* maintenance to a divorced wife. It follows that the only question to be decided in the present case is whether the decision in *Linton* v. *Linton* applies to arrears payable at the date of the receiving order. Now, the considerations which led the Court of Appeal to hold that there could be no proof for arrears which had become due since the receiving order, seem to have been that the sum payable was not a lump sum but a payment to be made monthly or weekly, that the sum was payable out of personal earnings, that that which would go to his wife would take nothing from the creditors, and that the payments could not be valued or have a capital value put upon them because the payments might at any time be put an end to by resumption of co-habitation. These considerations, except the last, all apply to permanent maintenance under this Act. The last consideration —viz., the impossibility of valuation, also in our judgment applies, although the impossibility is based on different facts in the case of permanent maintenance for a divorced woman to those on which it is based in case of permanent alimony for a judicially separated wife. Resumption of co-habitation between man and wife is no longer possible after divorce. The parties no longer stand in that relation, but the uncertainty as to the continuance of the obligation to make the payments exists, and exists not only as to future payments but also as to arrears, for the Divorce Court can and will wholly or partially relieve a husband from payment of arrears if it is just to do so: *De Blaquiere* v. *De Blaquiere*, 3 Hagg. 322; *Prescott* v. *Prescott*, 20 L. T. Rep. 331, 17 W. R. Prob. Dig. 2. In fact the practice of the Divorce Court so much treats the sums periodically payable under its order as a fund for maintenance and not as property, and so much keeps its hand on the obligation to make these periodical payments for maintenance that it is a searching rule that the court will not, in the absence of special circumstances, make an order enforcing more than one year's arrears. The very terms of section 1 of 29 Vict. c. 32, moreover, shows that the court has this power. Further than this, section 37, sub-section 3, of the Bankruptcy Act, 1883, shows that a debt is equally provable whether the obligation arose before the receiving order or after it at any time before discharge. It follows that *Linton* v. *Linton* is an authority for the proposition that so far as regards permanent alimony there can be no proof for arrears arising between receiving order and application to prove, and it is equally an authority in respect of arrears arising before the order, unless there is something in the nature of arrears arising before the receiving order which makes it possible in such a case to form that estimate which the court held in *Linton* v. *Linton* could not be formed in respect of the subsequent arrears; but it is to be observed that in *Linton* v. *Linton* it was in respect of arrears and not in respect of future liabilities that it was said that an order could be made on a judgment summons, on the ground that there could be no proof. With regard to the case of *Hardy* v. *Fothergill*, 37 W. R. 177, 13 App. Cas. 351, there is undoubtedly in the judgment a good deal to make one say that the liability of a husband to pay under the order of the Divorce Court permanent alimony or permanent maintenance by periodical payments was a liability capable of being estimated, but the Court of Appeal in *Watkins* v. *Watkins* do not suggest that anything in *Hardy* v. *Fothergill* has overruled *Linton* v. *Linton* or *In re Hawkins, Ex parte Hawkins*, and I am of opinion that the value of the liability, the continuance and extent of enforcement of which, both as to the past and future, is as entirely under the control of the court making the

original order for payment as this is, as these orders for alimony and permanent maintenance are, is and ought to be held incapable of being fairly estimated.

VAUGHAN WILLIAMS, J., then read the following judgment of

WRIGHT, J.—If liberty of the person were not in question I should not have thought it necessary to express the doubt which I entertain. But as the matter stands I think it right to say that in my opinion this case is governed by *Hardy* v. *Fothergill*, and we ought to hold that arrears of alimony accrued due and payable before the receiving order are provable in the bankruptcy unless the court has declared them incapable of valuation.

Appeal dismissed.

Solicitor for the appellant, *H. Westbury*, Preston.

Solicitor for the respondent, *The Official Solicitor.*

House of Lords.

From C. A. (England). July 22.

DERBY CORPORATION *v.* DERBYSHIRE COUNTY COUNCIL. (*a.*)

Practice—Discovery—Interrogatories—Criminal or penal proceedings—Pollution of river—Proceeding to restrain—Penalty—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10.

Proceedings instituted in a county court for an order under section 10 *of the Rivers Pollution Prevention Act,* 1876, *requiring a person to abstain from polluting a river, which is constituted an offence against the Act, are not proceedings of a criminal or penal nature, although disobedience by the person against whom the order to abstain is made, renders him liable to a penalty. An order for discovery by the person against whom proceedings for the abstention of pollution of a river are pending may accordingly be made.*

Decision of the Court of Appeal (45 *W. R.* 3, [1896] 2 *Q. B.* 297) *affirmed.*

This was an appeal by the Derby Corporation from on order of the Court of Appeal (Lord Esher, M.R., and A. L. Smith, L.J.) (45 W. R. 3, [1896] 2 Q. B. 296), affirming the judgment of the Divisional Court, reported 44 W. R. 543, [1896] 2 Q. B. 53.

The respondents, as the local sanitary authority, took proceedings in the county court, under section 10 of the Rivers Pollution Prevention Act, 1876, requiring the appellants, the Corporation of Derby, to abstain from causing or knowingly permitting sewage to fall or flow from their sewers into the river Derwent.

The respondents obtained an order for discovery of documents and the delivery of interrogatories.

The Divisional Court (Grantham, J., and Collins, J.) dismissed an appeal from this order, and this decision was affirmed by the Court of Appeal.

Cozens-Hardy, Q.C., and *W. Graham*, for the appellants.—An action which may or must result in a penalty is of a criminal nature.

They cited or referred to *Harrison* v. *Southcote*, 1 Atk. 528, 539; *Paxton* v. *Douglas*, 19 Ves. 225; *Claridge* v. *Hoare*, 14 Ves. 59; *Reg.* v. *Whitchurch*, 29 W. R. 922, 7 Q. B. D. 534.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Stanger, Q.C., and *T. G. Carver*, for the respondents, were not heard.

Lord HERSCHELL.—This is an extremely clear case. The proceeding pending in the county court out of which this appeal arises was a proceeding under section 10 of the Rivers Pollution Prevention Act, 1876, under which a county court judge has power to order any person to abstain from polluting a river (to put the matter shortly), and may require him to perform that duty in the manner specified in the order. The fullest discretionary power is conferred upon the county court judge. He can inquire into all the circumstances; he can suspend the order for any time he thinks right; he can accept any undertaking he pleases; and he can make it subject to such conditions as he thinks just. Ultimately, having taken everything into consideration, he has to determine what order it is reasonable to make in relation to the complaint that a river or stream is being polluted. In that proceeding, that is the only order which a county court judge can make.

In the present proceeding application was made for discovery and the objection was then taken that the applicant was not entitled to discovery, inasmuch as it was a penal proceeding. It is admitted that where a proceeding is one to enforce a penalty, or where a proceeding is of such a nature—not that it must end in a penalty, because the decision may be in favour of the person against whom it is taken—but, that it may result in a penalty, it is a penal proceeding. I think there has been some confusion between that doctrine and the doctrine that the court will not allow a party to insist upon a discovery of facts where that discovery may subject the party to a penalty even in some other proceeding. But in that case the objection must be either to the particular questions, or to the answering of particular questions, on the ground that the discovery, if given, would subject the party in some proceeding to a penalty. That is not the present case, because the discovery, if given here, could not possibly assist in subjecting the appellants to a penalty.

The first objection is that this is a penal proceeding—a proceeding which may end in a penalty. But it seems to me to be nothing of the kind. This proceeding never can end in a penalty. All it can end in is an order, under such terms and conditions as the county court judge thinks reasonable, to prevent or abate a nuisance. The Legislature has provided that if that order is disobeyed, then the county court judge may impose such a penalty, not exceeding £50 a day, as he thinks reasonable, payable to such persons as he thinks right, upon the authority or person who has disobeyed the order. That is a separate and independent proceeding. It is true it is taken, as it is said, *in* the action or the proceeding, but it is really a separate proceeding in which the penalty for disobedience is imposed. The present proceeding itself is no more a proceeding that may subject the present appellants to a penalty than is every proceeding which is ever taken in a court of justice. Every proceeding ends, or is expected to end, in an order of some sort; and every order of the court, if disobeyed (and it is only in the case of disobedience to the order of a county court judge that a penalty can be imposed under the statute), subjects the person disobeying it to a penalty. The court may inflict various penalties if its orders are disobeyed—in some cases imprisonment. It seems to me that it might just as well be contended that every action or proceeding in court was a penal proceeding on that account, as that this is a penal proceeding because if the order were disobeyed a penalty might be imposed. I do not see either in point of law or in com-

mon sense the slightest distinction between the two cases.

So much as regards its being a penal proceeding in which there can be from its nature no discovery at all. If it could be shown that the discovery sought here was of facts, the disclosure of which facts might subject the person disclosing them to the penalty provided in the latter part of the section, no doubt there would be foundation for saying that such discovery ought not to be enforced by the court; but no such question arises here. It has not been shown that any questions are sought to be asked which would assist in establishing that the appellants in some future proceeding under the latter part of the section would be liable to a penalty. The only penalty imposed is for disobedience to the order. Nothing that they can disclose under the present application for discovery, can help to show that they have disobeyed an order not yet made, and which, of course, possibly never may be made, and the terms of which at the present moment cannot even be accurately determined. I do not think that the objection to which I have just referred would be one which would go to the entire application for discovery. As I have said, if objection is being taken to a discovery sought on the ground that it would tend to expose to a penalty, you must either show that the answers to particular questions, if given in a particular way, would or might subject you to a penalty, or when the questions are put you must take exception to answering them on that ground. No such case really arises here, because, as I have said, no answer whatever to be given to the questions proposed to be put, if they be relevant questions, could be a step towards or assist in any way to exposing the appellants to the penalty. Indeed, the argument rests entirely upon this—that the discovery would be a step towards exposing to a penalty, because it would be a step assisting to making an order, disobedience to which order would expose to a penalty. That is a proposition which is far too wide. It is a proposition for which there is not the slightest authority, and it is, as it seem to me, most unreasonable.

For these reasons I move your lordships that the judgment appealed from be affirmed.

Lord Watson.—I am of the same opinion. I think that the discovery has been legitimately asked in aid of civil proceedings which may tend and lead to an order in terms of the first part of section 10 of the principal Act. If such an order were made, the discovery which the courts below have allowed would be of no relevancy in any prosecution for a penalty under the latter part of section 10, which could only be exacted in consequence of disobedience to the order, and nothing else.

Lord Shand.—I concur in the motion to dismiss this appeal, and in the reasons which your lordships have stated for proposing it. The proceeding under the statute appears to me to be one having for its object, not the obtaining of a decree for a penalty, but a remedial order for the abatement of a nuisance. The fact that disobedience to an order brings with it a liability to a penalty does not, in my opinion, make the original proceeding one of a a penal nature, any more than imprisonment in order to enforce obedience to an order in a civil proceeding, would make that proceeding of a penal character.

Lord Davey.—I am of the same opinion. I am quite satisfied with the reasons which have been given by the county court judge, in his very lucid and concise judgment, for the order which he made. It appears to me that the fallacy which runs through the whole argument on behalf of the defendants is that in this case the penalty is not for letting sewage flow into the stream and pollute the stream; but the penalty is for disobedience to the order; and no discovery which is sought for in this proceeding can in the least degree, *rebus sic stantibus*, expose the appellants to any penalty. They can only be exposed to a penalty if by reason of their own wilful act they disobey the order when it is made. That appears to me to distinguish the case entirely from all the class of authorities to which counsel have referred. For instance, *Reg.* v. *Whitchurch*, which the county court judge said had given him most doubt, seems to me an entirely different case. I will assume that the decision in *Reg.* v. *Whitchurch*, and in *Mellor* v. *Denham*, 5 Q. B. D. 467, 28 W. R. Dig. 163, on which it is founded, were quite right, but in those cases the penalty was imposed in the first instance. In *Mellor* v. *Denham* the parent did not send the child to school, and that case was brought before the justices, and the justices imposed a penalty. In the same way, in *Reg.* v. *Whitchurch*, the local authority had power to direct a person to remove an ashpit or to make a closet, or something of that kind—I forget exactly what; they gave a direction accordingly, but he did not do it. The matter was brought before the justices, and a penalty was imposed under the statute for not doing that thing. Lord Bramwell points out that it is exactly the same as if there were a provision in the Act that a person shall upon the direction of the local authority make a new ashpit, and if he does not comply with the direction a penalty is imposed. Those cases appear to me to be entirely distinct from the present case.

Appeal dismissed.

Solicitors for the appellants, *Satchell & Chapple.*

Solicitors for the respondents, *Wynne, Holme, & Wynne.*

Court of Appeal.

From Q. B. Div. (Lindley, M.R., and Chitty, L.J.) — Oct. 26; Nov. 9.

In re An Arbitration between Palmer & Co. and Hosken, Trevithick, Polkinhorn, & Co. (Limited). (*a.*)

Arbitration—Arbitrators—Misconduct—Refusal to state case for opinion of court, or to adjourn that court may be applied to to order a case—Application for case made reasonably and bonâ fide*—Remitting matter to arbitrator for reconsideration after award made—Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *ss.* 10, 11, 19.

Where one of the parties to an arbitration, acting bonâ fide *and on reasonable grounds, requests the arbitrator to state a special case raising a material question of law, or to delay his award until the party can apply to the court for an order directing a special case, the arbitrator, if he refuses and at once makes his award, is* primâ facie *guilty of a breach of duty amounting to misconduct within the meaning of section* 11 *of the Arbitration Act,* 1889. *In such circumstances the court is justified, under that section, in setting aside the award, or, under section* 10, *in remitting it for reconsideration, and may order the arbitrator to state a special case.*

Decision of Day, J., *at chambers affirmed.*

(*a.*) Reported by R. C. Mackenzie, Esq., Barrister-at-Law.

Appeal from Day, J., at chambers.

The arbitration in this case was as to the liability of Hosken & Co. to compensate Palmer & Co. in respect of an alleged deficiency below the agreed quantity in a cargo of wheat of which Palmer & Co. were buyers and Hosken & Co. sellers. The arbitrators decided that Hosken & Co. were not liable to make good the deficiency, and Palmer & Co. appealed, as, under the submission, they were entitled to do, to the directors of the Liverpool Corn Trade Association (Limited). During the proceedings before the directors Palmer & Co. applied to them to state a case for the opinion of the court on this question of law: Whether Palmer & Co. were entitled to be refunded by Hosken & Co. (Limited) in respect of the actual deficiency in the cargo of wheat below the bill of lading quantity, notwithstanding that the cargo was shipped in the hold, and rebagged and weighed at even weights of less than 250lbs. per draft, contrary to the terms of the contract. Palmer & Co. further asked that, if a case were refused, the hearing might be adjourned in order that the court might be applied to, under the provisions of the Arbitration Act, 1889, to order that a case should be stated. The directors, however, refused either to state a case or to adjourn, and confirmed the award. Palmer & Co. then applied to Day, J., in chambers, and his lordship made an order remitting the matter to the reconsideration of the directors, and directing them to state, in the form of a special case for the opinion of the court, the question of law above mentioned.

Hosken & Co. appealed.

On the argument of the appeal there was some dispute as to whether the decision of the directors had gone upon the ground that there was in fact no deficiency, or upon the question of law which Palmer & Co sought to have decided by the court.

The material provisions of the Arbitration Act, 1889, are as follows: Section 10—"(1) In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire." Section 11—"(1) Where an arbitrator or umpire has misconducted himself, the court may remove him; (2) where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside." Section 19—"Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference."

Edward Bray (with him *R. M. Bray*), for the appeal.—Section 19 of the Arbitration Act applies only before the award is completed: *Tabernacle Permanent Building Society* v. *Knight*, 41 W. R. 207, [1892] A. C. 298. Under section 10, sub-section 1, which is practically reproduced from section 8 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), the court cannot interfere unless there is fraud or corruption on the arbitrator's part, or some mistake of law or fact appearing on the face of the award, or unless the arbitrator admits he has made a mistake or desires the guidance of the court, or unless (what is not suggested here) further evidence has been discovered since the award: *In re An Arbitration between Keighley, Maxsted, & Co., and Bryan, Durant, & Co.*, 41 W. R. 437, [1893] 1 Q. B. 405; *Dinn* v. *Blake*, L. R 10 C. P. 388, 23 W. R. Dig. 10, a case under the Common Law Procedure Act, 1854.

T. G. Carver, for the plaintiffs.—The Arbitration Act, 1889, has introduced a new principle by allowing the court to interfere during the arbitration and order a case, and the older cases are no longer authoritative. The directors, though in one sense a court of appeal, are to be regarded, for the purposes of the Act, as the arbitrators: *per* Lord Esher in *Keighley case*.

He also cited *In re An Arbitration between the Kirkleatham Local Board and the Stockton and Middlesborough Water Board*, [1893] 1 Q. B. 375, 41 W. R. Dig. 269; *In re An Arbitration between Spillers & Baker (Limited) and H. Leetham & Sons*, 45 W. R. 241, [1897] 1 Q. B. 312.

E. Bray replied.

Cur. adv vult.

Nov. 9.—LINDLEY, M.R., stated the facts, read sections 19, 10, and 11 of the Arbitration Act, 1889, and proceeded: Those are the sections which are material. The Arbitration Act, 1889, s. 19, gives the court very extensive powers over arbitrators beyond any which the court previously possessed. It impliedly confers on the parties to an arbitration the right to apply to the court for an order directing the arbitrator to state in the form of a special case for the opinion of the court any question of law arising in the course of the reference. The right thus conferred must be respected by the arbitrator; and if a party to an arbitration, acting *bonâ fide*, requests an arbitrator either to state a special case raising a question of law arising in the course of the reference and material for consideration, or to delay his award until the party can apply to the court for an order directing a special case, and the arbitrator refuses to comply with either of such requests, the abitrator is, *primâ facie* at all events, guilty of a breach of duty towards such party. Such a breach of duty is *primâ facie* misconduct on the arbitrator's part within the meaning of section 11 of the statute, and justifies the court in setting aside the award under that section, or in remitting it for further consideration under section 10. Even in such a case as that supposed, there may possibly be some grounds for justifying the refusal of the arbitrator, although it is not easy to imagine any. But it is obvious that, if an application for a special case is frivolous, and is made merely for delay, an arbitrator will be perfectly right to refuse it, and will be upheld by the court in so doing. This view of the law is quite consistent with *Dinn* v. *Blake*, and *In re An Arbitration between Keighley, Maxsted, & Co. and Bryan, Durant, & Co.* Section 19 has imposed new duties on arbitrators, and has consequently made a breach of such duties by them misconduct on their part, although before such duties existed their conduct could not be so regarded. In the present case the question of law raised by the buyer is material if there is a deficiency, and is raised *bonâ fide* and not at all for delay. On the evidence before us a considerable deficiency seems established; but the parties are not agreed about the matter, and the court does not know what the arbitrator's decision on this question really is. If they find there is no deficiency, no question of law arises; but if there is a deficiency the question of law raised by the buyer becomes all-important. Under these circumstances the order appealed from should be slightly varied in its terms, so as to direct the arbitrators to reconsider their award and to state whether there is a deficiency or not, and if there is, then to state the special case. In substance, however, the order is right, and the appeal must be dismissed.

CHITTY, L.J.—The order under appeal cannot be supported under section 19 of the Arbitration Act, 1889, standing alone. The proceedings were closed by the award. Section 19 empowers the arbitrator to

state a case "at any stage of the proceedings," but not after the award has been completed, and the power of the court or a judge to compel him to state a case, under that section standing alone, is, on the construction of the section, limited in like manner. This was the opinion of the Lords by whom the *Tabernacle case* was decided.

The case, then, turns on section 10, read in connection with the other sections of the Act, including particularly sections 11 and 19. Upon the principle of construction adopted in *Keighley's case* the court or a judge has power to remit an award to the arbitrator for reconsideration where there has been misconduct on the part of the arbitrator. Now, on the facts of this case, I think that it was the duty of the directors to adjourn in order to give Palmer & Co. an opportunity to apply to the court or a judge for an order directing a special case to be stated for the purpose of raising the question of law. The application was made in good faith and on reasonable grounds; it was not made for the purpose of delay. According to the affidavits a strong case was made out in the evidence adduced before the directors by Palmer & Co., the ultimate buyers, showing that on the discharge of the cargo from the ship there was a deficiency in the quantity stated in the provisional invoice, which was founded on the bill of lading; and if there was in fact a deficiency, the contract between the ultimate sellers and buyers gave a right to the buyers to have the deficiency refunded; and the right to have the deficiency refunded was irrespective of any question of the liability of the ship. I am not stating these propositions for the purpose of deciding any point of law between the parties, but merely for the purpose of showing the nature of the case presented on Palmer & Co.'s behalf to the directors. The points of law, if they arise on the facts, will have to be considered and decided hereafter. Now, the appellants do not contest that the evidence as to deficiency on the discharge was such as is stated in Palmer's affidavit; wholly passing this evidence by, they state that there was evidence before the arbitrators of a due shipment of the full quantity of cargo referred to in the bill of lading, and they suggest that the arbitrators were not satisfied in fact that any deficiency in the outturn was proved. The chairman of the directors has made an affidavit, but it is silent on this point of fact. We are unable to say whether the directors were prepared to find as a fact that there was no deficiency. The order which we propose to make, varying the order in chambers, will leave that matter over for the decision of the directors. If they find as a fact that there was no deficiency, the point of law sought to be raised will not arise.

Our decision is quite consistent in principle with that of Lord Esher and the other members of the court in *In re Keighley*. There, in dealing with the 10th section of the Arbitration Act, 1889, the court referred to the corresponding 8th section of the Common Law Procedure Act, 1854, and the previous decisions on that section. But they had not to take into their consideration the new enactment of the 19th section of the Arbitration Act, 1889, and the general effect of that enactment on arbitrations and on the application of the 10th section to circumstances such as those before us. It seems to me that the Legislature intended to confer on the court or a judge a discretionary power, to be exercised according to the circumstances of the case over arbitrators in reference to questions of law, at least to this extent—namely, that when a request for a case is made in good faith, and on reasonable grounds, and the request is made for an adjournment for the purpose of applying to the court or a judge, the arbitrator by summarily making his award ought not to preclude, or attempt to preclude, the party from applying to the court. In this case I think that the adjournment ought to have been allowed; that there was a duty cast on the directors which they failed to perform; and that in this sense there was misconduct on their part which justifies us in remitting the case to them in the manner already stated by the Master of the Rolls. In *East and West India Docks Co.* v. *Kirk*, 12 App. Cas. 738, 36 W. R. Dig. 7, decided before the Arbitration Act, 1889, was passed, it was held by the House of Lords that the court had jurisdiction to give leave to revoke the submission if there was reasonable ground for supposing that the arbitrator was going wrong in point of law, even in a matter within his jurisdiction. The leave would have been given in the circumstances of that case if the parties had not come to terms that the arbitrator should state a special case for the decision of the court. This jurisdiction, as was held in *James* v. *James*, 37 W. R. 600, 23 Q. B. D. 12, is discretionary, and to be exercised according to the circumstances of the case. In the *East and West India Docks case* the discretion was exercised while the arbitration was still pending, and consequently the decision does not directly bear on the present case. Granting leave to revoke the submission is a strong measure and a drastic remedy. As the law then stood, it was considered the right mode of controlling the arbitrator in matters of law; and the case shows the importance attached by the House of Lords to keeping the arbitrator right in point of law; and in this respect it has an indirect bearing on the present case.

Appeal dismissed.

Solicitors, *Tilleards; Simpson, & Cullingford.*

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — Aug. 6.

KING v. EVERSFIELD. (a.)

Landlord and tenant—Market garden—Tenancy from year to year—Compensation—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 61—*Market Gardeners' Compensation Act*, 1895 (58 & 59 *Vict. c.* 27), *s.* 4.

By an agreement made in 1886 *certain land was let as market garden ground to a tenant at a certain rent "a year, payable quarterly, on the usual quarterly days for payment of rent in every year." The agreement also contained the following proviso: "That the said tenancy may be determined by either party giving to the other three calendar months' notice to quit or of his intention of quitting, as the case may be, on any day of the year." This contract was still current on the* 1*st of January*, 1896, *on which date the Market Gardeners' Compensation Act*, 1895, *came into operation.*

Held, that there was a letting from year to year, and a contract of tenancy within the meaning of section 4 *of the above Act as interpreted by section* 61 *of the Agricultural Holdings (England) Act*, 1883, *notwithstanding the proviso in the agreement as to the giving of the three months' notice; and that the tenant was consequently entitled to claim compensation for improvements effected by him on the land prior to the commencement of the Market Gardeners' Compensation Act*, 1895.

In re Threlfall, 29 *W. R.* 128, 16 *Ch. D.* 274, *followed.*

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Appeal from Divisional Court.

This was an appeal by the plaintiff from the decision of Day and Lawrance, JJ., who reversed the decision of His Honour Judge Martineau, sitting at the Hastings County Court. The question raised was whether the plaintiff was a tenant from year to year under a contract of tenancy within the meaning of section 61 of the Agricultural Holdings (England) Act, 1883, so as to entitle him to claim compensation under the Market Gardeners' Compensation Act, 1895, which forms part of the former Act.

The plaintiff held under the following agreement at the time of the commencement of the Market Gardeners' Compensation Act a piece of land which he cultivated as a market garden: "Agreement made the 22nd of October, 1886, between Mrs. Isabella Eversfield of the one part, and Alfred King, hereinafter called the tenant, of the other part, whereby the said Isabella Eversfield lets, and the tenant hires, from the 29th of September, 1886, a piece of ground forming part of the Sheepfield, St. Leonard's-on-Sea, now in the tenant's occupation, containing 4a. 3r. 24p. or thereabouts, at the rent of £19 12s. a year, payable quarterly on the usual quarterly days for payment of rent in every year; and the tenant agrees to pay the said rent at the times aforesaid, and to use the said premises as garden ground only, and to manure, crop, and cultivate the same in a husband-like manner; and it is hereby agreed that the said tenancy may be determined by either party giving to the other three calendar months' notice to quit, or of his intention of quitting, as the case may be, on any day of the year." On the 17th of October, 1896, the defendant gave the plaintiff three months' notice to quit. The plaintiff having during his tenancy and before the commencement of the Market Gardeners' Compensation Act made certain improvements, thereupon claimed compensation under that Act in respect thereof, and appointed a referee to act for him. The defendant refused to recognize the plaintiff's right to compensation on the ground that he was not a tenant within the meaning of the Act, and declined to appoint a referee on his own behalf. The plaintiff then applied to the county court for the appointment of a referee under section 9, sub-section 6, of the principal Act. The learned county court judge was of opinion that by the agreement a tenancy from year to year within the meaning of section 61 of that Act had been created and that the plaintiff was therefore entitled to claim compensation, and he accordingly made an order for the appointment of a referee. The defendant then appealed to the Divisional Court, when Day and Lawrance, JJ., reversed the judgment of the county court judge.

The plaintiff now appealed.

By section 1 of the Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27), it is provided that that Act shall be read and construed as part of the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), as amended by the Tenants' Compensation Act, 1890.

By section 2 it is provided that this Act shall come into operation on the 1st day of January, 1896.

Section 4 provides as follows: "Where under a contract of tenancy current at the commencement of this Act a holding is at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any of the improvements in respect of which a right of compensation or removal is given to a tenant by this Act, then the provisions of this Act shall apply in respect of such holding as if it had been agreed in writing after the commencement of this Act that the holding should be let or treated as a market garden."

Section 61 of the Agricultural Holdings Act, 1883, is as follows: "'Contract of tenancy' means the letting of or agreement for the letting of land for a term of years, or for lives, or for lives and years, or from year to year."

Channell, Q.C. (*Rawlinson* with him), for the appellant.—The appellant is a tenant from year to year. It is quite clear that such a tenancy is created by the earlier part of the agreement. The proviso at the end of the agreement as to the determination of the tenancy does not alter the nature of the tenancy. It does not make it a tenancy at will: *In re Threlfall*, 29 W. R. 128, 16 Ch. D. 274. It is merely an arrangement between the parties that either of them may give a three months' notice to quit on any day of the year. The appellant, being a tenant from year to year, is entitled to compensation under the Market Gardeners' Compensation Act, 1895.

[Counsel was here stopped by the court.]

Levett, Q.C. (*Boxall* with him), for the respondent.—Where a landlord or a tenant can determine a term on such notice as is provided by the agreement in this case, there is no tenancy within the meaning of the Act. There is here no tenancy from year to year. The duration of the tenancy is not specified. It was not the intention of the parties to create a tenancy which must of necessity last more than three months. In fact it is only a tenancy for three months. The essence of a yearly tenancy is that it shall last for one year at least: Preston on Conveyancing, 3rd ed., vol. 3, at p. 76; Burton's Law of Real Property, 8th ed., at p. 280; Williams' Real Property, 18th ed., p. 471. Further, there is here no tenancy for a term of years. A tenant under the Agricultural Holdings Act of 1883 is defined in section 61 as being the holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year. It is not sufficient that the letting may become a tenancy for a term of years; but there must be an actual letting or an agreement to let for a term of years. It is necessary to look at the letting, not at the holding. Here there is no special term mentioned, and therefore there is no tenancy within the scope of the Market Gardeners' Compensation Act. In the *Threlfall case* there was a specified letting from year to year.

The following cases were also cited: *Kemp* v. *Derrett*, 3 Camp. 510; *Doe dem. King* v. *Grafton*, 18 Q. B. 496.

Lord ESHER, M.R.—Now, here the question which has been determined, and which is now before us on appeal—is not what is to be the result as between these two parties—but the simple question is whether the person named here, who was in possession of this market garden land, and who is now put out of it, is such a person as is entitled to apply to the county court judge to name a referee to determine the question whether he is entitled to compensation under the Market Gardeners' Compensation Act, 1895. It is said that we must construe this Act strictly. Now, this is a beneficial Act, and an Act which was passed in order to meet what Parliament, after long discussion, had thought was a hardship upon somebody. That hardship was that a person who has been in possession of the land of another, and has effected improvements on that land, and which, if he goes out of possession, by reason of the strict law must all go to the advantage of the landlord—this Act was passed in order that they should not all go to the advantage of the landlord, but that the landlord must pay the tenant some compensation for them. But it is said,

"Oh, no; you must construe the Act strictly, and you must construe it, therefore, with this result—that if a man holds land of his landlord for three months, and during those three months makes a substantial improvement of that land with his own money and his own labour, not one bit of the advantage of which will accrue to him before the end of the three months, the whole of it will accrue to his landlord after the three months." Now, Parliament came to the conclusion, after long inquiry, that it was a hardship that the landlord could say, "You have improved my freehold, now I give you notice to go out of it; but you cannot carry your improvement away, because it is fixed to my freehold, or it is in my freehold, or it has become part of it; you must go out, and I will take the advantage of all that you have done and all that you have spent." That is the substantial ground of this Act of Parliament, and, so far from construing it strictly as against the man in possession of the land who has made the improvements, which improvements when he leaves will go to the advantage of his landlord, I think that the court ought to construe it as largely as it can in favour of the tenant. That is the first point.

Now to come to the second point—namely, the construction of this agreement. Is this man who was in possession of the land, and who is turned out by a notice from his landlord, such a person in whose case and upon whose claim the county court judge is entitled to nominate a referee? We are to determine this case upon the construction of this agreement in writing under a state of facts which are not disputed and which have happened under it. In the year 1886 this agreement was made between this person (I will not call him "tenant" yet) in possession of the land and the landlord, and under it he has held that land and paid rent for it from 1886 down to the present time. Yet it is said that he is not a tenant at all, that he has not a letting at all, that he is only a holder. Let us see what he is. The agreement says, "Whereby the said Isabella Eversfield lets, and the tenant hires, a piece of ground at the rent of £19 12s. a year, payable quarterly on the four usual quarter days for the payment of rent in every year, and the tenant agrees to pay the said rent at the times aforesaid, and to use the said premises as garden ground only." Now there is so far the agreement in which the plaintiff is called the tenant. That which has passed between him and the defendant is called a letting, in respect of which hiring the plaintiff has agreed to pay a fixed yearly rent, which is payable quarterly. If that stands alone, what is he? Is he only a holder and not a tenant at all? Is this only a holding and not a letting? To my mind such an argument is absolutely untenable. It is a tenancy from year to year. Then the agreement goes on to say: "And it is hereby agreed that the said tenancy may be determined by either party giving to the other three calendar months' notice to quit . . . on any day of the year. Now that is a provision which may or may not ever be exercised. This is not a tenancy for three months or for one year certain and nothing more, but until determined by notice. Then comes this stipulation as to something which may never be done, and with regard to which you may say if you like, that it is in the contemplation of the parties just as much that it will never be done, as that it will be done; yet it is contended that this stipulation alters the whole construction of the agreement. I do not think that is so. It seems to me to be as plain as possible that this is a letting, that the relation of landlord and tenant is established, and that at the time of this letting and hiring there was, except in the peculiar event contemplated in the proviso, an ordinary tenancy from year to year according to the terms of the letting and hiring. I think myself that this is a contract within the meaning of the Act, construed, as I say we ought to construe it, as largely as we can in favour of the dispossessed tenant; and I think that there is a holding from year to year within the meaning of the Market Gardeners Act and the Agricultural Holdings Act. If that is so, the county court judge had the jurisdiction and authority and the duty to name a referee. What the result of that reference may be it is not for us to say at present. I think that this appeal must be allowed, and that the case must be sent to the county court judge to exercise his jurisdiction as he thinks fit.

A. L. SMITH, L.J.—I think that the county court judge was right in this case. On the 1st of January, 1896, the date when the Market Gardeners' Compensation Act came into operation, King was the holder (I think that is the legal word) of land belonging to the landlady, Mrs. Eversfield. He had held that land under a written agreement from October, 1886, and had used it as a market garden. Notice had been given to terminate that holding, and King, under the provisions of the Market Gardeners' Compensation Act of 1895, claimed to be entitled to compensation, and inasmuch as Mrs. Eversfield did not appoint an arbitrator, an application was made to the county court judge to appoint a referee to settle the dispute as to compensation between King on the one hand and Mrs. Eversfield on the other. The point has been taken that King is not within the Act of 1895, and that therefore the county court judge could not appoint a referee. That depends upon whether or not King was under a contract of tenancy current at the commencement of the Act—whether he was at that date holding under a contract of tenancy a market garden. That is the question. Well, what is the contract of tenancy? One cannot doubt that this agreement is a contract of tenancy, because "contract of tenancy" is defined by the Agricultural Holdings Act of 1883 as applying to agricultural land, under which tenants of agricultural land are entitled to compensation. The Act of 1895 is to be read and construed as part of the Agricultural Holdings Act, 1883, and section 61 of this latter Act defines a contract of tenancy as "a letting of or agreement for the letting land for a term of years, or for lives, or for lives and years, or from year to year." It seems to me, therefore, that the meaning of a market gardener being under a contract of tenancy within the Act of 1895 is this—that he must not have a tenancy of land less than a tenancy from year to year. If he has a tenancy less than that, then he is not entitled to compensation under the Act of 1895. Now comes the question whether this agreement which was entered into in 1886 between King on the one side, and Mrs. Eversfield on the other, constitutes a tenancy less than a yearly tenancy. The agreement says this piece of land is let to the tenant "at the rent of £19 12s. a year, payable quarterly on the usual quarterly days for payment of rent in every year." He agrees to pay that rent, and yet it is argued that we sitting here and construing this agreement are to say that we cannot find within the ambit of this agreement the words "tenant from year to year." It is conceded that if the words "tenant from year to year" had been put in, the respondent would have been nowhere, but it is said that we on reading this agreement are not to read it as saying that King became a tenant from year to year, because these words "as tenant from year to year" are not to be found there. All I can say is with regard to that submission that I cannot agree, because I think that this is as plainly an agreement for a tenancy from

year to year as if the words were really here. Then we come to the clause by which it is said that the tenancy has been cut down to a tenancy from three months to three months. "And it is hereby agreed that the said tenancy may be determined by either party giving to the other three calendar months' notice to quit, or of his intention of quitting, as the case may be, on any day of the year." It is said that that cuts down the yearly tenancy; that there is no express statement that there is a tenancy from year to year; that there is only an implication of such, and that the implication is cut down by the words "three calendar months' notice to quit, or of his intention of quitting, as the case may be, on any day of the year." Taking this agreement as a whole (as I do), is the true interpretation this—that there is a tenancy from three months to three months at a yearly rent with a three months' notice to quit, or is there a tenancy from year to year with a yearly rent superadded to that three months' notice to quit? I will only cite what Cotton, L.J., said in the case of *In re Threlfall*. It fits in with what I am saying here. He said: "I know of no law or principle to prevent two persons agreeing that a yearly tenancy may be determined on whatever notice they like." I agree with that, and I think that that is what is done here. I think that it is perfectly clear from this agreement that it is a yearly tenancy, but there is superadded by bargain between the parties that either party may give the other three months' notice to quit; and, therefore, looking at this agreement as a whole, it is perfectly clear that King was a tenant from year to year within the meaning of the Act of 1895 and the interpretation clause in the Act of 1883.

RIGBY, L.J.—In this case the main points turn upon the construction of a certain document. Now, when we look at the agreement it appears to me that, unless we are absolutely estopped by authority binding upon this court, there really is not much difficulty about it. Here Mrs. Eversfield lets and the tenant hires from the 29th of September, 1886, a piece of ground at a certain rent of so much a year, payable quarterly, on the four usual quarterly days for payment of rent in every year. Now, that contemplated that there would be a tenancy not only for one year, but from year to year. It did not contemplate in the first instance a rent payable in one quarter or another, but that in every year a yearly rent was to be paid. "And the tenant agrees to pay the said rent at the times aforesaid and to use the said premises as garden ground only, and to manure, crop, and cultivate the same in a husbandlike manner." What is the meaning of that? Was King tenant only for three months? The parties never thought that. They thought that he would have a year in which he was not only to manure the land, but to gather the fruits of it. It is idle to suppose that they were contemplating a three months' tenancy or a tenancy from three months to three months. There was nothing else in their minds so far as we have gone than a year to year tenancy. Then comes the clause: "It is hereby agreed that the said tenancy may be determined by either party giving to the other three calendar months' notice to quit, or of his intention of quitting, as the case may be, on any day of the year." It is suggested, I daresay rightly, that it is not to be supposed that the relation of landlord and tenant would come to an end unless there was some considerable reason for it, but that the land might be wanted for other purposes. If there be no overriding authority I decline to accept that as proving that the tenancy was not what, from the rest of the document, I should say it plainly was. But then authorities have been cited. There are two, *Kemp* v. *Derrett*, 3 Camp. 510, and *King* v. *Grafton*, 18 Q. B. 496, and in each case the question was practically the same—namely, whether a notice to quit which had been given was a good notice or not, there being a tenancy from year to year. The parties had agreed in plain, undoubted language that the notice which had been given should be a good notice, and I confess that I find a difficulty in following the argument on the other side. But it appears to have been this, that whether you agree to the contrary or not, a year to year tenancy involved of necessity—as a matter of law which could not be varied at all by the agreement of the parties—that the notice must be given at the expiration of the year. Lord Ellenborough in one case and Lord Campbell in the other, use certain phrases which are not necessary to the determination of the case, but *obiter dicta* altogether, and they appear to have given more weight than I should have thought was deserved, to that objection. I will not say that they accepted it. But the Court of Appeal lays down in *In re Threlfall* the law that the parties under a yearly lease, may enter into any bargain they please as to the notice that may be given, even to the extent in that case of enabling the lessor to come in and say, "It shall be determined at once." They recognize that that was possible, and we are bound by it. You must look to the whole agreement and see what it means, and if an agreement that a notice other than a six months' notice, is consistent with a yearly tenancy, there is no further difficulty. I hold that it is. I might go on to say that if it depended upon technicalities I should by no means allow this case to go by without enquiring what was the tenancy after the expiration of the first year, and then I think that I could bring in the old doctrine that you can consolidate the time that has passed by and have a term of years, but really the point is decided upon the construction of the agreement.

Now, is there anything in the Act contrary to that? The Act does not refer to a tenancy from year to year possessing every incident of an ordinary tenancy from year to year. It does not say "This Act shall not apply to the case where a tenant may be turned out by bargain with his landlord." Nothing of the kind. If I found in the Act anything saying in plain language, "A tenant is not to be entitled to the privileges of the Act if he can be turned out under less than the notice which is given in a year to year tenancy," I should be bound by it. But there is nothing of the kind, and, indeed, it is rather peculiar to see that in clause 33, which was cited, the Legislature seems to recognize that for the purposes of that Act there may be year to year tenancies determinable on other than the ordinary notice. Section 33 says: "Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall, by virtue of this Act, be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient"—seeming thus to distinguish between other cases where by law it might not be necessary at all.

Appeal allowed.

Solicitors for the appellant, *Langham, Son, & Douglas.*

Solicitors for the respondent, *Savory & Stevens*, for *Mann & Knight*, Hastings.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) Aug. 4.

COURT v. BERLIN AND OTHERS. (a.)

Partnership—Dissolution—Retainer of solicitor to conduct action—Retirement of dormant partner—Costs incurred subsequent to dissolution—Liability of dormant partner—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *ss.* 17 (2), 36 (3).

A solicitor was retained by the managing partner in a firm to bring an action to recover a debt due to the firm. The firm consisted of the managing partner and two dormant partners. While the action was proceeding the partnership was dissolved, the dormant partners retiring from the firm. The solicitor, who did not know that the dormant partners were members of the firm, nor of the dissolution of partnership, continued the action, and judgment was recovered. In an action by the solicitor against the three partners upon his bill of costs,

Held, that the dormant partners were liable for the costs incurred subsequently to the dissolution of partnership.

Appeal from a decision of the Divisional Court (Wills and Grantham, JJ.).

The action was brought by a solicitor against three defendants upon his bill of costs.

The defendants had been the three partners in a firm carrying on business under the name of "I. Berlin."

Two of the defendants, Brook and Benjamin, were dormant partners, the other defendant, Idel Berlin, being the managing partner.

The plaintiff was retained by Idel Berlin to bring an action to recover a debt due to the firm, and commenced an action accordingly.

While the action was proceeding the partnership was dissolved, and the defendants, Brook and Benjamin, retired from the firm.

The plaintiff, who did not know that Brook and Benjamin were members of the firm, and had received no notice and did not know of the dissolution of partnership, continued the action, and judgment was recovered on behalf of the firm. The plaintiff then discovered that Brook and Benjamin had been partners in the firm, and sued the three defendants for the costs incurred in that action.

The defendants Brook and Benjamin contended that they were not liable for any costs incurred after the date of the dissolution of partnership.

Upon an application for judgment under order 14 the master ordered that the bill of costs should be taxed and that the taxing-master should decide all questions under the Partnership Act, 1890.

The taxing-master held that Brook and Benjamin were not liable for the costs incurred after the dissolution of partnership.

The Divisional Court, upon motion to vary the taxing-master's certificate, affirmed his decision.

The plaintiff appealed.

A. Powell, for the plaintiff.—A retainer to a solicitor to conduct a common law action is a retainer to conduct it to the end: *Underwood* v. *Lewis*, 42 W. R. 517, [1894] 2 Q. B. 306. It is an entire contract, and the solicitor cannot stop in the middle of the action without good reason. The plaintiff was duly retained on behalf of all the partners, and, though the two dormant partners, Brook and Benjamin, might perhaps have been entitled to give the plaintiff notice not to go on with the action after the dissolution of partnership at their expense, the plaintiff, not having received such notice, was entitled to go on with the action, and the two partners are liable for the costs incurred after that date. By section 17, sub-section 2, of the Partnership Act, 1890, a retiring partner does not thereby cease to be liable for partnership debts or obligations incurred before his retirement. The contract with the plaintiff was an obligation incurred before the dissolution.

E. Clayton, for the defendants Brook and Benjamin.—By section 36, sub-section 3, of the Partnership Act, 1890, the estate of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the retirement. The liability for these costs was incurred after the date of the retirement of the dormant partners, and therefore they are not liable, and there was no necessity to give notice of the dissolution of the partnership.

He referred to *Whitehead* v. *Lord*, 7 Ex. 691.

Lord ESHER, M.R.—The plaintiff was retained to bring an action to recover a debt due to the partnership—that is, a debt due to the three partners. Two of the partners were dormant partners. The difference as regards the public between the position of a dormant partner and the position of a partner who is not dormant is that the former's name is not known or published to the world as a partner in the firm. Idel Berlin was the managing partner in the firm, and he had authority from his position as managing partner to bind his co-partners by contracts entered into by him for the purpose of carrying on the business of the firm. For the purpose of carrying on the business of the firm it was necessary to recover debts due to the firm. In order to recover debts it is necessary to bring actions, and the usual mode of bringing actions is to employ a solicitor to do so. Therefore these dormant partners gave Idel Berlin authority to bring an action to recover the debt due to the firm, and to employ a solicitor on the ordinary terms. The ordinary terms in the case of a common law action are that the solicitor should institute the proceedings and conduct them to their termination. The retainer is an entire contract to conduct the action to the end. It is not necessary that the solicitor should come for instructions at each step in the proceedings. The defendants therefore employed this solicitor to carry on the proceedings to their termination. During the course of the proceedings the two defendants, Brook and Benjamin, retired from the partnership. Having employed the solicitor, who was bound to go on with the action until the end, the retiring partners cannot now say that they are not liable for the costs incurred subsequent to the dissolution. It is possible that they might have given the solicitor notice that he must not continue the action at their expense; but certainly without that notice they cannot escape liability for the costs incurred subsequently to the dissolution, the contract being an entire contract to carry on the action to the end. The appeal must therefore be allowed.

A. L. SMITH, L.J.—I am of the same opinion. The retainer of a solicitor in a common law action is an entire contract to carry on the action to its termination. This action was commenced under such a retainer, and in the result judgment was recovered for the partnership debt. The plaintiff then ascertained that Brook and Benjamin were dormant partners in the firm, and that they had retired from the firm during the progress of the action. The plaintiff brought this action against the three partners to recover the amount of his bill of costs.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The defendants Brook and Benjamin contend that they are not liable for the items of the bill of costs incurred subsequently to the date of the dissolution of partnership. It is said that the Divisional Court upheld this contention upon the ground that the liability for costs arose *de die in diem* as they were incurred. If they so held, I can only say that they were wrong. The employment of a solicitor in a common law action is, as was said in *Underwood* v. *Lewis*, an entire contract to conduct the action to its termination. A solicitor in a common law action cannot, without good cause, throw up his retainer in the middle of the action and sue for the costs incurred. Then comes this question, Can these two members of the firm say that the solicitor had ceased to carry on the action on their behalf after the date of their retirement? It seems to me clear that they cannot do so without having given the solicitor notice to that effect. I am inclined to think that it was open to them to give notice to the solicitor that after a certain date he was not to carry on the action on their credit. Is is not necessary to decide that point, for in this case no such notice was given. The plaintiff is therefore entitled as against all there defendants to recover upon his bill of costs.

RIGBY, L.J.—I am of the same opinion. Section 36, sub-section 3, of the Partnership Act, 1890, was relied upon by the respondents as relieving them from liability for the costs incurred subsequent to the dissolution of partnership, upon the ground that the debt was a partnership debt contracted after the date of their retirement. That is not so. The plaintiff's retainer was to sue for a partnership debt. The contract upon the retainer was an entire contract to conduct the action to its termination, and fresh instructions were not necessary from time to time. I do not say that the defendants could not have given notice to the plaintiff that he was not to carry on the action on their credit, but they gave no such notice.

Appeal allowed.

Solicitor for the plaintiff, *W. H. Court.*

Solicitors for the defendants, *Rising & Ravenscroft.*

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) — May 20, 21; June 3.

THORNTON *v.* FRANCE AND ANOTHER. (*a.*)

Limitation, Statutes of—Mortgage—Conveyance subject to mortgage—"Person claiming under a mortgage"—Real Property Limitation Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 28)—*Real Property Limitation Act,* 1874 (37 & 38 *Vict. c.* 57), *s.* 9.

By 7 *Will.* 4 & 1 *Vict. c.* 28 *it is provided that it shall be lawful for any person entitled to or claiming under any mortgage of land to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage. By* 37 & 38 *Vict. c.* 57, *s.* 9, *the aforesaid period of twenty years was altered to twelve years.*

In 1886 *the owner of one undivided moiety of certain land which for the previous eleven years had been in the possession of the owners of the other moiety, mortgaged his moiety, and in* 1890 *he conveyed his said moiety, subject to the mortgage, to the plaintiff, the land still continuing in the possession of the owners of the other moiety. The plaintiff subsequently paid off the mortgage. In* 1896 *the plaintiff brought an action to recover the said moiety.*

Held, that the plaintiff, on paying off the mortgage, did not become a "person claiming under a mortgage" within the meaning of 7 *Will.* 4 & 1 *Vict. c.* 28, *and that that Act does not confer a new right of entry on the mortgagee where, at the time of making the mortgage, a man is in possession holding adversely to the mortgagor, and the statute* 3 & 4 *Will.* 4 *c.* 27 *has already begun to run in his favour against the mortgagor.*

Doe v. *Massey,* 17 *Q. B.* 373, *questioned.*

This was an appeal by the plaintiff, Thomas Thornton, against the judgment of Grantham, J., before whom the action was tried without a jury. He found the facts in favour of the defendants and gave judgment for them accordingly.

The writ was issued on the 25th of July, 1896. By his statement of claim the plaintiff claimed a declaration that he was entitled as tenant in common in fee to one equal undivided moiety of certain premises known as the Foresters' Arms, with the garden and outbuildings thereto belonging, and the rights of way and other privileges enjoyed therewith. He also claimed partition of the said premises in accordance with the above declaration. In the statement of claim it was stated that by an indenture dated the 24th of June, 1890, and made between W. H. Thornton of the one part and the plaintiff of the other part, the said W. H. Thornton being duly seized of and entitled to the premises comprised therein, duly conveyed to the plaintiff in fee simple the undivided moiety, half part, share, and interest of him the said W. H. Thornton of and in the said premises; and that the said conveyance to the plaintiff was by the said indenture expressed to be subject to the principal moneys and interest secured to one Joe Robinson by an indenture of mortgage dated the 11th of June, 1886. It was further stated in the claim that all moneys payable under the said indenture of mortgage had been paid and discharged by the plaintiff, who now claimed to be entitled in fee simple free from all incumbrances to an undivided moiety of the said premises.

By their defence the defendants, Annie France, widow, and Joseph Berry, who were the trustees of the will of one Joel France, stated that they were in possession of the said premises. For a further defence they stated that the said premises, and other premises adjoining the same, were, in or about 1856, vested in the three daughters of one Thomas Senior and one Harriet Hallas her heirs or assigns as tenants in common, and that the said parties, in or about 1856, affected a partition of the said premises, whereby the premises mentioned in the statement of claim became vested in severalty in the said three daughters of Thomas Senior and were exclusively held, occupied, and enjoyed by them and their successors in title in severalty and not as tenants in common until 1893, when by deed dated the 14th of February, 1893, and made between Henry France and others, and Joel France, all the estate and interest of the said three daughters of Thomas Senior, of and in the said premises were conveyed to the said Joel France in fee simple. They further stated that Joel France died on the 31st of May, 1896, having by his will devised the said premises to them the defendants. In the alternative the defendants stated that on the 24th of June, 1890—*i.e.*, the date of the conveyance under which the plaintiff claimed, the said premises were vested in Ann France, Hannah Thornton, and Mary Kaye in fee simple as tenants in common, for that for more than twelve years next before the said 24th of June, 1890, the said parties had as to the said Ann France and Hannah Thornton by themselves, and as to the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

said Mary Kaye by herself, and her predecessor in title and by the tenants of the said parties, openly claimed, held, and enjoyed the several and exclusive possession and enjoyment of the entirety of the said premises mentioned in the statement of claim, and the rents and profits thereof, as sole owners, and thereby by virtue of the Statutes of Limitation, 3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57, had acquired a possessory and exclusive title in fee simple to the said premises; and that they granted and conveyed the same to the said Joel France who devised the same to the defendants as aforesaid. As a further alternative the defendants stated that if contrary to their contention the plaintiff was entitled to an undivided moiety of and in the said premises, and if the defendants' interest therein did not extend beyond the other undivided moiety thereof, then the said premises were so enjoyed under and by virtue of a deed of November, 1834, whereby a plot of land, part of which was now the said premises mentioned in the statement of claim, was conveyed to and settled upon one Susannah Senior for life, and on her death as to one moiety to Thomas Senior for life, and after his death to the use of his heirs and assigns, and as to the other moiety to Harriet Hallas and her heirs and assigns. The defendants stated that all the estate and interest of the said Harriet Hallas and her heirs and assigns had become vested in the plaintiff, and all the estate and interest of the heirs and assigns of the said Thomas Senior had become vested in the defendants, and that the plaintiff and defendants were interested in the whole of the said premises as tenants in common. The defendants claimed in the alternative by way of counter-claim a sale of the whole of the said premises under the provisions of the Partition Act, 1868, s. 3, 4, or 5. By his reply the plaintiff did not admit that the defendants had any estate or interest in the premises described in the last-mentioned paragraph as being occupied by the plaintiff. The plaintiff submitted that the defendants had no right to maintain their counter-claim for the aforesaid partition.

Scott Fox and *R. Younger* appeared on behalf of the plaintiff.

Swinfen Eady, Q.C., and *H. Manisty*, for the defendants.

The arguments of counsel sufficiently appear in the following written judgment.

Cur. adv. vult.

June 3.—The judgment of the Court (Lord ESHER, M.R., A. L. SMITH and CHITTY, L.JJ.) was read by

CHITTY, L.J.—This is an appeal by the plaintiff, Thomas Thornton, against the judgment of Grantham, J., before whom the action was tried without a jury. He found the facts in favour of the defendants and gave judgment for them accordingly.

The writ was issued on the 25th of July, 1896. By his statement of claim the plaintiff claimed a declaration that he is entitled as tenant in common in fee to an equal undivided moiety of the Foresters' Arms with the gardens and outbuildings thereto belonging, and the rights of way and other privileges enjoyed therewith; and he asked for a partition on the footing of this declaration.

On the plan produced at the trial, and admitted to be substantially accurate, the property claimed is coloured green; it includes the Foresters' Arms, which is a beerhouse, the garden, and also a field. The other property shown on the plan is coloured as to the greater part yellow; the remainder is coloured pink. The property coloured yellow consists of a cottage (which appears to be known as Hallas' Cottage) adjoining the Foresters' Arms, of a garden at the back of the cottage divided by a hedge from the garden of the Foresters' Arms, and of garden-ground adjacent to the field coloured green. The Foresters' Arms and Hallas' Cottage are about the same size, and the green garden and field are approximately of the same area as the gardens coloured yellow. The Foresters' Arms by reason of its licence is now of greater value than Hallas' Cottage. The Foresters' Arms and the cottage both front towards the Bradshaw-road, the entrance to the former being from the front, and to the latter from the back by a way over part of the green. There is no contest in the action about this way to the cottage, nor about the well or the washhouse coloured pink on the plan. When the writ was issued, the plaintiff was in possession of the yellow, and the defendants were in possession of the green.

By their defence the defendants, who are the trustees of the will of Joel France, relied on possession of themselves and their predecessors in title and on the Statute of Limitations. They also set up a presumed agreement in 1856 to partition the property shown on the plan, and an actual division of the property into the green and the yellow in that year, and the exclusive possession of the green since that year by themselves and their predecessors in title. These were the main grounds of their defence. But, if these grounds failed, they counter-claimed in the alternative for a partition of the yellow. By his reply the plaintiff did not admit that the defendants had any interest in the yellow, and submitted that the defendants had no right to maintain their counter-claim for a partition of the yellow. The result is that the plaintiff, in effect, claimed the entirety of the yellow, and an undivided moiety of the green; and that the defendants claimed no interest in the yellow except in the event of the plaintiff succeeding in his claim to the green. If the plaintiff fails to establish his claim to a partition of the green, the action wholly fails.

So far as concerns the documentary title, and apart from the Statute of Limitations, the plaintiff and the defendants derive title from Susannah Senior, who died in 1856. She bought the land in 1834, and by her direction it was conveyed to her for life with remainder as to one undivided moiety to the use of her son Thomas for life, and, after his death, of his heirs and assigns, and as to the other undivided moiety to the use of her daughter Harriet Hallas, her heirs and assigns. Subject, therefore, to the life estate of Susannah Senior, the son and daughter each took under this settlement an undivided moiety in fee. Susannah Senior never in fact occupied any part of the property herself, at all events after the two cottages were built. She built them in 1835 or 1836. Thereupon she put her son Thomas into possession of the cottage for which he afterwards obtained a licence, and now called the Foresters' Arms, and of the garden and field coloured green; and put her daughter Harriet into possession of the cottage known as Hallas' Cottage and the gardens coloured yellow. On the documentary title the plaintiff claims under Harriet and the defendants under Thomas.

Following out the title, apart from the Statute of Limitations, it stands thus. Thomas died in 1853, during his mother's lifetime, intestate, leaving three daughters his co-heiresses and a widow. The defendants' case is that the three co-heiresses and the widow continued after the death of Thomas Senior in the exclusive possession of the Foresters' Arms and ground until the conveyance of the 14th of February, 1893. By deed of that date the co-heiresses conveyed all their estate and interest in the Foresters' Arms and grounds to Joel France. The defendants

are his devisees. The plaintiff, as I have said, claims under Harriet Hallas. On the 8th of April, 1865, she conveyed, or purported to convey, her undivided moiety in the entirety of the property to Hathorn and Owen by way of mortgage, and in 1866 they transferred the mortgage to Owen and Stocks. In February, 1875, the heir of the mortgagor, Harriet Hallas, conveyed the Hallas moiety to William Henry Thornton, and the transferee of the mortgage joined in the conveyance for the purpose of receiving the mortgage-money and passing the legal estate. On the 11th of June, 1886, William H. Thornton mortgaged this undivided moiety to Joe Robinson. In June, 1890, William H. Thornton sold his equity of redemption to the plaintiff; and by deed dated the 24th of June, 1890, he conveyed to the plaintiff in fee his undivided moiety in the entirety, subject to the mostgage of 1886 then subsisting and outstanding in Joe Robinson. It was alleged on the part of the plaintiff that, some time before the issue of the writ, and, as we understand, in 1892, the plaintiff had paid off this mortgage; and, as we gather, this allegation was not contested at the trial. The plaintiff, however, had not obtained a reconveyance before the trial. It is said on behalf of the plaintiff on the appeal that he has since obtained it. Joe Robinson is not a party to the suit. At the trial the plaintiff asked for leave to add him as a co-plaintiff, but the judge refused to allow the amendment.

The judgment appealed from proceeds on the footing that the claim of the plaintiff is barred by the Statutes of Limitation (3 & 4 Will. 4, c. 27) and the Real Property Limitation Act, 1874, which came into operation on the 1st of January, 1879. A strong body of evidence was produced at the trial to show that the two properties had been separately possessed and enjoyed as separate properties by Thomas Senior and his successors in title as to the green, and by Mrs. Hallas and her successors as to the yellow. The evidence carried back the separate possession to the date of the cottages being built. On this issue of fact the learned judge held in favour of the defendants, and he carried back the separate possession for fifty or sixty years. We see no reason for differing from him on his general finding. The points raised on the facts against this finding are, in our opinion, wholly insufficient to justify us in disturbing it. It was urged that in 1876 William H. Thornton did some repairs on the Foresters' Arms; but, whatever he may have done, it was of the most trifling description: he was repairing the Hallas' cottage, and may have done some slight work on the front windows of the Foresters' Arms. With this exception, which we consider of no importance, the evidence was clear that the repairs to the separate properties were done by the separate possessors for the time being.

The main question on the appeal turns on the statutes above referred to, and the statute 7 Will. 4 and 1 Vict. c. 28. The learned judge appears to have held that what may be termed the Hallas title was barred in 1865. This opinion would be founded on the 12th section of the Act of William 4, which abolished the old doctrine that the possession of one tenant in common was the possession of all except where ouster was proved; and on the 34th section, which transfers the estate which is barred. But in 1865 twenty years had not run since the death of Susannah Senior, who died in 1856. On her death the right of entry of Mrs. Hallas arose under the settlement. On this point we were asked by the defendants' counsel to draw an inference of fact that the partition was agreed to and acted upon in the lifetime of Susannah Senior, and that, as part of this transaction, she surrendered to her son and daughter her life estate. As authorities for such an inference we were referred to *Tidbald* v. *James*, 29 L. J. Ex. 91, 8 W. R. C. L. Dig. 27, as explained by Monaghan, C.J., in *Murphy* v. *Murphy*, 15 Ir. C. L. Rep. 205, 214, on the authority of Martin, B. We think, however, that this case can be decided without entering upon the consideration of drawing the inference suggested, and in the rest of our judgment we shall assume that the statute had not run against the plaintiff's title on the 8th of April, 1865, when Harriet Hallas made the mortgage to Hathorn and Owen.

Now, the argument for the plaintiff is this. Although the statute had been running against Mrs. Hallas for some nine years or so, when the mortgage of 1865 was executed the statute is said to have ceased to run as against the mortgagees; and that, inasmuch as William H. Thornton took his conveyance in 1875 from the mortgagor and the transferee of the mortgage, he was a "person claiming under a mortgage of land" within the meaning of the statute 7 Will. 4 and 1 Vict. c. 28, notwithstanding that the mortgage was then paid off and had ceased to exist. A similar argument was presented in reference to the plaintiff's later title. It was contended that, although the statute may have begun again to run against William H. Thornton in 1875, and although it had been running for some eleven years in 1886 (the twelve years' limitation was then in operation), it ceased to run or was stopped by his mortgage to Joe Robinson; and that, inasmuch as the plaintiff has paid off Joe Robinson, he also is a "person claiming under a mortgage of land" within the statute 7 Will. 4 and 1 Vict. c. 28. In support of these propositions *Doe* v. *Eyre*, 17 Q. B. 366, and *Doe* v. *Massey*, 17 Q. B. 373, were cited.

To succeed the plaintiff must make out these contentions. The argument when pushed to its extreme, but legitimate, length comes to this: that, where a man's title to land is on the point of being barred, all he has to do is to execute a mortgage of the land, say, just before the statute has run, and then subsequently at his own time to pay off the mortgage; and thereby he would prevent the statute from running in favour of the person in possession until the expiration of the further statutory period after the mortgage has been paid off. In other words, the contention is that by execution of the mortgage a new right of entry is conferred, which passes to the mortgagor himself when he pays off the mortgage. For the purpose of the statutes under consideration we are unable to see any distinction between the case of a man taking a conveyance from a mortgagor alone, and afterwards paying off the mortgage, and the case of a man taking a conveyance of the land, and then mortgaging and afterwards paying off the mortgage.

The reason for the passing of the statute 7 Will. 4 and 1 Vict. c. 28, and the effect and construction of the Act have frequently been considered by the courts, notably in *Eyre* v. *Walsh*, 10 Ir. C. L. Rep. 346, and *Heath* v. *Pugh*, 29 W. R. 904, 6 Q. B. D. 345. The reason, stated broadly, was that it was doubted whether the statute 3 & 4 Will. 4, c. 27, regard being had to the 2nd section, had not put the mortgagee as between himself and the mortgagor in a worse position than he was prior to the passing of that statute. The language of the statute 7 Will. 4 and 1 Vict. c. 28, is as follows. [The Lord Justice here read the statute.]

The question in *Heath* v. *Pugh* related to the effect of a foreclosure decree. The judgment of the Court of Appeal, consisting of Lord Selborne and Baggallay, L.J., and the present Master of the Rolls, was delivered by Lord Selborne, and was affirmed by the House of Lords in *Pugh* v. *Heath*, 30 W. R. 553, 7

App. Cas. 235. After referring to the statute 3 & 4 Will. 4, c. 27, and 7 Will. 4, and 1 Vict. c. 28, Lord Selborne examined the nature of the mortgagor's possession before those statutes. He said: "The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity) to be at the will or by the sufferance or permission of the mortgagee under a tacit agreement which the mortgagee might determine at his pleasure. It was of the nature of the transaction that the mortgagor should continue in possession." He proceeded to point out that in the former Statute of Limitations (21 Jac. 1, s. 16) did not, under the circumstances of such a possession by the mortgagor, run against the mortgagee. Then, coming to the statute 7 Will. 4 and 1 Vict. c. 28, he said that it did not itself create a bar in any case in which it had not been already created by the Act which it explains: "it only declares (in conformity, and with manifest reference to the rule which had before prevailed in equity) that nothing in that Act shall bar the title of a mortgagee (continuing to be such) who has received any payment on account of principal or interest from the persons entitled to the equity of redemption within twenty years before the commencement of any action or suit." According to this judgment, which is of the highest authority, to bring the case within the statute 7 Will. 4 and 1 Vict. c. 28, the mortgage must be a continuing or subsisting mortgage. In *Doe* v. *Eyre* the action was by the mortgagee. The mortgage was executed before the passing of the Act 3 & 4 Will. 4, c. 27, and there was no adverse possession by the defendant at the time when the mortgage was executed, or when the Act was passed. The defendant had been permitted by her brother, the mortgagor, to reside on the property without payment of rent. In *Doe* v. *Massey*, again, there was no adverse possession at the time when the mortgage was executed. The mortgage had been paid off. Child, through whom the plaintiff claimed, bought the property from the mortgagor, and the mortgagee joined in the conveyance for the purpose of receiving the money due on the mortgage and conveying the legal estate to the purchaser. This is plain from the statement of the conveyance at p. 375 of the report, showing that Wilson, the mortgagor, was the directing party. It was held that the plaintiff "claimed under a mortgage" within the statute. If this decision is right, it would, apart from the point of adverse possession at the date of the mortgage, apply to the purchase deed of William H. Thornton in February, 1875, so that the statute would not have run against him till February, 1887; but it would not apply to the later title of the plaintiff, who in no possible sense of the term as used in the statute, could be said to claim under a mortgage until he paid off Robinson's mortgage in 1892, when the statute had already run against the plaintiff. The decision in *Doe* v. *Massey* may be open to some question as being inconsistent with the judgment of the Court of Appeal in *Heath* v. *Pugh*, that to be within the Act the mortgage must be a subsisting mortgage. But, whether questionable or not, the decision does not govern the present case. In our opinion the plaintiff does not claim under a mortgage within the meaning of the Act 7 Will. 4 and 1 Vict. c. 28. Further, we think that that Act does not confer a new right of entry on the mortgagee where, at the time of making the mortgage, a man is in possession holding adversely to the mortgagor, and the statute 3 & 4 Will. 4, c. 27, has already begun to run in his favour against the mortgagor. We can see no reason for giving so extensive a construction to an Act which was passed to remove a doubt—a construction which would tend in a large measure to undo the principal Act. The decision in this case will not in any degree imperil the rights of mortgagees. No person of ordinary prudence would advance his money on mortgage of land where the mortgagor claims an estate in possession without first ascertaining that the mortgagor is in possession or in receipt of the rents.

To avoid misapprehension we add that the plaintiff is in no worse position because Robinson was not added as a plaintiff. As the plaintiff was suing for a partition, he was entitled to maintain the action on his equitable title (unless barred); the objection that Robinson was not a party was at the utmost merely an objection for want of parties. The plaintiff's equitable title fell within the bar of the 24th section of 3 & 4 Will. 4, c. 27. For these reasons we think the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff, *Van Sandau & Co.*, for *C. H. Marshall*, Huddersfield.

Solicitors for defendants, *Jaques & Co.*, for *Armitage, Sykes, & Hinchcliffe*, Huddersfield.

From Chan. Div. (Lindley, Lopes, and Chitty, L.JJ.) — June 24.

PLANT v. BOURNE. (a.)

Vendor and purchaser—Contract—Specific performance—Identity of parcels—Uncertainty—Statute of Frauds—Admissibility of extrinsic evidence.

By agreement in writing P. agreed to sell and B. to purchase "twenty-four acres of land freehold, and all appurtenances thereto, at T., in the parish of D., in the county of S." In an action for specific performance of the contract the plaintiff proposed to call evidence to show that the land intended to be sold was the land of that acreage belonging to the plaintiff at the place named.

Held (*reversing* Byrne, J., 45 *W. R.* 498), *that, on the authority of* Ogilvie v. Foljambe, 3 *Mer.* 53, *and* Shardlow v. Cotterell, 30 *W. R.* 143, 20 *Ch. D.* 90, *parol evidence was admissible to show what land formed the subject-matter of the contract.*

Appeal of the plaintiff from a decision of Byrne, J. (reported 45 W. R. 498).

The vendor brought an action for specific performance of the following written agreement for the sale of land, made between the plaintiff and defendant, and signed by both parties. "An agreement made the 12th day of February, 1896, between Robert Plant, of Putney, in the county of Surrey, gentleman, of the one part, and Robert Henry Bourne, of Trentham, in the county of Stafford, stationmaster, of the other part. The said Robert Plant agrees to sell, and the said Robert Henry Bourne agrees to purchase, at the price of £5,000, twenty-four acres of land freehold, and all appurtenances thereto, at Totmonslow, in the parish of Draycott, in the county of Stafford, and all the mines and minerals thereto appertaining; possession to be had on the 25th of March next, the vendor guaranteeing possession accordingly."

The statement of claim alleged that the plaintiff was the owner of a freehold piece of land in Totmonslow containing 24a. 1r. 26p., with which the

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

defendant was well acquainted, and that the defendant had, before signing the agreement, on the same day, gone by appointment over the land with the plaintiff and had carefully examined it.

At the trial counsel proposed to give evidence of these statements. This was objected to by counsel for the defendant on the ground that the contract contained no such description or indication of the property as would satisfy the Statute of Frauds, and that extrinsic evidence could not be given to supply the want of description.

Byrne, J., held that the memorandum of agreement failed to satisfy the Statute of Frauds, and would not allow extrinsic evidence to be given; he consequently dismissed the action.

The plaintiff appealed.

Eve, Q.C., and *J. Rolt*, for the appellant.—Parol evidence can be adduced to show with certainty what was intended by a general description of the property: *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Shardlow* v. *Cotterell*, 30 W. R. 143, 20 Ch. D. 90. [They were stopped by the court.]

Astbury, Q.C., and *A. J. Chitty*, for the respondent.—The memorandum must contain a reference to the property, so that it can afterwards be identified by the memorandum. In *Shardlow* v. *Cotterell* there was only one property owned by the plaintiff and the agreement left no doubt as to what was sold or purchased. A clear principle underlies all the cases; when extrinsic evidence has been received as to the property, the contract must then be referred to for the terms. This memorandum comes to nothing more than this: "I agree to sell you land—somewhere," and that is not sufficient. There is nothing in the contract to say that it is the vendor's land; it is simply a contract to sell twenty-four acres in the parish of Totmonslow.

The following cases were referred to: *Rossiter* v. *Miller*, 26 W. R. 865, 3 App. Cas. 1124, 1140; *Potter* v. *Duffield*, 22 W. R. 585, L. R. 18 Eq. 4; *Bateman* v. *Phillips*, 15 East, 272; *Macdonald* v. *Longbottom*, 7 W. R. 507, 1 E. & E. 977.

No reply was called for.

LINDLEY, L.J.—I am not able to take the same view which the learned judge has taken of this agreement. It is a formal agreement between two persons who are named, and it runs thus: [His lordship read the agreement, and continued:]. Now, the objection to this agreement is that it does not specify in terms what twenty-four acres of freehold land at Totmonslow the agreement refers to; and it is said that this is a fatal objection. The answer to it is this. The plaintiff says: "I am at liberty to show by extrinsic evidence to what twenty-four acres this agreement has reference—what we were talking about, and what was the subject-matter of our treaty; and if I am at liberty to show that, then there is no difficulty in identifying the property about which we were talking, or to which this document relates." The learned judge has held that that evidence cannot be admitted. The judge, of course, has said that parol evidence is often necessary in order to identify the property which has to be conveyed, or which has to be dealt with, whatever the description is. You must find it out, and you must have evidence to show the property which is referred to. But, conceding that, he felt this difficulty, and came to the conclusion that although parol evidence is admissible for the purpose of identifying the property, you must have the property to be identified more accurately ascertained in language than it is by this document. I think that is the most forcible way of putting the objection, and that is the pith and substance of Mr. Astbury's argument. Now, to what extent is that sound? That depends upon the Statute of Frauds, and of course upon the decisions upon it. [His lordship then read the 4th section.]

As early as 1817 Sir William Grant had before him the case of *Ogilvie* v. *Foljambe*. That was a case in which property was agreed to be sold, and was described as "Mr. Ogilvie's house," and Sir William Grant said (3 Mer. 61): "The subject-matter of the agreement is left, indeed, to be ascertained from extrinsic evidence; and for that purpose such evidence may be received. The defendant speaks of 'Mr. Ogilvie's house,' and agrees to give £14,000 for the premises, and parol evidence has always been admitted in such a case so show to what house and to what premises the treaty related."

Now, if you once admit parol evidence to show to what twenty-four acres of land this agreement related, it appears to me the whole difficulty vanishes. The evidence sought to be adduced, and to which the learned judge objected, was this, that there were only twenty-four acres at Totmonslow, in the parish of Draycott, belonging to the vendor, about which the purchaser had any treaty at all. There is no ambiguity about it. There was a field of about 24a. 1r. 26p., which was perfectly well known to both of them. They had been walking round it in the morning, we will suppose, some time before this agreement was drawn up, and it was that property about which they were negotiating. That is the evidence the plaintiff is seeking to introduce. We have Sir William Grant's authority for introducing that; and if you introduce that, it appears to me that nothing further can possibly be desired. The decision of Sir William Grant has always been considered as a leading authority on the Statute of Frauds. It was never appealed against and it was commented upon, and adopted in the case of *Shardlow* v. *Cotterell*, to which our attention has been called. There the question was with reference to identifying some property which was sold. The judgment of Lush, L.J., to my mind, conveys and expresses the principle which is applicable to the present case. He says (30 W. R. 143, 20 Ch. D. 98), referring to the decision of Kay, J., which was reversed: "Then in the concluding part of the judgment he says that he is not prepared to carry the law on this subject one hair's breadth beyond the decided cases, and that he thinks he should be doing so if he held the description in the present case to be sufficient. I cannot help thinking that this conclusion is opposed to legal principle. The general rule is, *Id certum est quod certum reddi potest*, and I am of opinion that this maxim applies here. In *Ogilvie* v. *Foljambe* parol evidence was wanted just as much as here to show what was the subject-matter of the contract." Now it seems to me that we should be simply splitting hairs and introducing a distinction without a difference if we adopted the view which Mr. Astbury has pressed upon us, and said that there is a substantial distinction between this and the two cases to which I have referred. Of course I see that there are differences, but the question is, what are they worth? Now, is this or is it not a sufficient description, when you come to look at it, to let in this parol evidence to show what the agreement referred to? That there was an agreement is plain enough. What is it that the agreement refers to? The answer to that is, it was the twenty-four acres of freehold land which they were talking about. Evidence to show that, is admissible, and if that is once admitted there is an end of the case. I am of opinion this appeal should be allowed. As regards the costs, I notice, of course, that the evidence has not been gone into, and I observe the nature of the defence set up, as to which

I say nothing, but I think the right order will be to reverse the judgment which is appealed from, and make the costs of the appeal the plaintiff's costs in any event.

LOPES, L.J.—If parol evidence is admissible, beyond all question in my judgment there is no difficulty in identifying what was intended to be sold, and the question then is, What was the subject-matter of the contract?

Now, the material words in the contract are these: "Twenty-four acres of land freehold and all appurtenances thereto, at Totmonslow, in the parish of Draycott, in the county of Stafford," and at the end there is "the vendor guaranteeing possession accordingly." Now, it is said that that is too vague, and that parol evidence is not admissible to show to what it relates. It is admitted, and the learned judge seems to think that if it had been "the" twenty-four acres, that would have been sufficient, and Mr. Astbury would be bound to admit, I think, that if it had been "my" twenty-four acres that would have been sufficient.

Now, how does the matter really stand? In the case of *Ogilvie* v. *Foljambe* it was said the question is as to what the treaty related, and if parol evidence can be produced to show to what the treaty related, that is sufficient.

Now, if parol evidence can be produced to show here to what this contract related—namely, to these twenty-four acres, then it seems to me that there is an end of the case. It is clear to my mind that it does, because it appears that the vendor had only one twenty-four acres in this parish, at this place, and that on the very morning when this contract was signed they walked over this land and discussed the matter.

With regard to the case of *Shardlow* v. *Cotterell* the words in that case were "property purchased for £420 at Sun Inn, Pinxton, on the above date," which was the 29th of March. It was there held that that was a sufficient description in the memorandum, and that parol evidence could be produced to show what property was intended. I cannot distinguish that case in principle from the case we are dealing with. There may be minor differences of detail and so on but in principle I think they are substantially the same. I think, therefore, the decision of the learned judge in this case was wrong, and must be reversed. I agree with what has been said by Lindley, L.J., about the costs.

CHITTY, L.J.—I concur. I think the case is governed by the principles enunciated in *Ogilvie* v. *Foljambe*, where it was laid down by Sir William Grant, M.R., that parol evidence has always been admitted in such a case as he had before him, to show to what house or to what premises the treaty related. I have had several cases of this kind before me and I never heard that decision questioned. I think the case is also governed by the decision of the Court of Appeal in *Shardlow* v. *Cotterell*, and I do not think it necessary to go through any of the particular facts in that case nor the judgment for the purpose of making good this opinion of mine. It has already been sufficiently dealt with, I think, by my learned brethren. Now there is no mystery about the Statute of Frauds. All that it requires is a memorandum in writing of the contract where the subject-matter is such as we are dealing with. That memorandum must be construed in a reasonable way as well as any other memorandum which is in writing to which the Statute of Frauds does not apply. Here the vendor, Plant, and the purchaser, Bourne, are sufficiently named and described, and we have Plant agreeing to sell at the price which is mentioned "twenty-four acres of land freehold and all appurtenances thereto at Totmonslow, in the parish of Draycott, in the county of Stafford," and so on, and then possession is to be given and the vendor guarantees possession to be given accordingly on the day mentioned. I am of opinion, reading that according to the ordinary and fair rules of construction, there is no ambiguity about it as it stands. I am unable to understand the argument that Plant was not selling his own twenty-four acres of land because, I think on the face of the document, that is the meaning of it, and if that is the meaning of it, it at once comes within the range of cases to which I have referred.

I think Mr. Plant means he is selling "the twenty-four acres we have been looking at" or "my twenty-four acres." It is not twenty-four acres of land anywhere in England, but the place, the county, and the parish are all mentioned. It would be refinement, and not promoting justice, if we were to hold this description fails because "my" is not to be found before the "twenty-four," or the definite article "the."

Assuming that the parol evidence comes up to what has been stated, the result would be this, that Mr. Plant has twenty-four acres lying within the metes and bounds sufficiently defined, and if the fact be ascertained that he had no other twenty-four acres, that would answer that description; then it would only be necessary to put the contract alongside that fact and the result would be ascertained that the twenty-four acres within the metes and bounds was the property that was intended to be included in this description. There will be no variation of the original contract, nor will there be any of the evils which were very forcibly pointed out to us arising from fraud or perjury; those will not be produced in this case more than in any other.

I am of opinion it is impossible to avoid fraud and perjury, even under the strictest conditions, and I think that this will not be opening the door to let in that fraud which has been suggested.

Solicitors for the plaintiff, *Vizard & Monk Smith.*

Solicitors for the defendant, *Pitman & Sons*, for *F. W. Bayley*, Newcastle, Staffordshire.

High Court of Justice.

Q. B. Div. (Wright and Kennedy, JJ.) — Nov. 2.

REG. *v.* MEAD (METROPOLITAN POLICE MAGISTRATE). *Ex parte* LONDON COUNTY COUNCIL. (*a.*)

Metropolis — Building — Mandamus—*Service of summons — Unknown owner — Dangerous structure — Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 1—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 188 (i.).

By section 188 *of the London Building Act*, 1894, *it is enacted that any notice, order, or other document required or authorized to be served under that Act, the service of which is not provided for by the Summary Jurisdiction Acts, the Lands Clauses Acts, or the Companies Clauses Consolidation Act*, 1845, *may be served, among other ways, by delivering the same to some person on the premises to which it relates, or, if the premises are unoccupied, then by affixing a copy of the summons on some conspicuous part of the building.*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The magistrate before whom a summons, addressed only "To the Owner" of certain premises, was returnable, refused to hear the summons in the absence of the defendant because the complainant failed to offer evidence either that he had made all reasonable inquiries to ascertain, before serving the summons in this way, who the owner of the premises was, or that, if such inquiries had been made, in all probability the owner would not have been found, or that the premises were in fact unoccupied.

Held, that, in the absence of such evidence, the procedure under the Summary Jurisdiction Acts must be followed, and that the magistrate was right in refusing to hear the summons.

This was the argument of a rule for a *mandamus* calling on Mr. Mead, a metropolitan police magistrate, to show cause why he should not hear and determine a summons obtained by the London County Council under section 107 of the London Building Act, 1894.

The facts were as follows: On the 23rd of September, 1897, the London County Council made a complaint to the magistrate in respect of a dangerous structure and obtained a summons which was returnable before Mr. Mead on the 1st of October. It was addressed "To the Owner" (of the premises) merely, and when the owner was called on to appear no one responded. The complainant thereupon proposed to proceed in the absence of the defendant, and, on the magistrate calling for proof of service of the summons, a constable gave evidence that he had affixed a copy of the summons upon a conspicuous part of the premises, which appeared to him to be unoccupied. The question was then raised whether such a summons on such evidence under section 107 of the London Building Act, 1894, could be served by being affixed to the premises. It was stated also by the complainants that the owner was unknown, but no further evidence was given that any steps had been taken to discover him. There was no evidence even that the valuation list or rate had been examined, or the rate collector interrogated, or other obvious means taken with a view to discover who was the last owner or occupier. The complainants contended that under the circumstances there had been a good service of the summons as required by section 188 of the Act under which these proceedings were instituted.

The magistrate, however, refused to hear the summons on two grounds: First, that the summons, even if anonymously addressed—*i.e.*, "To the Owner"—was a document the service of which is provided for by the Summary Jurisdiction Acts, and must therefore be served under section 1 of Jervis' Act (11 & 12 Vict. c. 43) personally on the defendant or at his last known place of abode; and, secondly, that even if the service of a summons addressed "To the Owner" where the owner cannot be found, is not provided for by the Summary Jurisdiction Acts, there should have been evidence before the court that reasonable diligence had been exercised by the complainant to discover the owner of the property in question.

Section 188 of the London Building Act, 1894, provides as follows:

"(*i.*) Any notice, order, or other document required or authorized to be served under this Act, the service of which is not provided for by the Summary Jurisdiction Acts, the Lands Clauses Acts, or the Companies Clauses Consolidation Act, 1845, may be served by delivering a copy thereof at or by sending a copy thereof by post in a registered letter to the usual or last known residence in the United Kingdom of the person to whom it is addressed, or by delivering the same to some person on the premises to which it relates, or, if no person can be found on the premises, then by fixing a copy thereof on some conspicuous part of the building."

"(3) Any notice by this Act required to be given to or served on the owner or occupier of any premises may be addressed by the description of the 'owner' or 'occupier' of the premises (naming the premises) in respect of which the notice is given or served without further name or description."

Sutton showed cause against the rule.—All proceedings under the dangerous structure sections of the London Building Act, 1894, must, as to service of a summons, follow Jervis' Act, unless the complainant can satisfy the magistrate that after all proper inquiries the owner cannot be found, and also, that the premises are unoccupied. In that event only the method of service provided for by section 188 of the Act of 1894 applies. There is no such evidence here, and therefore the service of the summons was bad. The case of *Reg.* v. *Mead*, 42 W. R. 442, [1894] 2 Q. B. 124, which was relied on when the rule was moved for, is an authority on another statute, for that case was decided under provisions in the Public Health (London) Act, 1891, which have no counterpart in the Act of 1894.

Avory, in support of the rule.—The London County Council do not dispute that in all cases where the owner is known this form of service of summons given by the Act of 1894 cannot be used alternatively with the procedure prescribed by the Summary Jurisdiction Acts. Here the owner is not known, and to save delay, which in many cases might be attended with serious danger to the public were dangerous structures not at once taken down or secured, this speedy method of service of summons was expressly provided. A notice to an owner that his building is unsafe admittedly can be served in this way. I submit that it was the intention of the framers of the Act that in cases where delay would arise in finding out the name or address of the owner or occupier service of a summons by fixing the same to the premises must be treated as a good service by the magistrate on evidence that the name and address of the owner was not known to the complainant.

WRIGHT, J.—I think the magistrate was justified in refusing to hear this summons, on two grounds. First, because there was no evidence before him, so far as we know, that the premises were unoccupied at the time that the summons was affixed; but that, in my opinion, is a very small point. The second reason he put forward is, I think, far more important and of wider scope, and it is this, that in the present case there has been no such sufficient inquiry to find the owner as to entitle the London County Council to serve the summons in the manner prescribed by section 188 of the Act. The true construction of that section appears to me to be this: Where a person on whom it is desired to serve a summons can be identified by reasonable inquiry—not a prolonged or expensive inquiry, but an ordinary inquiry—then the procedure marked out by the Summary Jurisdiction Acts ought to be followed. If, on the other hand, an owner cannot be found after such an inquiry as, for instance, any police-constable knows how to make in cases of this sort, then the procedure marked out by section 188 may be followed. In other words, the complainant must be able to prove, first, that there has been a reasonable inquiry made; that after such inquiry he has failed to ascertain the owner; and, lastly, that the premises were unoccupied.

For these reasons I think the magistrate was right.

KENNEDY, J.—I agree.

Rule discharged.

Solicitor for the prosecution, *W. A. Blaxland.*

Solicitor for the defendant, *The Solicitor to the Treasury.*

Q. B. Div. (Divisional Court). (Lindley, M.R., and Chitty, L.J.) Oct. 30.

GRAY (*Appellant*) v. SYLVESTER (*Respondent*). (a.)

Local government — Sanitary authority — Bye-law— Reasonableness—Prohibition of sales on foreshore.

A sanitary authority was empowered by a local Act to make bye-laws and regulations with reference to the sea-beach and foreshore in the district, which were vested in the sanitary authority for the purpose of public walks and pleasure grounds. Subsequently to the passing of the local Act a part of the foreshore was converted into an esplanade. The sanitary authority made a bye-law prohibiting the sale of any goods on any part of the sea-beach, foreshore, or esplanade, except by the direction of the sanitary authority.

Held, that the bye-law was not unreasonable or ultra vires.

Special case stated by justices for the county of Southampton.

An information was preferred by the appellant against the respondent at Ryde Petty Sessions, charging him with unlawfully selling a weekly newspaper on the Sandown Esplanade contrary to the bye-laws of the sanitary authority, the Sandown Urban District Council.

The justices dismissed the information subject to this case.

It was proved or admitted that the sea-beach and foreshore at Sandown were vested in the urban district council for the purposes of public walks or pleasure grounds by virtue of a provisional order of the Local Government Board duly confirmed by the Local Government Board's Provisional Orders Confirmation (Caister Union, &c.) Act, 1877.

By section 7 of the same Act the Sandown Local Board were authorized (subject to the provisions of the Public Health Act, 1875) to make bye-laws and regulations with reference to the sea-beach and foreshore along the whole frontage of their district. Subsequently to the passing of that Act the esplanade was made on part of the sea-beach or foreshore.

In pursuance of that section and of section 164 of the Public Health Act, 1875, the Sandown Local Board, then being the sanitary authority for the urban sanitary district of Sandown, in 1892 duly made certain bye-laws, of which the one in question was as follows:

"A person shall not on any part of the sea-beach, foreshore, or esplanades sell or offer or expose for sale any commodity or article, or let to hire, or offer or expose for hire any chair, seat, or other thing except by the direction of the sanitary authority, or in any such part or parts of the sea-beach, foreshore, or esplanades (if any) as the sanitary authority may by notice affix or set up thereon from time to time appoint for the purpose, and every person who shall offend against such bye-law shall be liable to a penalty."

The justices were of opinion that the bye-law was illegal, inconsistent, unreasonable, and repugnant to the law of England and that it did not enable the sanitary authority of Sandown to legalize a nuisance or to prohibit a lawful act which was not a nuisance.

Macmorran, Q.C., for the appellant.—The justices should have convicted the respondent. This bye-law is not unreasonable having regard to the subject-matter to which it is directed—viz., the regulation of public walks and pleasure grounds. The justices thought that they were bound to hold the bye-law *ultra vires* on the authority of *Munro* v. *Watson*, 57 L. T. Rep. 366, 36 W. R. Dig. 124, and *Johnson* v. *Mayor of Croydon*, 16 Q. B. D. 708, 34 W. R. Dig. 129. Those cases were decided under the Municipal Corporations Act, which authorizes the making of bye-laws for the good rule and government of the borough, and for the prevention and suppression of nuisances not otherwise unlawful (see Municipal Corporations Act, 1882, s. 23). These decisions are no authority as to the validity of this bye-law, made under a different authority and directed to a different subject-matter.

C. A. Russell, Q.C. (*Dunlop Hill* with him), for the respondent.—In determining the validity of a bye-law the test is to see whether it goes beyond what is reasonably necessary for the protection required. The key-note of this urban district council's authority to make bye-laws, is regulation, not prohibition. This bye-law is far too wide. It absolutely prohibits all sales on the sea-shore except with the leave of the council. A bye-law to be valid in such a case as this must lay down and publish one rule for everybody, but under this bye-law licences may be granted or refused for different reasons which would not be made known to the public.

He cited *Macdonald* v. *Lochrane*, 51 J. P. 629; *Strickland* v. *Hayes*, 44 W. R. 398, [1896] 1 Q. B. 290.

LINDLEY, M.R.—In a case such as this the authorities are not very much use as a guide to the right decision. It is necessary in each case to look at the statutory authority under which the bye-law was made and at the language of the bye-law. Under a local Act, the local authority in this case were empowered to acquire the foreshore and lay out thereon an esplanade, and to make bye-laws and regulations with reference to the sea-beach and foreshore along the whole frontage of the district. Under that section the local authority have made the bye-law in question. The justices came to the conclusion that the bye-law was invalid as being more extensive than the circumstances of the case required. I am not prepared to go that length. In my opinion the bye-law is not unreasonable or *ultra vires*. The justices thought they were bound by the authority of certain decided cases, but those cases were decided under the Municipal Corporations Act, 1882, the language of which is very different from that of this local Act, and the bye-laws made under the Municipal Corporations Act are addressed to a very different subject-matter from the present. It is one thing to make a bye-law for the good government of a town and another for the regulation of an esplanade on the sea-shore. For the latter purpose it does not seem to me to be an unreasonable thing to say that nothing shall be sold on the esplanade without the leave of the local authority.

CHITTY, L.J.—I agree. I do not think that this bye-law can be impeached on the ground that it is unreasonable, for in my opinion it does not go beyond the requirements of the case. Having regard to the manner in which the ground was acquired for the purpose of public walks and pleasure grounds, I do not think any distinction can be drawn between the foreshore and the esplanade proper, and I do not think it unreasonable that persons on the foreshore and the esplanade shall be freed from the importunities of vendors of goods.

Appeal allowed. Case remitted to justices.

Solicitors for the appellant, *Wood, Bigg, & Nash*, for *Wooldridge & Wilton*, Sandown.

Solicitors for the respondent, *Hopwood, Stroughill, & Hopwood*.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Q. B. Div.
(Wright and Kennedy, JJ.) Oct. 28, 29.

BAKER v. WILLIAMS. (a.)

Animal—Regulation of cowsheds—Contagious Diseases (Animals) Act, 1878 (41 & 42 *Vict. c.* 74), *s.* 34—*Dairies, Cowsheds, and Milkshops Order of* 1885, *articles* 7, 8, 13—*Regulations of local authority—Ventilation—Air-space.*

A local authority has power under section 34 *of the Contagious Diseases (Animals) Act*, 1878, *and article* 13 *of the Dairies, Cowsheds, and Milkshops Order of* 1885, *to make regulations prescribing the amount of air-space to be provided for each animal kept in a cowshed, the term "ventilation" in that article including "air-space."*

Case stated by justices of the borough of Southport.

The appellant, Henry Baker, a cowkeeper, was convicted on the 20th of April, 1897, for having caused a greater number of cattle to be at one time kept in a building used as a cowshed than admitted of the provision of 800 cubic feet of air-space for each cow, contrary to the regulations made by the Corporation of Southport under the Contagious Diseases (Animals) Act, 1878, and the Dairies, Cowsheds, and Milkshops Order of 1885.

By the Contagious Diseases (Animals) Act, 1878, s. 34, the Privy Council* is empowered to make orders "for the inspection of cattle in dairies and for prescribing and regulating the lighting, ventilation, cleansing, drainage, and water supply of dairies and cowsheds in the occupation of persons following the trade of cowkeepers or dairymen," and also "for authorizing a local authority to make regulations for the purposes aforesaid or any of them." By section 58 every such order is to have effect as if it had been enacted by that Act.

By an Order in Council made under this section on the 15th of June, 1885, and intituled the Dairies, Cowsheds, and Milkshops Order of 1885, it is provided—Article 7: "It shall not be lawful for any person following the trade of cowkeeper or dairyman to begin to occupy as a dairy or cowshed any building not so occupied at the commencement of this Order" (viz., the 30th of June, 1885) "unless and until he first makes provision to the reasonable satisfaction of the local authority for the lighting and the ventilation, including air-space . . . of the same." Article 8: "It shall not be lawful for any person following the trade of cowkeeper or dairyman to occupy as a dairy or cowshed any building, whether so occupied at the commencement of this order or not if and as long as the lighting and the ventilation, including air-space . . . thereof are not such as are necessary or proper . . . (a) for the health and good condition of the cattle therein. . . ." Article 13: "A local authority may from time to time make regulations . . . (b) for prescribing and regulating the lighting, ventilation, cleansing, drainage, and water-supply of dairies and cowsheds in the occupation of persons following the trade of cowkeepers or dairymen. . . ." The local authority under the above Act and Order is, in a borough, the mayor, aldermen, and burgesses acting by the council. The mayor, aldermen, and burgesses of the borough of Southport, in pursuance of the above Act and Order, made *inter alia* the following regulation: "Every person following the trade of a cowkeeper . . . shall not cause or suffer any greater number of cattle to be at any time kept in a building used as a . . . cowshed than will admit of the provision of 800 cubic feet of free air-space for each cow."

The appellant was convicted for a breach of this regulation.

Moulton, Q.C. (*Pickford, Q.C.*, and *Horridge* with him), for the appellant.—The regulation is *ultra vires* and bad. A local authority has no power under the Act or the Order of 1885 to make regulations as to air-space. "Ventilation" and "air-space" are different things. When "ventilation" is intended to include air-space it is so expressed in the order, as in articles 7 and 8; article 13, under which the regulation was made, enables regulations to be made as to ventilation, but is silent as to air-space.

Macmorran, Q.C. (*G. H. Pollard* with him), for the respondent.—The regulation is good. Ventilation must be taken to include air-space. Article 13 of the order merely carries out article 8 in detail, and the definition of ventilation in article 8 is incorporated in article 13. The object is that cowkeepers may know from the regulations of the local authority precisely what are the requirements which they have to meet.

He cited *Ex parte Kingstown*, 18 L. R. Ir. 509; *Ex parte Foreman*, 35 W. R. 370, 18 Q. B. D. 393; *Reed* v. *Harvey*, 28 W. R. 423, 5 Q. B. D. 184.

Moulton, Q.C., in reply, cited *Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347.

Oct. 29.—WRIGHT, J.—By section 34 of the Contagious Diseases (Animals) Act, 1878, power was given to the Privy Council to make orders authorizing a local authority to make regulations for, amongst other things, regulating "the ventilation of dairies and cowsheds." By section 58, "Every Order of Council shall have effect as if it had been enacted by this Act." Under the powers so given the Privy Council in 1885 made an order, articles 7 and 8 of which deal with "ventilation, including air-space," and article 13 of which gives power to local authorities to make regulations respecting, amongst other things, "ventilation." [His lordship read these articles.] The question is whether the power delegated by the Privy Council to the local authority by article 13 of the order to make regulations as to the ventilation of dairies and cowsheds includes a power to regulate air-space. It is certainly strange that in articles 7 and 8 of the Order in Council the words "including air-space" are expressly put in after the word "ventilation," while in article 13 the word "ventilation" stands by itself. It may be that the omission of air-space from section 13 is intended to have the effect of excluding it from the purview of the local authority. It may be, on the other hand, that the words "including air-space" in articles 7 and 8 are intended to be a definition of the word "ventilation" throughout the order. The local authority for the borough of Southport, purporting to act under the powers so delegated to them, have made a regulation as to the air-space which must be provided in all cowsheds within their jurisdiction. [His lordship read the regulation.]

The suggestion is that that regulation is *ultra vires*. The justices have held that it is valid and binding, and have convicted the appellant for a breach of it.

It is to be observed that by section 58 of the Act of 1878 the Order in Council is to have the same effect as if it were enacted by the Act itself. What, then, is the effect of that provision on the question which

* These powers are now exercisable by the Board of Agriculture; see 52 & 53 Vict. c. 30, s. 2.

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

we are considering? The case of *The Institute of Patent Agents* v. *Lockwood*, to which we have been referred, decides that in such a case the proper course of construction is to read the original Act and the subordinate legislation together. That seems to me the right principle to adopt. Acting upon that we find that the principal Act authorizes the regulation of "ventilation," and the subordinate legislation, the Order in Council, deals in two places with "ventilation, including air-space," and in a third with "ventilation" pure and simple. Reading the two together it seems to me that there is no such inconsistency as to make article 13, if the word "ventilation" is there construed as including air-space, at variance with the principal Act. Articles 7 and 8 of the Order in Council show that the word "ventilation" in the order includes air-space, and I see no reason why it should not be construed as including air-space also in article 13. If there is any hardship section 14 of the Order gives power to the Privy Council—and now, I presume, to the Board of Agriculture—to cancel any regulation if it is of too restrictive a character or otherwise objectionable. I am therefore of opinion that the justices were right, and that their decision must be upheld.

KENNEDY, J.—The only question that we have to decide in this case is whether the regulation of the local authority dealing with air-space is *ultra vires* or not. Without repeating what has been said by my brother Wright on the construction of the Act of Parliament and the Order in Council, I will only say that there is nothing that satisfies me that a regulation made by a local authority in pursuance of the powers delegated by the Act and Order may not deal with air-space. Does the word "ventilation" when it is used alone in article 13 exclude air-space? It is, no doubt, a difficult question to answer, but since I see nothing in the Act or Order which compels me to hold that the word "ventilation" excludes air-space I think the word may fairly be given its inclusive meaning in article 13, and that the power of regulating ventilation given to the local authority includes the power of regulating air-space. If the argument of convenience may be looked at I think it is certainly more satisfactory that the local authority should fix a definite minimum requirement of cubic feet of air rather than that the cowkeeper should not know what the requirements are. It seems to me, therefore, that there is no reason why the powers of article 13 should not been given this wider meaning, and that the regulation is valid.

Appeal dismissed.

Solicitors for appellant, *Pritchard, Englefield, & Co.*, for *Arthur S. Mather*, Liverpool.

Solicitor for respondent, *J. Davies Williams*, Southport.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 15.

TOWNEND *v.* KIRKHAM. (*a.*)

Practice—District registrar—Jurisdiction—Power to set aside judgment—Ord. 35, rr. 1, 5, 6.

Where, in an action proceeding in a district registry, the plaintiff has signed judgment in default of appearance, the district registrar has jurisdiction to set the judgment aside on the ground that it has been entered for a larger sum than was in fact due.

The effect of rule 6 of order 35 is that in all matters other than those in which the district registrar has exclusive jurisdiction under rules 1-5, proceedings may be taken either before the district registrar or a master.

Appeal from an order of Day, J., at chambers.

The action was brought to recover a loan, and was commenced in the district registry of Manchester. The defendant having made default in appearance, the plaintiff signed final judgment.

The defendant applied to the district registrar to set aside the judgment on the ground that it had been signed for £7 more than was in fact due.

The district registrar set the judgment aside, and directed that judgment should be entered for the proper sum.

On appeal Day, J., held that the district registrar had no jurisdiction to make any order in the action after final judgment had once been entered, and he ordered that the original judgment should stand.

The defendant appealed.

By ord. 35, r. 1: "Where a cause or matter is proceeding in a district registry, all proceedings, except where by these rules it is otherwise provided, or the court or a judge shall otherwise order, shall be taken in the district registry, down to and including the entry of final judgment."

By rule 5: "Where a cause or matter is proceeding in a district registry, all proceedings relating to the following matters—namely: (*a*) Leave to enter judgments under ord. 16, rr. 50 and 51; (*b*) leave to issue or renew writs of execution; (*c*) examination of judgment debtors for garnishee purposes, or under ord. 42, r. 32; (*d*) garnishee orders; (*e*) charging orders *nisi*; (*f*) interpleader orders, shall, unless the court or a judge shall otherwise order, be taken in the district registry."

By rule 6: "Where a cause or matter is proceeding in a district registry, the district registrar may exercise all such authority and jurisdiction in respect thereof as may be exercised by a judge at chambers, except such as by these rules a master or chief clerk is precluded from exercising."

Montague Lush, for the defendant.—The learned judge thought the case was governed by rule 1 of order 35, which gives a district registrar jurisdiction down to final judgment only. But rule 5 gives jurisdiction in matters subsequent to judgment, and rule 6 gives all the jurisdiction which a master has in a London cause. It is clear that in a London cause a master might set aside a judgment by default if it had been obtained improperly. The district registrar, therefore, had jurisdiction in this case.

Carrington, for the plaintiff.—Rule 6 merely enables a district registrar to exercise the jurisdiction which has already been given him in the same way as a master exercises his jurisdiction. If it gave him all the jurisdiction of a master, the preceding rules would be superfluous. The jurisdiction of a district registrar does not extend beyond final judgment except in respect of the matters mentioned in rule 5. In *Hood & Sons* v. *Yates*, 42 W. R. 412, [1894] 1 Q. B. 240, it was held that a district registrar had no jurisdiction to make an interpleader order, and in consequence of that decision rule 5 was altered so as to include interpleader orders. Rule 5 does not mention the setting aside of a judgment obtained on default of appearance.

A. L. SMITH, L.J.—Rule 1 of order 35 says that,

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

where a cause is proceeding in a district registry, all proceedings shall be taken in the district registry down to and including the entry of final judgment. I will not read rules 2, 3, or 4, but I observe that the same word "shall" is used in each of them. Then we come to rule 5, where again the word "shall" is used; it says that all proceedings in certain specified matters which come after judgment shall be taken in the district registry. In my opinion those rules give exclusive jurisdiction to the district registrar in all the matters there mentioned. Then rule 6 says that a district registrar may exercise all such jurisdiction as a master may exercise. I think that that rule, according to its true construction, gives the district registrar concurrent jurisdiction in all matters in which exclusive jurisdiction has not been given to him. The case of *Hood & Sons* v. *Yates* has been referred to. In my opinion the judges there went further than was necessary for the actual decision of the case, which was that the master had jurisdiction. I think that without overruling that decision we may state what in our judgment is the true construction of the rules. The action of the Rule Committee in altering the rule in consequence of what the judges said in that case is quite intelligible. I think therefore that the district registrar had jurisdiction, and this his order must be allowed to stand.

RIGBY and COLLINS, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Sims & Symes.*

Solicitors for the defendant, *Shaw, Tremellen, & Kirkman.*

From Chan. Div. (Lindley, M.R., and Chitty, L.J.) — Nov. 3.

POLLOCK *v.* GARLE. (*a.*)

Bankers' Books Evidence Act, 1879 (42 *Vict. c.* 11), *ss.* 3-7—*Banking account of third party—Inspection before trial.*

Section 7 of the Bankers' Books Evidence Act, 1879, *was not intended to confer power on the court to order that a party to legal proceedings should have liberty to inspect and take copies of entries in a banker's books of the accounts of persons who are not parties to the action.*

Appeal of the defendant from an order of Kekewich, J.

The action was brought for the rescission of a contract between the plaintiff and defendant for the purchase of 150 shares in the Gresham Gold Exploring Syndicate, Limited.

The plaintiff alleged that the defendant, who was at that time a director of the said company, on or about the 2nd of December, 1895, made certain false representations to him in respect of the position of the company, by which he was induced to buy the said shares. The particular representation was that the company had at its bankers a sum of £87,000 cash undivided.

The defendant by his defence denied that he ever made any of the representations alleged, and asserted that the statement as to the undivided sum of £87,000 was true.

The pleadings having been closed, Kekewich, J., made an order on summons, before the action had been set down for trial, that the plaintiff, the applicant, be at liberty upon three clear days' notice in writing to Messrs. Smith, Payne, & Smith, bankers, to inspect and take copies of, or extracts from, any accounts in the books of the bankers in the name of the Gresham Gold Exploring Syndicate, Limited, pursuant to the provisions of the Bankers' Books Evidence Act, 1879, but such inspection was to be limited to showing the balances of the said company in the books of the said bankers on the 2nd of December, 1895.

Section 7 of the Bankers' Books Evidence Act, 1879, is as follows: "On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs."

The defendant appealed.

Mark Romer, for the appellant.—Apart from the Bankers' Books Evidence Act entries in bankers' books would not be evidence against third parties. This order should not have been made unless it was clear that the account, though not kept in the name of the defendant, was, in substance and in fact, kept on his behalf: *Howard* v. *Beall,* 37 W. R. 555, 23 Q. B. D. 1; *South Staffordshire Tramways Co.* v. *Ebbsmith,* 44 W. R. 97, [1895] 2 Q. B. 669.

A. J. Walter, for the Gresham Syndicate.—I am not a party to the action, and the plaintiff is, in reality, asking me for a proof before the trial, which he has no right to ask for. The Act was not intended for such a purpose; its object was to relieve bankers of the inconvenience of having to produce their books on subpœna.

Ernest Pollock, for the plaintiff.—*Arnott* v. *Hayes,* 36 W. R. 246, 36 Ch. D. 731, clearly shows that this process is right, in lieu of a *subpœna duces tecum.*

He referred to *In re Marshfield, Marshfield* v. *Hutchings,* 34 W. R. 511, 32 Ch. D. 499.

Romer replied.

LINDLEY, M.R.—I think this case raises a question of enormous importance to the public and to commercial people in particular. [His lordship stated the facts, and continued:] Just consider what it means. The application is to compel bankers to give leave to somebody else to look at and take copies of entries of a third party who has nothing to do with the litigation. That appears to me to be absolutely contrary to every principle of law relating to discovery and to the settled practice of the court. It was said that the court had power to make the order under section 7 of the Bankers' Books Evidence Act, 1879. The Bankers' Books Evidence Acts were passed for a very definite purpose. Before the Acts the procedure was to serve a clerk of the banker with a subpœna to attend at the trial and produce the books. That was extremely inconvenient to bankers whose books were in daily use, and so the Acts were passed to protect them from that inconvenience, and they are now protected by sections 3 to 6 of the Act of 1879. These sections were not intended to apply to litigants, but to enable bankers to send attested copies of entries in their books instead of the books themselves. Then comes section 7, which has nothing to do with protecting bankers from inconvenience; it has to do with litigants. [His lordship read the section.] If that is taken literally, it means that any party to a proceeding may take copies of entries of the account of anybody else not a party to the action. Such an interpretation would be simply monstrous, and I will

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

not be a party to any such decision. Obviously the meaning was to give facilities for the taking of copies of entries of persons who are parties to the litigation and no other.

Of course a party to an action may be an undisclosed principal, a banking account in the name of another person being really his, and possibly section 7 can in that case be used to obtain inspection of the account; but when the court is asked to throw open to third parties the accounts of persons who are not parties to the litigation, it ought not, as a general rule, to accede to the request. I do not say that such a thing can never be done, but the court must take care that the section is not made use of oppressively. It may be that at the trial the court may make an order on a person who could be subpœnaed to bring copies of the accounts; we are not dealing with that case here. The plaintiff wants to see the credit standing to the company's account at a particular time. In order to do so he must be able to overhaul the whole account for half a year, and will see all the particulars to which the figures relate; in short, he will have a roving inspection of the account, and against that we must protect third parties.

The order must be discharged altogether, with costs, and the plaintiff must be left to do what he can at the trial, and the bankers must be left to the protection of the Act. It would be far too mischievous and oppressive to make the order.

CHITTY, L.J.—The Act of 1879 is divided into two portions. Sections 3 to 6 are intended to relieve bankers, and section 7 is different, and relates to the parties to the litigation. This is the account of a third person who has been served and objects to have his account inspected before trial. This is an attempt to obtain inspection of the account of a third party by means of section 7. Although in terms it is not said that the account must be that of a party to the action, yet the court ought to exercise the greatest caution in making an order relating to the account of a third person.

In this case the inspection must run over a period of at least five months. In order to ascertain the balance on the 2nd of December the plaintiff would have the right to see the account from the 30th of June preceding to that date; he would be entitled to look, not merely at the figures, but also at the names and the various items, and would ransack the account and obtain particulars of what he had no right to look at.

In my opinion the 7th section was not intended to be used for any such purpose, and it would inflict a great injustice on third persons if such an order as has been made were allowed to stand.

Appeal allowed.

Solicitors, *Cheston & Sons; Wilson, Bristow, & Carpmael; H. F. Pollock.*

From Chan. Div. (Lindley, Lord Ludlow, and Chitty, L.JJ.) — Aug. 4, 1897.

SOUTH AFRICAN REPUBLIC *v.* LA COMPAGNIE FRANCO-BELGE DU CHEMIN DE FER DU NOR DE LA REPUBLIQUE SUD AFRICANE. (*a.*)

Practice—Foreign State plaintiff—Action for appointment of new trustee—Counter-claim for damages for libel—Order excluding counter-claim—R. S. C., 1883, *ord.* 19, *r.* 27; *ord.* 21, *r.* 15.

The fact that the plaintiff is a foreign state is not a sufficient reason for allowing the defendant to set up by way of counter-claim a claim which he could not set up against an ordinary plaintiff. An order will therefore be made excluding a counter-claim for damages for a libel alleged to have been published by a foreign state, which is plaintiff in an action seeking the appointment of new trustees of a fund in court.

Appeal from North, J.

The plaintiff republic brought an action for the appointment of a new trustee of large sums of money which, in pursuance of an agreement between the republic and the defendant railway company, had been lodged in a bank in the joint names of two trustees, one of whom represented the plaintiffs and the other the defendants. The plaintiffs' trustee had since died. By their defence the defendants submitted that it would be inequitable that the funds should again be placed under the control of the plaintiffs, by being placed in joint names or otherwise, except upon the terms of the plaintiffs agreeing to observe the agreement already mentioned between the plaintiffs and the defendants. By way of counter-claim the defendants claimed, *inter alia*, £100,000 damages for a libel alleged to be contained in a letter dated the 8th of June, 1895, which the Government commissioner of railways of the South African Republic had written to the defendants, and sent for publication to the London Stock Exchange, where it was accordingly published. In substance, the alleged libel consisted of statements that the conditions of the concession granted by the Government of the South African Republic had not been duly fulfilled, and that the writer of the letter had advised the Government of the Republic not to pay any interest on the share capital of the defendant company (such interest being guaranteed by the Government) until the matter should have been investigated. The defendants alleged that in consequence of this letter the committee of the London Stock Exchange refused to grant a quotation of the shares of the defendant company, and the company suffered serious injury.

North, J., on the application of the plaintiffs, made an order excluding from the counter-claim the defendants' claim for damages for libel.

The defendants appealed.

Cozens Hardy, Q.C., and *Vernon R. Smith, Q.C.*, for the appeal, referred to R. S. C., 1883, ord. 21, r. 15, ord. 19, r. 27, ord. 36, rr. 2, 8, ord. 21, r. 15; *Strousberg* v. *Republic of Costa Rica*, 29 W. R. 125; and Annual Practice, 1897, vol. 1, p. 475, where *Griendtoveen* v. *Hamlyn*, 8 Times L. R. 231 is cited.

Swinfen Eady, Q.C., and *Waggett*, for the plaintiff Republic were not called upon.

LINDLEY, L.J., stated the facts, and proceeded: I say nothing at all about foreign republics suing or being sued here, and the possibility of actions for libel being brought against or by them. I treat this as an action by a foreign government which submits to the jurisdiction of the court as regards all matters which are properly raisable in such an action. Amongst such questions as can be raised are the questions which, according to our practice, may be raised under a counter-claim, and I suppose that, subject to the rules, the question of libel may be raised. Let us, therefore, treat this as an ordinary action by an ordinary individual subject to the jurisdiction of the court. Does anyone suppose for a moment that this cross-action—for that is what it really is, call it what you like—that this cross-action for libel would be allowed to be tacked on to such a claim as I have suggested, and be brought and tried here along with that other claim? The question has only to be asked

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

to answer itself. Of course it would not. What would be done, whether the thing would be struck out or whether there would be a transfer of part of the action to the Queen's Bench Division, I do not know; but I should think myself that any judge in the Chancery Division would strike it out, and leave the defendants to bring a cross-action. That is precisely what North, J., has done. Then it is pointed out, and truly pointed out, that the position of the defendant would be very different if, instead of the plaintiffs he had an ordinary opponent, against whom he could bring a cross-action. It is said, and it is true, that a cross-action will not lie against the present plaintiffs, unless they submit to be sued here, and really we are asked to put them upon the terms of submitting to be sued here in an action for libel. How can we? It seems to me absolutely wrong, whether it is under ord. 21, r. 15, or under ord. 19, r. 27. I should myself say it falls under both. I should say a joining of this action for libel with this action for the appointment of new trustees and the protection of funds is very seriously calculated, in the words of ord. 19, r. 27, to "prejudice or embarrass the fair trial of the action." I do not know how a judge would do it except piecemeal, and I think he would be perfectly justified in striking it out under that rule. If not, it is quite justifiable to strike it out under the other. The broad question is whether we ought to allow this counter-claim to stand on the ground that if we do not the defendants will be in a difficulty about suing the plaintiffs. I do not think that it is a sufficient reason. I think that the order is perfectly right, and the appeal must be dismissed.

Lord LUDLOW, L.J.—I am of the same opinion. The principal object in this action is to protect the funds in court and to obtain the appointment of a new trustee. That is the ostensible object. The defendant takes advantage of the republic having brought itself within the jurisdiction of the court here to start a counter-claim in respect of an alleged libel, claiming very heavy damages. That portion of the counter-claim, and the defence which relates to the damages recoverable in that counter-claim for libel, has been struck out by the learned judge, and the question here is whether he was justified in so striking it out. Now, I distinctly say that I express no opinion as to whether a counter-claim, which is really a cross-action, can be brought against the South African Republic. I state no opinion upon it, but for the purposes of the present case I assume it can, and I treat the republic as an ordinary litigant who has come here, and so has brought himself within the jurisdiction of the court here. Now, suppose it had stood in that way, suppose that the plaintiff here, instead of being the South African Republic, had been an ordinary individual; what course would be adopted by the learned judge in regard to a counter-claim of this kind? I unhesitatingly say that under ord. 19, r. 27, or probably under ord. 21, r. 15, the judge would strike out such a counter-claim, and would not permit it. I think that is what ought to be done in this case. Probably it would be struck out in chambers, and the learned judge would say that the plaintiffs could bring an independant action. But then it is said that that is all very well in the case of a private individual, because against him you can bring a cross-action, but that is not the case here, because the defendant could not bring an action for libel against the republic. It is the fact that the republic has submitted to the jurisdiction of this court, and that, it is contended, enables the plaintiffs to do what they are now doing. We are asked therefore to give effect to that which has been done by the republic—namely, to give an advantage to the defendants because the republic has submitted to the jurisdiction of the courts and enabled him to bring an action which he otherwise could not have brought. I do not think that is right. I do not think that can be supported on any ground. I think therefore that the learned judge at chambers was perfectly right in striking out so much of this counter-claim as related to the damages claimed on the ground of libel.

CHITTY, L.J.—I am of the same opinion. I exclude entirely from consideration, for the purposes of this judgment, the circumstance that the South African Republic is plaintiff, and I deal with the case upon the same footing as if the plaintiffs were ordinary subjects of the Queen resident here. In my opinion it is right, under either or both of the two rules that have been referred to, to exclude from this action the counter-claim for libel. The nature of the action has been already stated by the lord justices. The plaintiffs only ask for the appointment of a new trustees, but the defence raises the question which for the purpose of our present decision may be shortly stated as a claim that the fund is not a trust fund either in whole or in part. It seems to me it would be wrong, on the supposition on which I proceed, to allow this counter-claim for damages for libel to stand. You might no doubt separate the issues, and the issue of libel might be sent to a jury, but I think, for the reasons that have already been given, that it is not right to allow such a counter-claim as this to stand. For these reasons I think the order of North, J., was right in excluding it.

Appeal dismissed.

Solicitors, *Harwood & Stephenson; Clark, Rawlins, & Co.*

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — July 29, 1897.

CARLTON STEAMSHIP CO. v. CASTLE MAIL PACKETS CO. (a.)

Ship—Charter-party—Berth for loading—Order by charterers—Tides.

By a charter-party a ship was to proceed to a certain dock, or so near thereunto as she could safely get, and there load always afloat as and where ordered by the charterers a cargo of rails. The ship proceeded to the named dock, and was ordered by the charterers to a berth. The depth of the water in the dock was such that it was impossible, as the parties knew, for the ship to leave the dock, after being loaded, till the next spring tides, which would be in about a fortnight's time.

Held (A. L. Smith, L.J., *dissenting*), *that the order given by the charterers was not unreasonable.*

Appeal from the judgment of Mathew, J., at the trial of the action without a jury.

The action was brought by the owners of the steamship *Carlton* to recover damages from charterers for failure to name a proper berth for loading under the charter-party and for consequent detention of the ship.

By the charter-party, which was dated the 22nd of February, 1897, the vessel was to proceed to Senhouse Dock, Maryport, or so near thereunto as she could safely get, and there load in the customary manner always afloat as and where ordered by the

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

charterers a cargo of rails and proceed therewith to Delagoa Bay.

The vessel proceeded to Maryport, and went into Senhouse Dock on the 28th of February, and on the 1st of March she was ordered by the charterers to a berth in the dock. She had taken on board a quantity of bunker coal, and in consequence thereof she could not then lie always afloat in any part of the dock, and it was clear that the loading of the cargo could not be completed before the 5th of March, when the spring tides would come to an end, and that she could not come out of the dock fully loaded till the next spring tides. The shipowners thereupon received on board about 575 tons of cargo, and then on the 7th of March took the vessel out of the dock to Barrow, and offered to receive the rest of the cargo there.

The charterers refused to deliver any of the cargo except at Senhouse Dock.

On the 16th of March the vessel returned to Senhouse Dock, the loading was proceeded with, and on the 20th of March she sailed from the dock with her cargo on board.

Mathew, J., held that the ship was justified in leaving the dock, and that the charterers were responsible for the delay, and he accordingly gave judgment for the plaintiffs.

The defendants appealed.

Joseph Walton, Q.C., and *James Fox*, for the defendants.

Robson, Q.C., and *Scrutton*, for the plaintiffs.

The following cases were cited in argument: *Tapscott* v. *Balfour*, 21 W. R. 245, L. R. 8 C. P. 46; *Tharsis Sulphur and Copper Co.* v. *Morel Brothers*, 40 W. R. 58, [1891] 2 Q. B. 647; *Shield* v. *Wilkins*, 5 Exch. 304; *Nelson* v. *Dahl*, 28 W. R. 57, 29 W. R. 543, 12 Ch. D. 568, 6 App. Cas. 38; *The Alhambra*, 29 W. R. 655, 6 P. D. 68; *Reynolds & Co.* v. *Tomlinson*, [1896] 1 Q. B. 586, 44 W. R. Dig. 150.

Lord ESHER, M.R.—There seems to be some difficulty in this case. Mathew, J., apparently held that the order given by the charterers was a wrong order. We have to deal with a charter-party made between English shipowners and English charterers, and with reference to an English port—viz., Maryport—the like of which exists in many places in England in this respect—that it has a particular depth of water between neap and spring tides and another depth during spring tides. Those depths are published in documents which are in the hands of all charterers and all shipowners, so that both parties when they entered into this contract must be taken to have known the ordinary conditions as to the depth of water in this port. The charter-party says that the ship is to proceed to Senhouse Dock, or so near thereunto as she can safely get. I will assume that she could not safely get to Senhouse Dock within the meaning of the charter-party unless she could come safely out when she was loaded. She could go safely into Senhouse Dock unloaded. But at particular states of the tide she could not come out loaded. But then again in the ordinary course of the tides there were times when she could come out loaded. Therefore, it seems to me she was bound to go in, and she did go in. Now, she was to load as and where ordered by the charterers. For well-understood business reasons charterers generally have the power to order where they will deliver cargo. But, although charterers have the right to name a berth, shipowners usually stipulate, as they did here, that it must be a berth where the ship can load always afloat. In my opinion charterers are bound to give an order to go to a particular berth almost immediately after notice of the arrival of the ship. Here they gave an order on the 1st of March, which was clearly not too late. But I do not think they are bound to give an order which can be immediately obeyed. It may be that no berth is then vacant, though one will be vacant in a reasonable time. I think that if an order is given to go to a berth to which the ship can go in a reasonable time, and where she will then be able to load always afloat, that would be a proper order. In this case the order which was given might be obeyed at the next spring tides—that is to say, in about a fortnight. I cannot see that it was unreasonable to give the order under the circumstances. Therefore, in my opinion, the action, which is brought substantially for having given a wrong order, cannot be maintained, and the appeal ought to be allowed.

A. L. SMITH, L.J.—I cannot think that Mathew, J., was wrong in his decision. I do not feel at all certain that a shipowner need know the character of the ports at which his ships may be, though no doubt this ought to be known to the charterers. I will, however, in this case assume equal knowledge on both sides. When the ship got to Senhouse Dock she was an arrived ship, and there was then an obligation on the charterers within a reasonable time to give an order for a berth where the ship could load always afloat. I cannot read into the contract any reference to the course of nature with regard to the depth of water at different states of the tide. I treat it as a matter of absolute bargain. An order was given within a reasonable time. But what was the substance of the order? It was an order which the ship could not obey within a fortnight. Was that a reasonable order to give? I do not think so. There must be some limit as to the time in which an order can be obeyed, and in my opinion a fortnight is too long. I therefore think the appeal ought to be dismissed.

RIGBY, L.J.—I agree with the Master of the Rolls in thinking that the appeal should be allowed. The parties had knowledge of the facts, and I do not think there was any unreasonable delay of which the plaintiffs can complain. There was no duty on the defendants to provide an immaculate berth.

Appeal allowed.

Solicitors for the plaintiffs, *Botterell, Roche, & Co.*

Solicitors for the defendants, *Parker, Garrett, & Holman.*

From Chan. Div. (Lindley, Lopes, and Chitty, L.JJ.) — July 21, 1897.

STROHMENGER v. BOROUGH OF FINSBURY PERMANENT INVESTMENT BUILDING SOCIETY. (*a*.)

Building society—Fully paid-up shares—Loss written off by reducing shares—Resolution of special meeting—Ultra vires—*Building Societies Act*, 1836 (6 & 7 *Will.* 4, *c.* 32), *s.* 1—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 7, 13, 16, 18—*Building Societies Act*, 1894 (57 & 58 *Vict. c.* 47), *ss.* 1 (*f*), 25 (2).

Section 18 *of the Building Societies Act*, 1874, *confers upon "any society under this Act certified previously to the passing of this Act," a general power of altering its rules as to all matters affecting merely the rights of the members* inter se.

(*a*.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

A society certified after 1856, *but before* 1874, *has, therefore, power to alter its rules so as to provide for losses incurred by reducing the shares; and it makes no difference whether this is done by amending the existing rules or by substituting a new set of rules.*

Decision of Stirling, J., 45 *W. R.* 700, *reversed.*

Appeal from Stirling, J. (reported 45 W. R. 700).

The society was formed in 1863 under the Building Societies Act, 1836 (6 & 7 Will. 4, c. 32), s. 1 of which provides "that it shall and may be lawful for any number of persons in Great Britain and Ireland to form themselves into and establish societies for raising, by the monthly or other subscriptions of the several members of such societies, shares not exceeding the sum of £150 for each share, such subscriptions not to exceed in the whole 20s. per month for each share, a stock or fund for the purpose of enabling each member thereof to receive out of the funds of such society the amount or value of his or her share or shares therein, to erect or purchase one or more dwelling-house or dwelling-houses, or other real or leasehold estate to be secured by way of mortgage to such society until the amount or value of his or her shares shall have been fully repaid to such society with the interest thereon, and all fines and other payments incurred in respect thereof, and to and for several members of each society from time to time to assemble together, and to make, ordain, and constitute such proper and wholesome rules and regulations for the government and guidance of the same as to the major part of the members of such society so assembled together shall seem meet, so as such rules shall not be repugnant to the express provisions of this Act, and to the general laws of the realm, and to impose and inflict such reasonable fines, penalties, and forfeitures upon the several members of such society who shall offend against any such rules as the members may think fit. . . ." The society was incorporated under the Building Societies Act, 1874. That Act, by section 7, repealed the Act of 6 & 7 Will. 4, but so as not to "affect any subsisting society certified under the said Act, until such society shall have obtained a certificate of incorporation under this Act; and this repeal shall not affect the past operation of the said Act." Section 13 provides that "any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising, by the subscriptions of the members, a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate by way of mortgage; and any society under this Act shall, as far as is necessary for the said purpose, have power to hold land with the right of foreclosure, and may from time to time raise funds by the issue of shares of one or more denominations, either paid up in full or to be paid by periodical or other subscriptions, and with or without accumulating interest, and may repay such funds when no longer required for the purposes of the society." Section 16 provides that "the rules of every society hereafter established under this Act shall set forth (1) the name of the society and the chief office or place of meeting for the business of the society; (2) the name in which the stock or funds of the society are to be raised, the terms upon which paid-up shares (if any) are to be issued and repaid, &c.; (3) the terms upon which shares may be withdrawn and upon which mortgages may be redeemed." Section 18 provides that "any society under this Act, certified previously to the passing of this Act, may alter or rescind any rule or make any additional rule by the votes of three-fourths of the members present at a special meeting called for the purpose, of which meeting notice, specifying the proposed alteration, rescission, or addition, shall be given to the members in the manner provided by the rules of the society, or in the absence of such rules by letters sent through by post seven days previous to such meeting; and any society hereafter established may alter or rescind any rule, or make any additional rule, in the manner its rules direct."

The Building Societies Act, 1894, s. 25, sub-section 2, provides that after the expiration of two years from the passing of that Act, the Act of 1836 "shall be repealed as to all societies certified thereunder after the year 1856."

Until 1897 the rules of the society provided that "any member may, subject to the provisions of rules 73 and 91, withdraw all or any part of his shares upon giving one month's notice in writing, dating from any subscription, to the manager, when such member shall be entitled to receive back his subscriptions, with such portion of the profits realized as may have been posted to his credit either by way of interest or bonus, together with interest circulated up to the date of the notice" (rule 71); that "the rule formerly numbered 72 was rescinded at a special general meeting of the society on the 13th of January, 1891" (rule 72); that "in the event of the assets of the society being insufficient to meet the liabilities thereof, the directors may order that a sum sufficient to discharge a proper proportion of such liabilities shall be deducted from the amount payable to any member on withdrawal" (rule 73); and that "the funds of the society shall be applied solely for the purposes set forth in these rules, and in manner therein provided—firstly, in payment of all the expenses of the society authorized by the rules; secondly, in payment of the interest, dividends, or bonuses due to the holders of investment shares; thirdly, in making advances to members, notwithstanding the currency or expiration of any notices of withdrawal by other members; lastly, in repaying subscriptions to members withdrawing their shares" (rule 91).

Rule 118 dealt with dissolution of the society, and provided: "In case three-fourths in number and value of the investing members of the society for the time being, present at a general meeting specially convened for the purpose, shall resolve that no new business shall be transacted, then the society shall cease to transact any new business." The same rule further provided that the directors were to get in the assets, and to pay and discharge all the liabilities of the society, and make arrangements with borrowing members for the redemption of their securities; and that "when all the liabilities and expenses shall have been discharged, the surplus assets shall, from time to time, as the same shall be got in, be divided among the investing members in the proportions in which they may be entitled to the same; and when the whole of such surplus assets shall have been so disposed of the society shall be, and be deemed to be, absolutely at an end."

Through the defalcations of some of its officials the society had lost a large sum of money, and several meetings of the members had been held with the view of considering what ought to be done. Ultimately, in May, 1897, there had been passed certain resolutions, some of which were complained of, altering the rules of the society. The first alteration which it is necessary to mention was one with regard to rule 71, in which the provision that a member should be entitled to receive back his subscriptions with a proportion of profits was now struck out, and a provision substituted that he should be entitled to receive "the amount standing to his credit in the books of the society." In place of what was formerly in rule 72 this was inserted: "The amount due from the society

to each member in respect of any share or shares held by him on the 1st of December, 1896, shall be deemed to be and taken as thirty-three fiftieths of the net amount paid on such share or shares, anything in these rules to the contrary contained notwithstanding." Rule 73 was altered so as to read thus: "The directors may at any time order that a sum sufficient to discharge a proper proportion of any loss actual or anticipated incurred by the society shall be deducted from the amount payable to any member on withdrawal."

The plaintiff, who was the holder of fully paid-up shares in the society, then commenced an action, on behalf of himself and all other members of the society, claiming an injunction to restrain the society and their directors and officers from acting upon the alteration of the rules, and from dealing with the funds of the society otherwise than in accordance with the rules as they stood before the alterations.

Stirling, J., held that the alteration made in rule 72 was *ultra vires* of the society, and granted an injunction as to the alteration of that rule (see 45 W. R. 700).

The society appealed.

Graham Hastings, Q.C., and *E. A. Wurtzburg*, for the appeal, referred to the Building Societies Act, 1836, ss. 1, 5, 6; the Building Societies Act, 1874, ss. 18, 19; the Building Societies Act, 1894, s. 1 (*c*), (*f*); *Murray* v. *Scott*, 33 W. R. 173, 9 App. Cas. 519, 538; *Barnard* v. *Tomson*, [1894] 1 Ch. 374; *Pépé* v. *City and Suburban Permanent Building Society*, 41 W. R. 548, [1893] 2 Ch. 311, 313; *Laing* v. *Reed*, 18 W. R. 76, L. R. 5 Ch. App. 4; and *Auld* v. *Glasgow Working Men's Building Society*, 35 W. R. 632, 12 App. Cas. 197, 201.

P. J. Stokes, for Strohmenger.

Wurtzburg replied.

LINDLEY, L.J.—This society was established in 1863, before the Building Societies Act, 1874, was passed. It was afterwards incorporated under the Act of 1874 soon after that Act was passed. That being the state of the society, the real question is, By what Act of Parliament was it governed when, in May, 1897, the members altered their rules, or made rule 72? Those are the three material dates, which we must keep in our minds. What then, in May, 1897, was the state of the legislation applicable to this society? So far as the society was concerned, the Act of William 4 was absolutely repealed. Section 25, sub-section 2, of the Building Societies Act, 1874, repealed it altogether, several previous enactments having partially repealed it. This society was certified after 1856, and therefore as regards it the Act of William 4 is entirely gone, and no agreement which could be based on that Act of Parliament or on any of the sections it contains would be legitimate, or can be attended to. That, therefore, is one matter distinctly ascertained. Now, another question which arises is: What is the legislative enactment in force in May, 1897, which relates to the alteration of the rules of this society? As to that, there are two sections applicable. The first of the two is section 18 of the Act of 1874, which is very wide. Under that section this society can—and could in May, 1897—alter or rescind any rule, or make any additional rule, by the vote of three-fourths of the members. The other section which was applicable is section 1 of the Building Societies Act, 1894, which runs thus: "The rules of every society under the Building Societies Acts established or substituting a new set of rules for its existing rules after the passing of this Act, shall set forth . . . (*f*) the manner in which losses are to be ascertained and provided for." I understand that to mean every society established after the passing of this Act, or, if established before, substituting after the passing of this Act a new set of rules for its existing set of rules. The importance of that section will appear presently. We come back to this question: What is there in any of those subsisting enactments which prevents the society doing what it has done? I need not refer to those enactments. It was suggested by counsel that we had to consider—and Stirling, J., passed his judgment upon the view that the court had to consider—section 16 of the Building Societies Act, 1874. But the truth is that that was an oversight on the part of the learned judge. That section does not apply to this society at all, and we have nothing to do with it now. The same observation applies to *Knight* v. *Tabernacle Building Society* (not reported on this point), which was cited to us. It is clear that there has been a slip; for unless that were so I cannot suppose that there would have been any difference of opinion on this point between Stirling, J., and this court. At all events, neither section 16 of the Building Societies Act, 1874, nor the case of *Knight* v. *Tabernacle Building Society* applies to this case. We come back, then, to this. A shareholder of this building society says that it was not competent for a meeting duly called in accordance with the Acts to pass the rule which I am about to read. On the 18th of May, 1897, a duly-constituted meeting passed, by a majority of three-fourths, this rule. [The Lord Justice read rule 72 as amended, and proceeded:] The reason why that rule was passed, why three-fourths of the members thought it desirable to reduce the shares, is perfectly intelligible. The society had sustained a loss of £30,000, owing to the defalcations of some of its officers and other causes. How was that loss to be met? The meeting came to the conclusion that the most expedient course was to reduce the shares; for clearly everybody must contribute to the loss—it was a loss which fell upon them all. It seemed to the members present at the meeting that, as it was a loss that had to be shared by all, the fairest way was to reduce the shares all round. What is there in any of the Acts which makes it incompetent for three-fourths of the shareholders present at a meeting to pass such a rule as this? I cannot see anything to show that there is any illegality at all in what was done by the majority of the meeting. Even if section 16 of the Act of 1874 had still applied, I should have doubted whether the rule was *ultra vires*; but all doubt is removed by the language of the amending Act passed in 1894. It was perfectly competent for this society, if it had chosen, to substitute a new set of rules for the old set; I see nothing at all to prevent that. I merely make that observation for the purpose of expressing my opinion that there is nothing "unwholesome or improper," to use the phrase in the Act of 1836, in what has been done by the majority of the shareholders. The Act of 1836 is gone, but, to vary the phrase, what has been done cannot be said to be *ultra vires* merely because an amended rule has been inserted in the old set instead of a new set being adopted. I cannot see in the Acts any sign that that is to make any difference.

There has clearly been a slip and an oversight in the court below. No judge, and nobody of any experience at the bar, can wonder that a slip should occur in regard to this series of Acts. I do not say that they are actually the worst in the Statute Book, for some other groups of Acts also are exceedingly complicated; but certainly the Building Societies Acts are in a very bad state now. The appeal must be allowed, but without costs.

LOPES, L.J.—I am of the same opinion. The

question raised by this case is whether, when a building society has lost part of its capital, it can alter its rules so as to affect the rights of members who have entered into contracts under the rules as they previously existed. Is, then, this alteration *ultra vires?* It seems to me that there was a slip before Stirling, J. This case depends on section 18 of the Act of 1874, because the Act of William 4 was repealed absolutely by the Act of 1894. Section 16 of the Act of 1874 does not apply to this case as appears by the language of section 16. This society was established after 1856 but before 1874, and therefore section 16 has no application to the present case. Over and above that, by the Act of 1894, section 16 of the Act of 1874 is repealed. In no sense, therefore, can section 16 of the Act of 1874 have any application to this case, and all that remains is section 18 of the Act of 1874, which (so far as it deals with the power of a a society to alter its rules) is as large and comprehensive as it well can be, provided that the assent of three-fourths of the members is obtained at a special meeting. I do not mean to say that that section would be sufficient to entitle any meeting by a three-fourths majority to alter the constitution of the society, but I think it clearly gives full power to alter the rules so long as the alterations merely relate to the internal rights of the society and its members *inter se*. It cannot be said that what was done here went beyond an alteration as to the internal rights of the members and the internal management of the society. I do not hesitate to say that in the circumstances it probably was a right thing—I will use the word a "wholesome" thing—to do. I think this alteration was *intra vires* and that the new rule is legal, right, and proper.

CHITTY, L.J.—The plaintiff's contract as a member of this society has always been subject to the terms of the contract being altered by new rules made within the powers conferred upon the society. The society was established under 6 & 7 Will. 4, c. 32, and obtained its certificate under the Act of 1874. I proceed to inquire what power of altering and rescinding rules it had in May, 1897. In my opinion its power to do that was conferred by section 18 of the Act of 1874. That section gives to every member of the society the safeguard that the majority to carry the rules rescinding or altering the existing rules must be a three-fourths majority. In section 18 there is in terms no limit placed upon the power. I think, for the reasons which have been stated, that the rule-making and rule-altering powers in the Act of William are entirely gone, and that, therefore, we have not got to consider the meaning of the vague words "proper and wholesome," which occur only in that Act. But under section 18 there is no power to change the nature or constitution of the society, and the rules must be confined to the internal rights of members of the society. There is nothing, of course, which would allow the society to say that they would not pay their outside creditors. There are, therefore, obvious limits to the power of making and rescinding rules; but in the present case, what the court has to deal with is a rule which, in my opinion, has been made fairly and equitably, and which is not directed against particular individuals, but affects all the members equally.

It was said that instead of passing this rule it would have been better to let the heavy loss which had been incurred stand as a loss in the books of the society. I think that was one of the matters left by the Legislature within the discretion of the society acting by a sufficient majority of the members. It is for the benefit of all concerned that this great loss, instead of being left to appear year after year in the society's books, should be finally written off from the the books of the society. At any rate, that is a matter within the competency of the society. I agree with what has been said as to the slip which was made in the court below, and which is not to be wondered at. Section 16 of the Act of 1874 did not apply to this society, but section 1 of the Act of 1894 did apply, and I think there is considerable force in the argument founded on the latter section. On the question whether this was a fair and proper rule to make, it is clear that this society had the power of making rules, and, instead of making two or three rules, could, if it had chosen, have made an entire new set, and that this new rule, if it had been one of such a set, would have been justified. It seems to me that the difference between making one rule and making a set is a mere matter of form, and that the case cannot turn upon that.

Appeal allowed, without costs.

Solicitors, *Bolton, Sons, & Sandeman; Dod, Longstaffe, Son, & Fenwick.*

High Court of Justice.

Chan. Div. } Stirling, J. } Oct. 27; Nov. 6.

In re HEYWOOD.
HEYWOOD *v.* HEYWOOD. (*a.*)

Administration — Practice—Priorities—Rates—Preferential Payments in Bankruptcy Act, 1888 (51 & 52 *Vict. c.* 62), *s.* 1, *sub-sections* 1 (a), 6; *s.* 3.

The priority conferred by section 1, *sub-section* 1, *of the Preferential Payments in Bankruptcy Act,* 1888, *applies in the administration of the insolvent estate of a person who has died since the* 31*st of December,* 1888, *the date of the commencement of that Act; but does not apply in cases of death prior to that date.*

This was a summons taken out in an administration action raising the question whether certain rates ought to be paid in priority to the claims of other creditors.

John Heywood died on the 6th of January, 1896, intestate.

On the 29th of March, 1897, the usual order was made at the instance of creditors for the administration of the estate of John Heywood. In the prosecution of that order it appeared that the estate was insufficient for the payment in full of the intestate's debts and liabilities, and the question raised by the summons, which was taken out by the persons claiming priority, was whether certain rates, including poor rates, general district rates, and highway rates, due at the death of the intestate were to be paid in priority to the other debts of the intestate.

The case was argued on the 27th of October.

H. M. Humphry, for the applicants, cited *In re Leng*, 43 W. R. 406, [1895] 1 Ch. 652.

Curtis Price, for the respondents, cited *In re Albion Steel and Wire Co.*, 26 W. R. 348, 7 Ch. D. 547. [STIRLING, J., referred to *In re Association of Land Financiers*, 29 W. R. 277, 16 Ch. D. 373.]

H. M. Humphry replied.

Cur. adv. vult.

Nov. 6.—STIRLING, J.—The point arises upon the

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

terms of the Preferential Payments in Bankruptcy Act, 1888, but before dealing with that statute it is desirable to consider the previous legislation on the subject.

Section 10 of the Judicature Act, 1875, provides that: "In the administration by the court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

It is quite settled that this enactment introduced into the administration of insolvent estates and the winding up of insolvent companies some only, and not all, of the rules of bankruptcy; and considerable difficulty has arisen in determining which of those rules apply to administrations and windings up. In the case of *In re Albion Steel and Wire Co.* Sir G. Jessel, M.R., held that poor rates and local rates (which under section 32 of the Bankruptcy Act, 1869, had priority in bankruptcy) had not priority in the winding up of a company in liquidation, saying that the meaning of the enactment (Judicature Act, 1875, s. 10) was "simply that the rules in bankruptcy shall apply so far as relates to the proof and receipt of dividends out of the assets of the company." On the other hand, in *In re Association of Land Financiers*, decided in 1881, Malins, V.C., held that the priority given by the same Bankruptcy Act to servants' wages extended to the winding up of companies, and he declined to follow *In re Albion Steel and Wire Co.*

In that state of the authorities there was passed the Companies Act, 1883 (46 & 47 Vict. c. 28), which conferred priority in the winding up of companies on certain debts for wages but not for rates. In the same year was passed the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which, by section 40, provides as follows. [His lordship read the section and continued:] In 1888 was passed the statute which I have now to construe (51 & 52 Vict. c. 62). [His lordship referred to section 1, sub-sections 1, 2, 5, 6, section 2, sub-section 1, section 3, section 6.] The effect of this Act is to introduce into the law of bankruptcy the priorities which are there mentioned. That Act came into operation on the 1st of January, 1889, and it has been, therefore, in operation eight years. I have thought it right to make inquiries as to what has been the practice in chambers during that period, for I need not say that many hundreds of insolvent estates have been administered by the court in that time. The result of those inquiries is that I find there is really no fixed practice. Throughout the whole of that period one master appears to have adopted one course and another the opposite; and even in the chambers of the same judge different masters have adopted different practices; and I cannot find that during the whole of that time the question has ever been brought before a judge of this division personally even in chambers, and certainly there is no adjudication on the subject.

In 1895 there was decided by the Court of Appeal the case of *In re Leng*. It was there held that the claim of a widow for money lent to her husband for the purpose of his trade or business was by the combined effect of section 3 of the Married Women's Property Act, 1882, and section 10 of the Judicature Act, 1875, postponed to the claims of other creditors.

This case seems to me to be decided on the principle expressly stated by the present Master of the Rolls in his judgment that "the rules in bankruptcy as to debts and liabilities provable . . . include all rules expressly enacted by any statute and made applicable in the event of bankruptcy."

It is contended on behalf of the creditors for rates that this principle ought to be applied in the present case. It is not disputed that this priority would be imported into the administration of insolvent estates by courts of equity if section 1 of the Act of 1888 stood alone; but it is said that section 3 expressly limits the operation of the Act to receiving orders, orders under section 125 of the Bankruptcy Act and the winding up of companies. If this latter contention prevails section 3 will operate as a repeal of the statutory provision of the Judicature Act, 1875, as interpreted by the Court of Appeal in *In re Leng*, so far as relates to administration of insolvent estates of deceased persons in courts of equity.

In my judgment this is not the true effect of section 3. The statute deals directly with administration of estates by courts having jurisdiction in bankruptcy and in the winding up of companies; no reference is found in it to administration by courts having the ordinary jurisdiction in equity. Section 3 appears to me to provide that not every administration in bankruptcy or winding up is to be affected by the Act, but only those where an order has been made after the period fixed for the commencement of the Act; I do not think it was intended by the Legislature to exclude the application of section 10 of the Judicature Act, 1875. By the combined effect of section 1, sub-section 6, of the Act of 1888, and section 10 of the Judicature Act, 1875, the limitation imposed by section 3 of the Act of 1888 has been imported into the administration of estates by courts of equity—that is to say, the rule introduced into bankruptcy by the Act of 1888 will apply only where the date of the death (which is by section 1, sub-section 6, to be substituted for a receiving order) occurs after the commencement of the Act.

I have the less difficulty in arriving at this conclusion in that it agrees with the opinion expressed by the Master of the Rolls in *In re Leng*. The Master of the Rolls says this: "Whether debts entitled to priority in bankruptcy are to be treated as entitled to similar priority in administering the assets of a deceased insolvent was a question on which decisions were conflicting (compare *In re Albion Steel and Wire Co.*, *In re Association of Land Financiers*). All doubt on this point was, however, removed by an Act passed in 1888 (51 & 52 Vict. c. 62, s. 6, sub-section 6), which makes the rules in bankruptcy applicable." It is quite true, as was pointed out in the argument, that his lordship does not make any express reference to section 3 of the same Act, but it seems to me most improbable that that section should have been overlooked.

Solicitors, *Torr, Gribble, Oddie, & Sinclair*, for *Toller & Roberts*, Barnstaple; *C. W. & H. B. Taylor*.

Chan. Div. } July 10; Aug. 5, 11, 1897.
Romer, J. }

In re KAY.
MOSLEY *v.* KAY. (*a.*)

Trustee — Executor guilty of devastavit *— Judicial Trustees Act,* 1896 (59 *&* 60 *Vict.* c. 35), *s.* 3.

A testator died in June, 1894, *with assets reckoned at* £22,000, *and debts as then known under* £100. *His executor paid an immediate legacy of* £300 *to the widow, and made other payments for the benefit of the children. In November advertisements for creditors were issued. In December a writ was served on the executor by certain large landowners claiming an account of rents received by the testator as their agent.*

In spite of this action the executor continued to make payments to the beneficiaries, without going to the court for directions, until judgment in April, 1896, *when about* £26,000 *was found due to the plaintiffs from the testator's estate.*

Held, that the executor, under the circumstances, had acted reasonably in paying the widow the £300 *and such other payments necessary for the maintenance of the family up to the date of his receiving the writ; and that he should be relieved to this amount under section* 3 *of the Judicial Trustees Act,* 1896.

Further consideration.

Samuel Kay, a solicitor at Manchester, had for many years acted as agent and collector of rents for Sir Thomas Mosley, and his successor, the plaintiff, Sir Oswald Mosley.

Samuel Kay died on the 27th of June, 1894, leaving a will of which the widow and the defendant Keyworth were respectively executrix and executor.

By the will an immediate legacy of £300 was to be paid to the widow and the rest of the property was given to the widow for life, and on her death to the children.

The £300 was paid to the widow, and some small payments made to the children.

In August, 1894, some claim was made on behalf of the plaintiff, Sir Oswald Mosley, against the testator's estate for rents received and not accounted for.

In November the will was proved, and it was stated that the assets were about £22,000, and that the debts, as then known, did not amount to more than £100.

On the 30th of November, 1894, the defendant advertised for creditors.

On the 17th of December, 1894, the plaintiff issued the writ in the present action claiming an account of all rents and other moneys received by the testator, Samuel Kay, deceased, as agent of the late Sir T. Mosley and the plaintiff, or which but for the wilful default of the said Samuel Kay ought to have been so received; payment of what should be found due on taking such account, and administration of Samuel Kay's estate if the defendants did not admit assets.

The defendant Keyworth continued to allow the widow to receive the income of the estate until judgment was pronounced on the 21st of April, 1896, whereby the defendants were ordered to pay to the plaintiff £3,511 on account of rents received by Samuel Kay. It was also referred to the official referee to take an account of rents received by Samuel Kay on behalf of the plaintiffs and not accounted for, and on this about £26,000 was found due to the plaintiffs.

It was contended by the plaintiffs that the defendant Keyworth was personally liable to make good what had been paid to the widow on account of income and the £300 legacy, in all about £2,000, and the defendant claimed to be relieved under section 3 of the Judicial Trustees Act, 1896.

Farwell, Q.C., and *Dauney,* for the defendant, asked for relief under section 3 of the Judicial Trustees Act, 1896, contending that the defendant had acted reasonably within the meaning of that section.

Levett, Q.C., and *A. R. Kirby,* for the plaintiffs.

ROMER, J., having reserved judgment.—It is clear that section 3 of the Judicial Trustees Act, 1896, read after section 1, sub-section 2, applies to the case of an executor who has been guilty of *devastavit,* and it is also clear that in this case this executor has acted honestly. The question is, has he acted "reasonably" and in the words of section 3 ought he "fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach"?

Here the facts were that the testator at the time of his death was of good reputation, left assets to the amount of £22,000, and there was certainly no ground for imputing that he had been guilty of dishonesty, or that his debts were anything but small. How was the executor to act under these circumstances. The estate was apparently solvent, the will bequeathed an immediate legacy to the widow for urgent expenses, and there were the children to maintain and the household to be kept up. Money had to be found, unless the executor had reason to suspect that the assets would be insufficient—which he had not. It would be a monstrous thing that an executor should in such a case be bound to at once cut off all supplies and let the family go to the workhouse, and he only acted reasonably in paying the £300 legacy and making the other small payments on account of income that were reasonably necessary, until the testator's debts could be fully ascertained.

The old liabilities against an executor for *devastavit* were very hard. His position was somewhat relieved by the Act 22 & 23 Vict. c. 35, which enabled an executor to distribute assets after advertisement for creditors. It was further relieved by this Act of 1896, but in construing this Act the provisions of 22 & 23 Vict. c. 35, should be remembered, and the proper course for a prudent and reasonable executor to pursue thereunder, which is to advertise for creditors as soon as possible after his testator's death, and having notice of any claim not to pay legatees without making due provision for such claims.

There was not such delay in advertising as would prevent the executor being entitled to relief, but when he had notice of such a serious claim as was disclosed by the writ in the present action he could not reasonably go on paying beneficiaries except at his own risk. He ought to have ascertained the extent of the claim or applied to the court for directions, in which case the court would certainly not have authorized further payment to the beneficiaries. He did not come to the court but acted on his own responsibility.

I do not desire to narrow the effect of the Act of 1896, but each case must be dealt with according to its own circumstances. I have power under that Act to grant relief wholly or partially, and I grant relief to the defendant to the extent of £570, which included the £300 legacy; but in the exercise of my judicial discretion I cannot allow the payments made after the writ.

Solicitors, *C. E. Soames; Gedge, Kirby, & Millett.*

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Chan. Div.
Vaughan Williams, J. } Oct. 27, 28.

In re AMALGAMATED SYNDICATE (LIMITED). (a.)

Company—Winding up—Memorandum of association—Ancillary clauses—Substratum gone—"Just and equitable"—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-section* 5.

A company formed to carry on a temporary business as its main object, but whose memorandum of association also stated other object clauses, not as defining a succession of objects different to the main object, but as referring to matters incidental to it, should be wound up and its surplus assets distributed among the shareholders by its directors, when the temporary business which was its main object has been accomplished, for it would be ultra vires *to carry on any other business mentioned in the ancillary clauses.*

Where, however, the directors propose to carry on such ancillary business instead of winding up the company, the court, on a shareholder's petition, will make a compulsory order.

Ex parte Fox, 18 *W. R.* 1083, *L. R.* 6 *Ch. App.* 176, *distinguished.*

This was the petition of shareholders of the company that the syndicate should be compulsorily wound up.

The syndicate was incorporated on the 20th of May, 1897, its memorandum of association contained the following clauses: "(*a*) To acquire and take over as a going concern the undertaking and all or any of the assets and liabilities of the Diamond Jubilee Syndicate (Limited), incorporated in the month of April, 1897, and with a view thereto to enter into the agreement with Harold Maximilian Seare, of Finsbury House, Blomfield-street, in the City of London, on behalf of the Jubilee Syndicate (Limited) referred to in clause 2 of the company's articles of association, and to carry the same into effect with or without modifications." "(*b*) To acquire and take over as a going concern the undertaking and all or any of the assets and liabilities of the Diamond Jubilee Syndicate (No. 2) (Limited), incorporated in the month of April, 1897, and with a view thereto to enter into the agreement with Harold Maximilian Seare, of Finsbury House, Blomfield-street, in the City of London, on behalf of the Diamond Jubilee Syndicate (No. 2) (Limited) referred to in clause 2 of the company's articles of association, and to carry the same into effect with or without modification." "(*c*) To acquire and take over as a going concern the undertaking and all or any of the assets and liabilities of the Diamond Jubilee Contract Corporation (Limited), incorporated in the month of April, 1897, and with a view thereto to enter into the agreement with Harold Maximilian Seare, of Finsbury House, Blomfield-street, in the City of London, on behalf of the Diamond Jubilee Contract Corporation (Limited) referred to in clause 2 of the company's articles of association, and to carry the same into effect with or without modification." "(*d*) To carry on all kinds of promotion business, and in particular to form, constitute, float, lend money to, assist, and control any companies, associations, or undertakings whatsoever, including any companies, associations, or undertakings for the purpose of acquiring all or any of the property and liabilities of this company." "(*e*) To act as house agents, surveyors, and builders." "(*f*) To acquire, sell, and deal in rooms, premises, stands, seats, and places of observation in connection with any procession, spectacle, entertainments, sports, exhibition, demonstration, or public gathering of any description, and to supply refreshments or lodgings and accommodation for any persons attending, witnessing, or interested in the same."

There were also other clauses of a similar character to (*d*), (*e*), and (*f*). The main objects of the companies mentioned in the first three clauses had been the acquiring of sites and the erection thereon of seats for viewing the Diamond Jubilee Procession held in June, 1897.

The business in connection with the Jubilee had resulted in a loss to the syndicate, but the directors still held a portion of the subscribed funds, and with these now proposed to embark in some of the businesses mentioned in the later clauses of the memorandum of association and declined to wind up the syndicate. Certain of the shareholders therefore presented this petition.

Alexander, Q.C., and the *Hon. M. Macnaghten*, for the petitioners.—The substratum of the company is gone, and it should be wound up. It has of necessity ceased to carry on its main business, and the directors do not propose to wind it up, but to carry on other business. It is therefore "just and equitable" that the court should wind up the company under sub-section 5 of section 79 of the Companies Act, 1862, as this is *ejusdem generis* to the circumstances mentioned in the preceding clauses of the section. The object to which the directors now propose applying the company's funds is an illegitimate one and *ultra vires*, and a shareholder is entitled to have the company wound up: *Re Crown Bank*, 38 W. R. 666, 44 Ch. D. 634.

Ashton Cross and *Stewart Smith*, for shareholders supporting the petition.

Bramwell Davis, Q.C., and *Vernon*, for the syndicate.—A very small number of shareholders support the petition. The substratum of the company has not gone. Clause (*d*) and the following ones in the memorandum are just as much objects of the undertaking as (*a*), (*b*), and (*c*). They are not general words here, for the objects are plainly stated, and the company is entitled to undertake them, and a winding-up order should not be made: *In re New Gas Co.*, 25 W. R. 643. Even if the proposed undertaking is *ultra vires*, the proper remedy is to commence an action to restrain the directors from carrying on this further business; there should not be a winding-up order: *In re Pioneers of Mashonaland Syndicate*, 41 W. R. 492, [1893] 1 Ch. 731; *Ex parte Fox*, 18 W. R. 1083, L. R. 6 Ch. App. 176. *In re Crown Bank* is distinguishable. In *In re Anglo-Mexican Mint Co.*, W. N., 1875, 168, the company supported the petition. In any event the petition should stand over till the wishes of the shareholders have been ascertained in a meeting which the directors have called for an early date.

H. W. Grazebrook and *W. de B. Herbert*, for shareholders supporting and opposing the petition.

VAUGHAN WILLIAMS, J.—I think I ought to make the order for the compulsory winding up of this company. I agree that the petition can only be supported as coming within sub-section 5 of section 79 of the Companies Act, 1862, but, in my opinion, it can, or ought to be, supported under that clause. This amalgamated syndicate was formed, as appears from paragraphs (*a*), (*b*), and (*c*) of its memorandum of association, to take over the business of certain companies formed with a view to providing seats to view the Diamond Jubilee Procession. The Diamond Jubilee is over, and any loss or profit which was to be incurred or gained by carrying out what appears on the face of the memorandum of association

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

to have been the principal object of the syndicate must now be divided. It is admitted that there was a loss which is said to be about 77 per cent. of the whole subscribed capital, although the amount is, perhaps, immaterial. All that remains to be done is to return to the shareholders the balance or wreckage, after deducting the losses and expenses. It is, of course, within the function of the company and its directors and officers to perform this duty, and to adjust matters among the shareholders. But it is suggested by the petition that the company should be wound up by the court, in order that what is left may be duly distributed. If nothing was left to be done but to make such division and adjustment, and there were no other circumstances in the case, I do not think the court would or could make the winding-up order. But it is said that in this particular instance it is "just and equitable" that the court should take upon itself to wind up the company, because the principal business which the company was formed to carry on has come to an end, and that the directors, instead of setting about to divide and adjust the balance of assets, are contemplating entering on a new business, and that this is *ultra vires*. The company cannot enter on business of the nature of its principal and primary business, because that is connected with the jubilee, which is a thing of the past, and in that state of things it is said the syndicate ought at once to be wound up; and as the directors, as far as one can judge by the evidence, have no intention of winding up, that this syndicate, the substratum of which is gone in the sense I have mentioned, should be wound up by the court. It is also said that the business which the directors have in contemplation is *ultra vires* of the syndicate; but it was argued on the other side that this is not so, and in support of that view they refer to the general object-clauses of the memorandum, beginning with clause (*d*). Now, all these clauses are so wide that it is impossible to suggest any business which would not be included therein if they are not read as including only matters incidental to the main or primary business, and my answer is that I ought not to read the later object-clauses as defining a succession of objects different from the main object, but to read those clauses as only referring to matters incidental to the primary object. It is incredible that those who subscribed for shares thought that providing seats, &c., to view the jubilee procession was only one among many objects of the syndicate. Practically one cannot doubt that anyone who took shares in this syndicate understood that he was taking shares in a company which would begin and end with the jubilee. Arriving, as I do, at the conclusion that the business of the company has come to an end, why is it not "just and equitable" to wind up the syndicate without waiting till the views of the directors are submitted to a meeting of the shareholders? I think I ought not to wait, because I think the views of the directors, *ex facie*, show that an act which is *ultra vires* is intended. And there are other matters which affect my discretion—*e.g.*, the question as to the fitness of this board to carry out the division and adjustment of this residue. If that were the only question, I do not say that it would not be one to be decided by the domestic *forum* of the shareholders, but when the substratum is gone in the sense I have mentioned, I not only might but ought to bear in mind that the directors are not applying themselves to distribute the salvage, but are contemplating business which is not within the scope of the memorandum. If these matters are taken into consideration, the *primâ facie* right of the shareholders to have the question settled by the domestic *forum* is gone, and the matter is left to the discretion of the court.

Under the pressure of this petition the directors have now issued a prospectus which is more remarkable for that which it does not tell than for the facts which it narrates and which still leave the shareholders in the dark as to what is going to be done with their money. There is a general statement of what the directors have done, but it is not enough; though it is enough to show that whatever their plans may be they have not waited to consult their shareholders' views, but have to a certain extent acted on their own. I am not going to place much reliance on this, but I cannot help being struck with the fact that the syndicate was formed to carry on those businesses which had formerly been carried on by the three companies, and I have no information as to the amount of cash which was handed over either by the shareholders of those companies to their companies or by those companies to the Amalgamated Syndicate, but there is an amount of reticence about this which makes me doubtful. Then it is said that though the meeting of shareholders has not yet been held yet that there has been such an expression of opinion of shareholders in court to-day as to lead me to dismiss the petition; but whereas there has apparently been about £6,000 of share capital paid up the total number of shareholders both supporting and opposing the petition together represent only agout £3,000 of capital, but it would seem that of those shareholders who appear or have the right to appear there is a considerable majority against the petition, but the answer given to this is that the evidence shows that those shareholders have exercised no independent judgment whatever. I must therefore consider the sort of view which the shareholders have given to the petition, and, under the circumstances, I do not think there is any such expression of the wishes of the shareholders as to preclude me from doing what I think will be in the interest of the company. The wishes of the shareholders and creditors in winding up and of the latter in bankruptcy are to be regarded, but in each case there is a difficulty in getting people to apply their reasoning faculties to the matters before them and in this case I am not satisfied with the reasons put forward. Mr. Bramwell Davis, the counsel for the company, has called my attention to *Ex parte Fox*, and says that it affords authority for the proposition, which no one disputes—viz., that where the company is proceeding to do something *ultra vires* the shareholders have a right of action to restrain it, but that they have no right to come to this court for a winding-up order under the "just and equitable clause." I agree that that is generally a true proposition. I also agree that there is a class of matter which should be left to the shareholders to decide, but I do not think *Ex parte Fox* goes the length of saying that where the court has to consider whether it should take on itself to adjust the rights of the shareholders of a company, the substratum of which is gone, it may not take into consideration the fact that the directors intend to enter upon a business which would be *ultra vires* of the objects of the company. The matter is dealt with in the following way in Buckley on the Companies Act (7th ed., p. 245): "So, where a company is proceeding to do something which is *ultra vires* a shareholder has a right in an action on behalf of himself and all other shareholders to restrain the company, though every shareholder but himself be acquiescent, but has no right to come for a winding-up order under the 'just and equitable' clause," and *Ex parte Fox* is cited as an authority. But it is plain that this passage is a mere illustration of a previous one on the same page, which runs: "There is no doubt that the 'just and equitable' clause gave the court power to wind up a

company in cases not coming under the first four heads (of section 79), but there must be strong ground for exercising the power, at any rate at the instance of a shareholder."

Without going into details I repeat what I said during the argument, that the stringency of the *ejusdem generis* rule has been much relaxed of late. At all events, in my judgment it is "just and equitable" that this company, the business of which has come to an end with the Diamond Jubilee, should be wound up by the court.

There will be the usual compulsory winding-up order.

Solicitors, *W. H. Smith & Son; E. R. Donisthorpe; Julian A. Ellis; J. Vernon, Son, & Stephan; Cresswell & Co.; French & Co.*

Q. B. Div.
(Wright and Kennedy, JJ.) Oct. 29.

MORLEY *v.* CARTER. (*a.*)

Landlord and tenant—Compensation for improvements—Notice of claim—Time—Determination of tenancy—Farm buildings held over by tenant—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 7.

Where, under the terms of his lease and the custom of the country, the tenant of a farm held over the farm buildings for a period after he had given up possession of all the agricultural land,

Held, that the determination of his tenancy within the meaning of section 7 *of the Agricultural Holdings (England) Act,* 1883, *took place when he gave up the agricultural land, and that a notice of claim for compensation given after that date, but more than two months before he gave up the buildings, was bad.*

Dictum *of* Lord Watson *in* Black *v.* Clay, [1894] *A. C.* 368, 43 *W. R. Dig.* 161, *followed.*

In re Paul, 24 *Q. B. D.* 247, 38 *W. R. Dig.* 99, *distinguished.*

Appeal from the refusal of the registrar of the county court of Yorkshire, holden at Halifax, to appoint a referee under section 9, sub-section 6, of the Agricultural Holdings (England) Act, 1883.

The appellant was the tenant and the respondent was the landlord of a farm comprising agricultural land and buildings at Illingworth, near Halifax. By the terms of the lease and by the custom of the country the tenant was entitled, upon giving six months' notice, to give up the land on the 2nd of February in any year, and to retain the buildings until the following May.

In June, 1896, the appellant gave notice to the respondent that it was his intention to quit the farm on the 2nd of February, 1897. He gave up possession of the land on that day, and of the farm buildings on the 1st of May following.

On the 26th of February, 1897, the appellant gave notice to the respondent that he claimed compensation in respect of the unexhausted value of certain improvements executed by him on the holding, and that he had appointed a referee.

The respondent did not appoint a referee, and the appellant took out a summons in the county court for the appointment of a referee to act for the respondent. The application came on on the 14th of June, 1897, and was by consent heard by the registrar.

The registrar held that the tenancy was determined on the 2nd of February, and that the notice of claim for compensation not having been given two months prior to that date the provisions of section 9 of the Agricultural Holdings Act did not apply, and the county court had no jurisdiction to appoint a referee.

Section 7 of the Agricultural Holdings (England) Act, 1883, provides that "a tenant claiming compensation under this Act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim."

Section 8 provides that the landlord and the tenant may agree on the amount and mode and time of payment of compensation, and that if they do not so agree the difference shall be settled by a reference.

Section 9 provides for the appointment of referees by the parties, and by sub-section 6 enacts that "if for fourteen days after notice by one party to the other to appoint a referee . . . the other party fails to do so, then, on the application of the party giving notice, the county court shall, within fourteen days, appoint a competent and impartial person to be a referee."

On the appeal any objection on the ground that—the county court having disclaimed jurisdiction—the proper remedy was by *mandamus* was waived on behalf of the respondent.

Beverley, for the appellant.—The notice of claim was in time. The buildings which were held over were part of the holding, and the tenancy was not determined as to the buildings until May, more than two months after the notice was given. It is sufficient if the notice be given two months before the giving up of such portion of the holding as is last retained by the tenant: *In re Paul*, 24 Q. B. D. 247, 38 W. R. Dig. 99.

Clavell Salter, for the respondent.—The notice was given after all the agricultural portion of the holding had been given up, and was therefore too late; where different portions of the holding may be given up at different dates the date of the determination of the tenancy for the purposes of the Act is the date at which the last agricultural portion is given up. The time at which the tenant is entitled to the compensation is "on quitting his holding at the determination of a tenancy" (section 1). The Act contemplates that the quitting of the holding and the determination of the tenancy shall be simultaneous, and the holding to which the Act applies must be agricultural or pastoral (section 54). Lord Watson, in *Black* v. *Clay*, [1894] A. C. 368, 43 W. R. Dig. 161 (decided on section 7 of the Scotch Act, which is identical with section 7 of the English Act except that the notice required is four months instead of two), expressed the opinion that a notice given after all the agricultural land had been given up, but before the buildings were given up, would be out of time. In *In re Paul* the notice was given more than two months before the surrender of a part of the agricultural land. Section 7 of the English Act gives the landlord until fourteen days after the expiration of the two months to decide whether he will make a counterclaim, and if that period does not expire until after the land has been quitted, a new tenant may have entered and the landlord will be unable to view the land for the purpose of ascertaining whether there has been any waste or breach of covenant by the old tenant.

Beverley, in reply.—The relation of landlord and tenant existed until May, and the buildings retained were required for agricultural purposes and were part of the holding as defined by the Act.

WRIGHT, J.—With the assistance of the Scotch case (*Black* v. *Clay*) I entertain no real doubt as to this case. The Act says in substance that the tenant

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

shall be entitled to compensation on quitting his holding at the determination of his tenancy, and that a holding within the Act must be either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral; subject to that a holding is "any parcel of land held by a tenant" (section 61). Therefore the right to compensation is given in respect of an agricultural holding on the determination of the tenancy of such a holding. On the 26th of February there was no tenancy of an agricultural holding within the Act. The agricultural land was given up on the 2nd of February, and the time for giving notice of claim expired two months before that date. *Black* v. *Clay* is an authority for that proposition. In the case of *In re Paul* the notice was given two months before about two hundred acres of meadow land was given up, and the court considered that while that land was retained the tenancy subsisted. For these reasons I think that the decision of the registrar was right.

KENNEDY, J.—I am of the same opinion. *In re Paul* seems to me to point to the conclusion that where there is a separate determination of the tenancy of the agricultural portion of a holding the right to compensation is gone if the claim be not made in due time before the tenancy of that part of the land is determined.

Appeal dismissed.

Solicitors for the appellant, *Turner & Co.*, for *Percy Naylor*, Keighley.

Solicitors for the respondent, *Bower, Cotton, & Bower*, for *Longbottom & Sons*, Halifax.

House of Lords.

From C. A. (England). July 8.

BENSAUDE *v.* THAMES AND MERSEY MARINE INSURANCE CO. (*a.*)

Insurance — Marine — Policy on freight—Exception—Claim consequent on loss of time—Delay by peril of sea.

A time policy of marine insurance against total loss of freight of a ship contained the following exception: "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise."

While the ship was proceeding on a voyage under a charter her main shaft broke by perils of the sea, the damage being of such a character that the necessary delay for repairs frustrated the objects of the adventure, and the owners lost their chartered freight. In an action by the owners against the underwriters,

Held, that the claim was within the terms of the warranty, and therefore the underwriters were not liable.

Decision of the Court of Appeal, 45 *W. R.* 114, [1897] 1 *Q. B.* 29, *affirmed.*

This was an appeal from the decision of the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.), reversing that of Collins, J., 45 W. R. 114, [1897] 1 Q. B. 29.

The facts are set out in the report in the court below.

The action was brought by the appellants upon a policy of marine insurance against total loss of freight on the steamship *Peninsular*.

The ship broke her main shaft owing to perils of the sea, and the consequential delay led to the total loss of freight.

The defendants, the underwriters and present respondents, relied upon the exception in the policy set out in the headnote.

Collins, J., gave judgment for the plaintiffs, but this was reversed by the Court of Appeal, who held that the claim was within the warranty, so that the defendants were not liable, against which the plaintiffs, the present appellants, now appealed.

Bigham, Q.C., and *Bucknill, Q.C.* (*Leck* with them), for the appellants.

Joseph Walton, Q.C., and *Scrutton*, for the respondents, were not heard.

Lord HALSBURY, C.—This case has been very ably argued for the appellant, but I think none of your lordships entertain any doubt as to the conclusion at which we must arrive. If the words on which the question turns are to be read as part of the contract it is impossible to support the judgment of Collins, J. The words, if they are part of the contract, seem to be very plain; they are these: "Warranted free from any claim consequent upon loss of time arising from a peril of the sea or otherwise." *The Peninsular* (the vessel insured by a policy which contained these words by way of exception), as a matter of fact, broke her main shaft. It is not denied that if it was capable of being repaired within such time as would have enabled her to complete the adventure there would have been no loss of freight. The reason why there was loss of freight was that the repairs would have taken so long a time that the object of the adventure would have been defeated. That is how the loss of freight arose.

It has been assumed—and, indeed, it underlies the whole of the judgment of Collins, J.—that the right to insist upon the payment of the insurance money as upon a total loss of the freight was consummate at the moment the main shaft broke. Now, there is a fallacy underlying that form of the argument. It assumes that there must be a sufficiently ascertained condition of damage to show at once that the loss must have accrued, because the damage was of such a character that it could not be repaired in the time. But that is not so, for it would be only a question of evidence, which one might either ascertain at that time or wait until the facts had proved it by the occurrence of those facts subsequently. But the reason why the loss of freight had been incurred must be that the damage was of such a character that there was an impossibility of prosecuting the voyage within the time within which it was necessary to prosecute it. The facts here have been ascertained, and we now know why the freight was lost. Why was it? Not *simpliciter* because the main shaft was broken, but because the main shaft was broken under special circumstances—that is, at a distance from any place where it could be repaired within such a time as would have enabled the vessel to prosecute her voyage. But then the question comes, whether this is included in the language which I have read—"warranted free from any claim consequent upon loss of time arising from a peril of the sea or otherwise"? The main shaft being broken in consequence of a peril of the sea, what is the consequence of that? The consequence of that is that the vessel cannot within the time, perform the voyage. Is that, or is it not, a "claim consequent upon loss of time arising from a peril of the sea"? If this exception is part of the contract, and if it is applicable to the

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

contract into which the parties have entered, I really am wholly incapable of following the argument that the present claim does not come literally within the words.

But then there is a sort of faint effort made to suggest that it is not part of the contract at all. Nobody actually says that it is not; nobody has ever ventured to say in terms that it is not; but there is a sort of insinuation to the effect that this warranty is only upon a piece of paper pasted on the margin of the policy. What is the relevancy of that? It either is, or is not, part of the contract. If it is part of the contract it is perfectly immaterial what part of the contract it appears in. It might as well have been incorporated in the original policy itself. But then it is said—or when I say it is said, perhaps that is overstating it—it is rather suggested that this may not have been a sort of stipulation that was applicable to the particular contract which the parties were making. It appears to me that this case itself shows that those words can receive a reasonable and intelligible meaning as applicable to the contract into which the parties were entering. Then why am I to reject the clause? Is it because it is pasted on? Is it because it is aside of the rest of the contract? No one can gravely suggest that. Then I have to construe this as part of the contract, and, as I have already said, this case itself furnishes an illustration of what the parties were intending to do. They intended to except out of the liability they had otherwise entered into, a claim which was consequent upon loss of time arising from a peril of the sea. If the claim was consequent upon loss of time occasioned in that way, then the warranty was to apply. This claim seems to me to be in the strictest sense consequent upon loss of time so occasioned in any ordinary and reasonable meaning that can be put upon the words. Therefore I think the judgment of the court below was perfectly right, and I move your lordships that it be affirmed.

Lord WATSON.—In this case I think it is part of the appellants' own case that the breaking of the shaft of *The Peninsular*, owing to a peril of the sea, rendered inevitable such delay in the prosecution of her voyage as entitled the charterer to determine the adventure. The loss of freight, in my opinion, was consequent upon that delay in this sense, that but for delay occasioned by the breaking of the shaft there would have been no loss to claim. The only question that remains is, whether the clause, which is one of the conditions pasted upon the document forming the contract between the parties, is to receive effect or no? For my own part, I think there has been no cause whatever shown for rejecting it, and I can only add that I entirely agree with the opinions expressed by the learned judges of the Court of Appeal, because I think with them that the case which occurs here falls precisely within the words of the exception which are introduced by their conditions. I therefore concur in the judgment which has been moved.

Lord HERSCHELL.—This is a policy against total loss of freight. The learned counsel for the appellants were unable to suggest any case or class of cases to which the words of the warranty would apply, unless it were to such a case as is now before your lordships. I quite agree that if you find in a policy, as you commonly do, a number of stipulations inserted, and with reference to the subject-matter of a policy one of those stipulations is, on its natural construction, inapplicable, it would not be right for the purpose of finding a meaning for that as applicable to that particular contract to torture or strain its language. The natural conclusion would be that the common form had been used with the insertion of certain warranties or conditions not applicable to the particular case as the policy was completed. This is, of course, not an uncommon occurrence. But if with reference to the subject-matter of the policy the particular stipulation is applicable without any straining or torturing of the language, then it is the duty of the court construing the contract to give that natural meaning and construction to it as applicable to the subject-matter of the contract. Now, can these words be properly applied to a policy against total loss of freight? It seems to me that they can, and that the present case is an illustration of a perfectly proper application of them. The whole basis of the claim, of course, must be the loss of the subject-matter insured—that is, the freight. That loss must arise from one of the perils insured against. What is the meaning of saying that the underwriter is not to be liable for any claim consequent upon loss of time? It must mean that, although the subject-matter insured has been lost, and although it has been lost by a peril insured against, if the claim depends on loss of time in the prosecution of the voyage, so that the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability. It seems to me, not only is no violence done to the words, but they receive the natural, the ordinary and reasonable, signification when they are applied to such a case as this.

Lord SHAND and Lord DAVEY concurred.

Appeal dismissed.

Solicitors for the appellants, *Lowless & Co.*

Solicitors for the respondents, *Waltons, Johnson, Bubb, & Whatton.*

From C. A. (England). July 19, 1897.

LAMBETH OVERSEERS *v.* LONDON COUNTY COUNCIL. (*a.*)

Poor law — Rating — Beneficial occupation — London County Council—Assessment of public park—Rateable value—London Council (General Powers) Act (53 & 54 *Vict. c. cxliii.*), *ss.* 4, 5.

Where lands are held by a County Council, and every part thereof must by statute be retained by the County Council in perpetuity for the use of the public, and the expenses of management exceed the incomings, the County Council is not rateable in respect of such lands.

Hare *v.* Overseers of Putney, 29 *W. R.* 721, 7 *Q. B. D.* 223, *approved.*

Decision of the Court of Appeal (44 *W. R.* 621, [1896] 2 *Q. B.* 25) *affirmed.*

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) reversing a judgment of the Queen's Bench Division (Pollock, B., and Wright, J.) upon a special case stated under 12 & 13 Vict. c. 45, s. 11. The case is set out at length in the court below (44 W. R. 621), the short question being whether the London County Council were rateable as occupiers of Brockwell Park, which they had acquired under the London Council (General Powers) Act, 1890, and which they were by statute directed to lay out and maintain for the public, there being no duty imposed on the council to acquire such, and the expenses of maintenance being greater than the incomings. The Court of Appeal had decided that the London County Council were not rateable.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Lawson Walton, Q.C., and *Lewis Coward*, for the appellants.—The property is capable of beneficial ownership or occupation. The London County Council act as owners, and have all the rights of property consistent with the restriction. They have elected to take it for a large sum. The statute affects the occupiers, not the property.

They cited or referred to *London County Council* v. *Erith Churchwardens*, 42 W. R. 330, [1893] A. C. 562; *Bristol Guardians* v. *Wait*, 5 A. & E. 1; *Jones* v. *Mersey Docks and Harbour Board*, 13 W. R. 1069, 11 H. L. Cas. 443; *Hare* v. *Overseers of Putney*, 29 W. R. 721, 7 Q. B. D. 223; *Reg.* v. *Metropolitan Board of Works*, 17 W. R. 527, L. R. 4 Q. B. 15; *West Bromwich School Board* v. *West Bromwich Overseers*, 32 W. R. 866, 13 Q. B. D. 929; *Reg.* v. *London School Board*, 34 W. R. 583, 17 Q. B. D. 738; *Burton-upon-Trent Corporation* v. *Burton Union*, 38 W. R. 181, 24 Q. B. D. 197.

Bosanquet, Q.C., and *Horace Avory*, for the respondents.—The money spent in the management of the park is for the benefit of the public: *Erith case* (*Worcester Corporation* v. *Droitwich Union*, 25 W. R. 336, 2 Ex. D. 49, and *Liverpool Corporation* v. *Wavertree Overseers* there referred to); *Altrincham Union* v. *Cheshire Lines Committee*, 15 Q. B. D. 597, 34 W. R. Dig. 136; *Sculcoates Union* v. *Kingston-upon-Hull Dock Co.*, 43 W. R. 623, [1895] A. C. 136; *Lincoln Corporation* v. *Holmes Common Overseers*, 15 W. R. 786, L. R. 2 Q. B. 482; *Putney Bridge case*, 29 W. R. 721, 7 Q. B. D. 223.

Lewis Coward replied.

The House took time for consideration.

Lord HALSBURY, C.—In this case the question is whether Brockwell Park is rateable, and, if so, what is to be the principle upon which it is to be rated.

The facts which raise the question may be very simply stated. In 1891 the London County Council purchased the land and buildings which now form the park under the powers of an Act which, when purchased, cast upon them the perpetual obligations to maintain and preserve it as a park for the perpetual use of the public for exercise and recreation.

The special case goes on to state some other things which appear to me to be irrelevant. We have nothing to do with the previous history of the seventy-eight acres of which Brockwell Park consists, nor are we concerned with the question whether it would be rateable if it were otherwise held and enjoyed. The main question, and indeed, as it appears to me, the only question, is whether it is now rateable at all; and I am of opinion that it is not. I do not think there is here a rateable occupation by anybody. The "public" is not a rateable occupier, and I think that one sentence disposes of the case. I think the *Putney Bridge case* is expressly in point, and I can draw no distinction between an artificial structure with a road over it for the use of the public and a park for the like purpose of allowing the public to go into and use it. I think the *Putney Bridge case* was rightly decided, and I think it is strictly in point in this case. The fact that the park is vested in the County Council does not make them the occupiers. It would be absurd to contend that wherever the legal estate is there is occupation. A road is vested in some one, but if a public road there is no occupation of it any more than of a milestone or a direction-post. I have hitherto dealt only with the question of occupation, and, as I have said, I think there is no occupation at all, the County Council being merely custodians and trustees for the public.

But I do not disagree with the reasoning of A. L. Smith and Rigby, L.JJ., as to the rateability of an occupation where an occupation exists. No tenant would give anything for an occupation which would not give him a capacity to earn more than the rent which he is called upon to pay for it, and if the statute, as in this case, prevents him from earning anything, there can, under the Parochial Assessment Act, be no rateable occupation, as under that Act the rate is to be measured by the rent which a tenant would pay. It appears to me that the nature of the occupation here is such that there can be no rateable occupation in the sense in which those words are explained by many cases which it is not now necessary to refer to.

The law is, I think, now settled, and the case of the occupying owner, which has caused some confusion, is now clear enough; and upon this point also the *Putney Bridge case* seems to me in point. Once it has been found, as in this case, that the occupation cannot, as a matter of law, be a beneficial occupation, there is an end of the question. I say as matter of law; because that it does not give a beneficial occupation as matter of fact is nothing to the purpose. Here there is no possibility of beneficial occupation to the County Council; they are incapable by law of using it for any profitable purpose—they must allow the public the free and unrestricted use of it.

It is hardly necessary to deal with the other point (if it can be called another point) in respect of the mansion-house and refreshment-rooms. They are and must remain part of the park, and are no more capable, or in fact subject, to different considerations than the park itself. They are and must be part of the park. They cannot be separated from it, and are within the principle which I have already explained.

For these reasons I think the judgment of the Court of Appeal ought to be affirmed.

Lord HERSCHELL.—The question raised in this case is whether the respondents are liable to be rated as occupiers of a public park which is vested in them solely for the purpose of maintaining it for the use of the public.

The park was acquired under the powers of the London Council (General Powers) Act, 1890. That statute empowered the council to purchase by agreement certain lands, and provided that, when they had acquired the same, they should "hold the same and every part thereof as a park, and lay out and maintain and preserve the same and every part thereof as a park for the perpetual use thereof by the public for exercise and recreation." The statute also enabled the council to enclose the lands for the better preservation thereof for public use, and to adapt the buildings thereon for the public benefit; to erect lodges for the accommodation of keepers and others employed in the maintenance and management of the park, and such other building as they might think requisite for refreshment rooms, band-stands, and other conveniences. These powers were all strictly ancillary to the maintenance of the park in perpetuity for the use of the public.

Small sums of money are received by the council for licences to supply refreshments in the park, and for the grazing of the herbage; but the case states that the necessary expenses of maintaining the park as a whole with the buildings on it for the purposes of the Act far exceed any sums of money which are or could be derived from licences for the supply of refreshments or for grazing rights or otherwise.

In order to determine whether the respondents are liable to be rated in respect of the park and its adjuncts, the question which has to be answered is, at what rent (if any) the hereditaments might reasonably be expected to let, taking one year with another. It is well settled that in answering this question

regard must be had to any restrictions which the Legislature has imposed upon their use, and the hypothetical tenant must be supposed to take them subject to these restrictions. Bearing this in mind, it seems clear that the park and the buildings thereon can have no rateable value; no tenant would give anything for them, seeing that every part of them is dedicated to the public use, and that the small sums of money which might be received in respect of them would, as the case finds, be more than absorbed by the expense of keeping them in order. It was argued, however, for the appellants that, on the authority of the *Erith case*, the respondents ought to be considered as among the possible hypothetical tenants, and that, as they made a considerable contribution towards the cost of purchasing the park, they would have been willing to pay a rental for its use. In my opinion the *Erith case* has no application. The land on which the pumping stations were constructed, the rateability of which was there in question, was not by statute dedicated to that use. The London County Council could place there pumping stations where they pleased; they could remove them elsewhere at any time they thought fit, or dispense with them altogether if they adopted some other method of dealing with their sewage, and could sell or let the land to a tenant whose use of it would be unrestricted. About the rateability of the land there, there could be no real controversy. The only question was what was its rateable value, and whether the county council could be taken into account in enquiring what the hypothetical tenant would give. It was held that they might, inasmuch as their statutory duties imposed upon them the obligation to provide for the disposal of the sewage. Here, these very lands and every part thereof by statute must be held in perpetuity for the use of the public, and the question is whether, under these circumstances, they are rateable at all. I think that on principle they are not, and the *Putney Bridge case*, which, in my opinion, was rightly decided, is not distinguishable from that under consideration. Moreover, I am not satisfied that the County Council are occupiers of this park for rating purposes, though the legal possession is no doubt vested in them. They seem to me to be merely custodians or trustees to hold it and manage it for the use of the public. This was the view taken by some of the learned judges in the Court of Appeal with regard to the position of the county council in relation to Putney Bridge. I concur in the view they expressed, and in my opinion it is equally applicable to Brockwell Park. For these reasons I think the appeal should be dismissed.

Lords MACNAGHTEN and MORRIS concurred.

Appeal dismissed.

Solicitor for the appellants, *W. Honey.*

Solicitor for the respondents, *W. A. Blaxland.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 22.

TURNER *v.* STALLIBRASS AND OTHERS. (*a.*)

Practice—Costs—Action founded on tort—Bailment—Agistment—Injury to animal—Negligence—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

The plaintiff delivered a horse to the defendants to be agisted in consideration of a daily payment, and the defendants negligently turned the horse into a field in which there was a barbed wire fence covered with long grass, whereby the horse was injured. In an action to recover damages for the injuries to the horse, the jury found a verdict for the plaintiff for £30.

Held, as the negligence relied upon was a breach of the common law duty arising out of the bailment, that the action was founded on tort within the meaning of section 116 *of the County Courts Act*, 1888, *and the plaintiff was entitled to costs upon the High Court scale.*

Appeal from an order of Day, J., at chambers.

The action was brought to recover damages for injuries to the plaintiff's horse by reason of the negligence of the defendants.

The statement of claim alleged that the plaintiff delivered to the defendants a horse to be agisted, kept, and taken care of by them in consideration of a payment of one shilling a day, and the defendants promised in consideration thereof to safely agist, keep, and take care of the horse, yet that the defendants in breach of the contract negligently put the horse into a field where there was a wire fence hidden by long grass, whereby the horse was injured.

The facts as proved showed that the plaintiff delivered a horse to the defendants to be agisted, and that the defendants turned the horse into a field in which was a barbed wire fence covered with long grass, in consequence of which the horse was injured.

The jury found a verdict for the plaintiff for £30, and judgment was entered for the plaintiff for this amount. Upon the taxation of costs the master was of opinion that the action was founded on tort and that the costs should be taxed upon the High Court scale. Upon appeal, Day, J., was of opinion that the action was founded on contract, and that the costs should be taxed upon the County Court scale.

The plaintiff appealed.

T. W. Chitty, for the plaintiff.

Hon. A. Lyttelton, for the defendant.

The following cases were referred to: *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 43 W. R. 120, [1895] 1 Q. B. 134; *Kelly* v. *Metropolitan Railway Co.*, 43 W. R. 497, [1895] 1 Q. B. 944; *Marzetti* v. *Williams*, 1 B. & Ad. 415; *Boorman* v. *Brown*, 3 Q. B. 511; *Legge* v. *Tucker*, 5 W. R. 78, 1 H. & N. 500; *Corbett* v. *Packington*, 6 B. & C. 268; Bullen & Leake's Precedents of Pleading, 3rd. ed., 275.

A. L. SMITH, L.J.—In my opinion this is an action founded on tort within the meaning of section 116 of the County Courts Act, 1888, and the costs should be taxed upon the High Court scale. If the action is one in which the plaintiff, in order to succeed in his claim, need not rely upon and prove a contract, it is an action founded on tort. If, on the other hand, it is necessary for him to rely upon and prove a contract, it is an action founded on contract. The question, therefore, is whether it was necessary for the plaintiff to rely upon and prove a contract. It was held long ago in *Bryant* v. *Herbert*, 26 W. R. 898, 3 C. P. D. 389, that the form of the pleadings is not material upon this question, and that case has been followed in *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, and *Kelly* v. *Metropolitan Railway Co.* In my judgment it is also immaterial how the plaintiff's case is opened at the trial, or how the judge directs the jury, though, if the latter, consideration is material, the learned judge in this case directed the jury as if this was an action of tort. In my opinion the cause of action in this case can be maintained without proof of a contract of agistment. There was a bailment upon proof of which the duty arose not to be negligent. The plaintiff therefore

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

need only prove the bailment, the breach of duty, and the damages. That being so, this action was founded on tort within the meaning of section 116. The appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. The section divides actions into two classes for the purpose of determining what costs are to be allowed. Before the action is tried it can be seen into which class it falls. It is not material to consider how the action is conducted or how it is tried. The pleadings also are not conclusive. If the plaintiff is obliged to rely upon a contract, then it is an action founded on contract. If, on the other hand, he is not obliged to rely upon a contract, it is an action founded on tort.

COLLINS, L.J.—I am of the same opinion. Some confusion may perhaps be caused by saying that the question depends upon whether the plaintiff is obliged to rely upon a contract or not. A bailment arises out of some relation between the parties, some meeting of the minds, but that is not such a contract, if it can be called a contract, as determines whether an action is founded on contract or on tort within the meaning of section 116 of the County Courts Act, 1888. The necessity of proving a bailment does not dispose of the question whether the plaintiff is obliged, in order to succeed, to rely upon a contract. The question comes in after that. Having got the common law duty and rights arising out of the bailment, then if the plaintiff alleges that the defendant was bound to do something more than was embraced in the common law obligation, the action is founded on contract. If the plaintiff is only obliged to rely upon the common law obligation, then it is an action founded on tort. That seems to me to explain all the cases, and the difference between misfeasance and non-feasance. It seems to me that whether the complaint arises out of misfeasance or non-feasance, if it comes within the ambit of the common law obligation, the action is founded on tort. But if it does not come within the common law obligation and something more is required, the action is founded on contract. If, therefore, in order to support the plaintiff's claim, it were necessary to import into the contract of agistment some obligation which the common law did not import, then it would be an action founded on contract. In my opinion there is no such necessity here, and therefore this is an action founded on tort.

Appeal allowed.

Solicitor for the plaintiff, *A. Slater.*

Solicitors for the defendants, *King & Burrell.*

From Q. B. Div. (Lindley, M.R., and Chitty, L.J.) — Oct. 27, 30.

STERN *v.* TEGNER; SMITH (*Claimant*). (*a.*)

Bill of sale—Execution creditor—Sale by sheriff by order of court—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 11—*R. S. C., ord.* 57, *r.* 12.

The jurisdiction conferred on the court by ord. 57, *r.* 12, *ought not to be exercised against a mortgagee, unless there is a reasonable ground for assuming that the sale will produce more than sufficient to answer the just claims of the mortgagee, so as to leave a surplus available for the execution creditor.*

Semble, *the effect of section* 11 *of the Bankruptcy Act,* 1890, *upon the execution and the proceedings thereon, on request made by the official receiver for delivery of the goods, would be to preclude any proceedings being taken by the execution creditor under ord.* 57, *r.* 12.

Appeal from an order of Ridley, J. (sitting as Vacation Judge).

On the 11th of August, 1897, one Tegner executed a bill of sale in favour of the appellant Smith to secure £300 at 30 per cent. interest, repayable on the 11th of November next.

In September the landlord distrained on the grantor of the bill of sale for rent, and on the 30th of September the sheriff seized the goods comprised in the bill of sale at the instance of Stern, who had obtained a judgment against Tegner.

On the 1st of October Smith, the claimant, sent in his claim under the bill of sale, and shortly afterwards paid off the landlord.

On the 7th of October the sheriff issued an interpleader summons, and on the same day a receiving order was made against the debtor.

On the 15th of October an adjudication in bankruptcy was made, and on the same day the master in chambers directed a sale on certain terms which were subsequently varied by the order of Ridley, J.

The bill of sale holder, Smith, appealed.

Herbert Reed, Q.C., and *Muir Mackenzie,* for the appellant.—The order directing the sale by the sheriff is in no form authorized by any statute or rule of court. The court has no right to interfere with a legal mortgagee and order a sale by the sheriff when the security is doubtful. There are three enactments in the Bankruptcy Acts bearing on this—section 9 (2) and section 45 of the Act of 1883, and section 11 of the Act of 1890, which replaced section 46 of the Act of 1883. The effect is that the execution creditor is squeezed out. The order was wrong and ought to be discharged, and the sheriff should be directed to withdraw.

They referred to *Ex parte Halling, In re Haydon,* 26 W. R. 182, 7 Ch. D. 157; *Forster* v. *Clowser,* [1897] 2 Q. B. 362, 45 W. R. Dig. 123; and *The Merchant Banking Co., of London* v. *The London and Hanseatic Bank,* 55 L. J. Ch. 479, 34 W. R. Dig. 122.

A. H. Carrington, for the official receiver and trustee in bankruptcy.—The order is quite correct, and jurisdiction is obtained under ord. 57, r. 12. Section 11 of the Bankruptcy Act, 1890, does not apply and does not contemplate a case where there is the complication of bankruptcy as here. [LINDLEY, M.R.—Have you any authority to say that section 13 of the Common Law Procedure Act, 1860, or ord. 57, r. 12, has ever been applied to bankruptcy?] No. The master and judge both thought the order advisable.

J. P. Earle, for the execution creditor.

Rose-Innes, for the sheriff.

Reed, Q.C., replied.

Cur. adv. vult.

Oct. 30.—LINDLEY, M.R., stated the facts, and continued: The execution creditor is relying with the trustee in bankruptcy upon the right to have this property sold under ord. 57, r. 12. The case is distinguishable, so far as I know, from any case which has arisen yet, by reason of the operation of section 11 of the Bankruptcy Act, 1890, which was relied on very strongly by counsel for the appellant, as rendering the application of ord. 57, r. 12, inaccurate in the present case. Now I will read the section of the Bankruptcy Act first. Section 11 of the Bankruptcy Act, 1890, runs thus: "Where any goods of a debtor are taken in execution, and before the sale thereof, or the completion of the execution by the

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof for the purpose of satisfying the charge." Now what was done is very curious. In this case the trustee in bankruptcy has not asserted his right to the goods under section 11. He has not requested, in other words, the sheriff to deliver his goods to him nor to pay the money to him. He has appeared on the interpleader proceedings, and he has, so to speak, made use of the execution creditor's judgment in order, if he can, to compel the sale of these goods under ord. 57, r. 12. That is a curious proceeding, and it is important, because before I had read this section 11 as carefully as I have since done, I was rather impressed by the argument addressed to us by the claimant, Mr. Smith's counsel, that the bankruptcy put an end to the execution. It only does so at the option of the trustee. If he chooses to assert his rights, the execution creditor seems to me to have no rights, but if the trustee takes the course which he has taken, not of asserting his rights, but of backing up the execution creditor, and getting what he can by that process for the purpose of inducing the court to make an order which it otherwise would have no jurisdiction to make, then it appears to me that section 11 does not invalidate the execution. That gets rid of a considerable part of the argument which was addressed to us.

Now I come to ord. 57, r. 12: "When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under bill of sale or otherwise, to the goods or chattels by way of security for debt, the court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just." That is copied, and reproduced with slight variations, from section 13 of the Common Law Procedure Act, 1860, and the effect of it is quite obvious from the history of that Act and what we all know, and what we shall find very concisely stated in Day, J.'s book, at p. 361. The comment is this: "This section confers new and valuable powers. Hitherto, if the claimant established a title to goods of however great value by way of security, for however small a sum, the execution was defeated absolutely, as the court had no power to provide for the realization of the security and the disposal of the surplus or for the payment of the debt and discharge of the security by the execution creditor. This defect is now mended, and a convenient and much-used scheme for defeating creditors is interrupted." Now comes the question, How are we to deal with this rule under those circumstances? I am not prepared to say but that the course taken by the trustee in bankruptcy is illegal or improper, and I am not prepared to say that ord. 57, r. 12, cannot be invoked, having regard to what has been done in the present case. If the trustee had asserted his rights against the execution creditor under section 11 of the Bankruptcy Act, 1890, I doubt whether ord. 57, r. 12, would have been applicable. My present impression is that it would not; but the trustee has not asserted such rights, and I will assume that ord. 57, r. 12, can be still invoked by him and the execution creditor. But ord. 57, r. 12, was not intended to deprive secured creditors of the benefit of their security, and when this will, or very likely will, be the case the court ought not to direct the sale, but ought to direct the sheriff to withdraw. There are three cases which arise in practice. First of all, the case where the security is ample and where the bill of sale holder or the execution creditor tries to assert his rights; he defeats the other creditors. That is the common case which section 13 of the Common Law Procedure Act, 1860, was intended to rectify. The bill of sale holder cannot stand upon his rights when it is plain that he is defeating the execution creditor, which, of course, involves the assumption that after paying off the bill of sale there will be something left. That is an easy case. Now, the next case is where the security is plainly deficient. Then, on the hypothesis that there is nothing for the execution creditor, it follows that there will be a deficiency, and that even if there were a sale there would not be a surplus. Then it follows as a matter of course that the only proper course is to direct the sheriff to withdraw. What has the execution creditor got to do with it if he cannot possibly get anything out of it? That is an easy case. The third case is somewhat more doubtful and more difficult. It is when there is a doubt whether the security is sufficient to pay off the secured creditor or not. The proper course in such a case is for the court to say, "Unless you, the execution creditor, will guarantee the secured creditor against loss by sale we will not order the sale." Here the execution creditor and the trustee have declined to redeem and declined to give any guarantee at all against any loss. That has induced me to look more carefully than I did in court, into the evidence, and upon the evidence I am perfectly satisfied that if these goods are sold by the sheriff it is extremely doubtful whether there will be enough to pay the bill of sale holder. As to there being a surplus for the execution creditor, of course I cannot say what the result of a sale might be, but the surplus might be nothing; it might be a shilling, or sixpence, or a few shillings. Well, under those circumstances, how can it be just to enforce a sale and deprive him of his security? That is to abuse the rule, not to put it into operation in a case, to meet which, it was passed. It is said that this view is opposed to a decision of this court in *Forster* v. *Clowser*. I do not think so at all. It appears to me perfectly consistent with it. What the Court of Appeal did there was this: they were satisfied that there was enough to pay off the bill of sale holder that which they considered was the sum properly payable to him. I think the court went a long way in anticipating the date of payment. That is nothing. I am satisfied they never would have deprived him of his security; they were satisfied, in other words, that upon the sale and the payment to him in full of what they thought he was entitled to there would be a surplus left for the execution creditor. That is quite a different case. Here I am satisfied that it is extremely doubtful whether there will be a shilling for the execution creditor. The conclusion which I have arrived at is that if there is an enforced sale by the sheriff, of the nature we are all acquainted with, there will not be twenty shillings in the pound for the secured creditor. Under those circumstances it appears to me this appeal ought to succeed. The proper order will be that the sheriff is to withdraw, and there must be no action against him. The execution creditor must pay him his costs and charges. The execution creditor and the trustee in bankruptcy must pay the appellant here and below his costs, and must bear their own costs themselves, but the order is not to prejudice the right of the trustee to pay his costs out of the bankrupt's estate. We think it would be right,

if we could do so, to give the execution creditor a second charge on these goods so that he may be reimbursed the expenses to which he will have to be put, because he has acted with the trustee and under his direction. I am assuming there is a surplus. I do not know that we have any jurisdiction to do that, but it would obviously be right if some arrangement could be made between the trustee and the execution creditor to reimburse the execution creditor the costs which he will have to pay.

CHITTY, L.J.—I agree. It was argued for the appellant that the execution was wholly put an end to by the 11th section of the Bankruptcy Act, 1890, and consequently that ord. 57, r. 12, was no longer applicable inasmuch as the receiving order had been made before the order for sale. It is not necessary to determine what would have been the effect of the 11th section upon the execution and the proceedings thereon if a request had been made by the official receiver for delivery of the goods to him. As at present advised I think that such a request would preclude proceedings by the execution creditor under ord. 57, r. 12. No such request was made; on the contrary the official receiver and the trustee in bankruptcy, both in chambers and before us, supported the application for sale and the order made on that application. In other words they declined to avail themselves of the benefit of the 11th section. It is not easy to see how in these circumstances the secured creditor, whose rights are not affected by the receiving order and the subsequent bankruptcy, can set up this 11th section as a bar; but, again, it is unnecessary to decide this point, and I will assume against him that he cannot. I think, however, that the order, assuming there was jurisdiction to make it, was unjust towards him.

I have carefully considered the effect of the evidence as to the value of the goods, and have come to the conclusion that the sale will not produce a sum sufficient to satisfy the just claims of the mortgagee. A forced sale of furniture by the sheriff without reserve and away from the house is notoriously a disadvantageous method of selling. In my opinion the jurisdiction conferred by the 12th rule ought not to be exercised against the mortgagee unless there is a reasonable ground for holding that the sale will produce more than sufficient to answer the just claims of the mortgagee, so as to leave a surplus available for the execution creditor. In *Forster* v. *Clowser* the judge was satisfied that there would be a surplus; the Court of Appeal saw no reason for disturbing his decision on this point; and the majority of the court gave effect to what they considered were the substantial rights of the mortgagee.

Appeal allowed.

Solicitors, *W. Vant, jun.; Barber & Son; Petch & Smurthwaite; W. & T. Burchell.*

From Chan. Div. (Lindley, Lopes, and Chitty, L.JJ.) — July 29, 1897.

VISCOUNT HILL *v.* BULLOCK. (*a.*)

Fixtures—Movable chattels—Stuffed birds and animals—Mansion-house—Settled estate.

Specimens of stuffed birds and animals, forming part of a natural history collection in a museum built on to the mansion-house, are not fixtures so as to devolve with the freehold under the limitations of a settlement.

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

The decision of Kekewich, J. (45 *W. R.* 587), *affirmed.*

Appeal of the plaintiff from Kekewich, J. (reported 45 W. R. 587).

The action was brought by the Right Hon. Rowland Richard Clegg Hill, Viscount Hill, the tenant for life of the mansion-house and settled estates at Hawkstone, in the county of Salop, and William Slaney Kenyon-Slaney, the surviving trustee of the settlement, for an injunction to restrain the defendant, his servants and agents, from removing, or causing to be removed, from the said mansion-house any pictures or other chattels fixed to the walls or floors of the said house, or other fixtures therein, or any heirlooms or settled chattels, and also for a mandatory injunction ordering the defendant to restore any such fixtures, heirlooms, and chattels as had been removed by him.

The defendant was the trustee in bankruptcy of the late Viscount Hill, who was adjudicated bankrupt on the 24th of August, 1894, and who died on the 30th of March, 1895.

The defendant claimed (*inter alia*) the following articles as being the property of the late viscount—namely, the fixed cases, together with the birds and animals and other objects of art and natural history, contained in the rooms called the "Bird Gallery." At the trial of the action the point at issue was mainly confined to the question whether the birds and animals were fixtures or not. It was admitted that the cases, which were fixed to the freehold by means of iron brackets let into the wall, did not pass to the defendant. The cases in the middle of the room were made of wood, and were not fixed, but rested by their own weight. Wooden trays or drawers were fitted into these iron cases, and could be removed at pleasure. The birds and animals were of considerable value, and were mounted in the usual manner, some being also attached to imitation rockwork or branches fitting inside the cases, others not being fastened in any way.

Kekewich, J., held that the contents of the cases were not fixtures attached to the freehold, but were movable personal chattels, and as such devolved upon the trustee in bankruptcy of the previous owner.

The present viscount, the tenant for life, appealed.

Cozens-Hardy, Q.C., and *Christopher James*, for the appellant.—The birds would pass with a conveyance of the house without special mention.

They relied upon *D'Eyncourt* v. *Gregory*, 15 W. R. 186, L. R. 3 Eq. 382.

P. O. Lawrence, Q.C., and *Muir Mackenzie*, for the respondent, were not called upon.

LINDLEY, L.J.—It is now admitted that the cases in which the birds were kept were part of the house, and the linings are also admitted to be part of the freehold. It is said further that a conveyance of the house would pass the birds. But is that common sense? After all, in considering what are legal fixtures, we must apply common sense. For what purpose does a man make a collection of birds? In such a collection as this would he ever dream of such a proposition as that he could not take out a bird from its case and put it in another room? Such a contention is absolutely impracticable. It would be contrary to the habits of mankind. The case of *D'Eyncourt* v. *Gregory* does not apply. In that case the tapestry and certain unfixed articles were held to pass because they formed strictly part of the architectural design. The birds here are not part of the architectural design.

The appeal must be dismissed.

LOPES, L.J.—The cases have been held by Keke-

wich, J., to be fixtures, and they were properly so held. The linings were also held to be fixtures, as part and parcel of the cases. It was not so held with regard to the birds. I am unable to accede to the appellant's argument that they are fixtures. The birds are fixed by gum or glue, or by wire fixed on to the linings. We must look to the degree of annexation; it is extremely slight. But, further, what was the object of the annexation? Was it with the idea of making the birds part of the house? That would be absurd. The wire was used for the purpose of supporting them and making them more convenient to be looked at. They cannot be said in any way to be fixtures.

D'Eyncourt v. *Gregory*, which was relied upon, has no application here. The result is that Kekewich, J., was right, and the appeal must be dismissed.

CHITTY, L.J.—The appellant's case is that the birds form part of the house. The reasoning is that the room in which they were was built for the purpose of receiving them, and became part of the settled land. The appellant has to face this additional difficulty: he cannot claim the whole, but claims rather more than half. He claims those which are annexed to the freehold by wire, glue, or gum. These adjuncts are employed for the purpose of showing off the birds to greater advantage. Then it is said that the birds form part of the architectural design, and are an ornamental feature of the building; that the second Viscount purported to annex them to the freehold, so that he could not change a single bird if he wished to. That argument answers for itself. Such an idea is preposterous. The paper on the wall is part of the wall—*per* Lord Romilly: the silk which replaces the paper is part of the wall, and *ergo* tapestry, *ergo* birds which replace that.

The result is that the trustee in bankruptcy is brought in. The birds are mere chattels, removable by the person who put them there, and they are now removable by the owner, the trustee in bankruptcy.

The appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors, *Stibbard, Gibson, & Co.*, for *Rowlands & Co.*, Birmingham; *Pritchard, Englefield, & Co.*, for *E. Bygott*, Wem.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) June 29, 1897.

ATTORNEY-GENERAL v. WRIGHT. (*a*.)

River—Navigable river—Foreshore—Right to moor vessels—Public right.

The owner of the foreshore of a navigable river holds possession of the soil subject to the right of all persons navigating the river to use the waters in all ordinary navigable ways, including the right to moor their vessels by means of fixed moorings.

Application by the defendant for judgment in an action tried before Cave, J., and a jury.

This was an action for an injunction brought by the Attorney-General on the relation of certain fishermen and boat owners who were accustomed to moor their boats in the estuary of the Thames at Leigh. They complained that the defendant, who was the sub-lessee of a several fishery in the waters in question, and claimed to be in occupation of the foreshore, had interfered with their moorings and cast their boats adrift.

The defendant by way of counter-claim complained that the plaintiffs had wrongfully laid down permanent moorings in the soil of the foreshore, and thereby committed a trespass on his property, and he asked for a declaration that he was entitled to enjoy the soil free from the rights which the plaintiffs claimed on behalf of the public.

The jury found that all persons navigating the waters in question had from time immemorial used the foreshore for fixed moorings, and the learned judge accordingly granted an injunction as asked for by the plaintiffs.

The defendant gave notice of motion that judgment might be entered for him.

Witt, Q.C., and *Courthope Munroe*, for the defendant, in support of the motion, cited Brooke's Abridgment, Customs, par. 46; *Fitch* v. *Rawling*, 2 H. Bl. 393; *Blundell* v. *Catterall*, 5 B. & Ald. 268; *Gann* v. *Free Fishers of Whitstable*, 13 W. R. 589, 11 H. L. Cas. 192.

Rentoul, Q.C., *Stuart Moore*, *R. Edmondson*, and *Ernest Saunt*, for the plaintiffs, cited Lord Hale's *De Portibus Maris*, c. 7; and *Free Fishers of Whitstable* v. *Foreman*, 16 W. R. 1019, L. R. 3 C. P. 578.

Lord ESHER, M.R.—In this case in a part of the River Thames where it is navigable certain fishermen and owners of yachts and other vessels have put down moorings, which they have marked with buoys, so that each of them can attach his vessel to his mooring, and can from time to time slip his vessel and sail away and on his return attach it again. These moorings—that is to say, the things of which they are formed, the sunken beam of wood or other heavy weight and the chain and buoy attached to it, are the property of the persons who put them down, at any rate they were their property at the time they were put down. The defendant is the lessee of the owner of the soil under the water where these moorings are placed, and he contends that the plaintiffs have no right to put anything into his soil, and he complains of what they have done as a trespass, and claims that he has a right to get rid of that trespass by cutting the chains and sending the vessels adrift, and also a right to take and use the things which the plaintiffs have put into his soil.

Now, what is the meaning of a mooring? It is a phrase used in connection with the sea, and it means not merely the bringing of a vessel to anchor, but such a mode of anchoring a vessel as will allow the vessel to leave her anchorage for a time and come back and take possession of it again. The owner of the vessel takes possession of his own anchor and buoy, not of the soil. He does not claim an exclusive right to any measured amount of water, but he claims to be entitled to say that no one has a right to cut his chain or move his buoy. He admits that others may anchor their vessels close to his vessel, but not so as to touch it.

Is that mode of anchoring a vessel a common incident of navigation? Judges must use the knowledge which they possess in common with other persons, and everyone knows that there are two ways of anchoring a ship—one the temporary way, by means of an anchor, which can be dropped and lifted whenever necessary; the other, the more permanent mode, by means of moorings. This latter mode is within the ordinary course of navigation. I think that, when these fishermen and others put down moorings in these navigable waters, they were not exercising a right belonging to them as individuals, but a right belonging to the public generally—viz., to use navigable waters in all ordinary navi-

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

gable ways, including the right to anchor vessels in either of the two recognized modes, by means of an anchor or of moorings. It follows that the defendant has possession of the soil subject to this public right, and I do not think that the plaintiffs, in order to support their case, require any prescription other than this prescriptive right belonging to the people of this country generally. The defendant therefore had no right to interfere as he did with the plaintiffs' moorings.

It may be that there is a prescription in favour of persons frequenting this particular place. If any such prescription is necessary for the plaintiffs' case, I think there was evidence to support it, and that we may presume a grant either from the Crown or from the lord of the manor. The plaintiffs therefore are entitled to an injunction, and the appeal must be dismissed.

A. L. SMITH and RIGBY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiffs, *W. F. Saunt.*

Solicitors for the defendant, *Ranger, Burton, & Frost.*

From Chan. Div. (Lindley, Lopes, and Chitty, L.JJ.) June 17, 18, 1897.

BREAY *v.* ROYAL BRITISH NURSES' ASSOCIATION. (*a.*)

*Corporation—Newspaper—Libel—Action against editor—Liability of proprietors—Indemnity—*Ultra vires.

The editor of a journal owned by and published for the benefit of the members of a nursing association (incorporated by Royal Charter) inserted in the journal, on the express instructions of the executive committee of the proprietors, paragraphs which were alleged to be libels on one of the members of the association. An action for libel having been brought by the member against the editor alone, the executive committee resolved to defend such action and to indemnify the editor against costs and damages.

Held (reversing the decision of North, J.), *that such a defence of the action was not a misapplication of the funds of the association; and a motion for an* interim *injunction by one of the members of the association to restrain such application of the funds was accordingly dismissed.*

Appeal of the defendants from North, J.

The defendant association (which was incorporated by Royal Charter for objects connected with nursing) were the proprietors and publishers of a journal called the *Nurses' Journal*, published for the information and benefit of the members of the association. It was superintended by a sub-committee called the Journal and Library Sub-committee, appointed by the executive committee, and was edited by a member of the association, Miss De Pledge.

In July, 1896, the annual general meeting of the association was held, and in the August number of the journal appeared an account of the meeting, together with editorial comments on the part taken at it by Dr. Bedford Fenwick.

Dr. Fenwick being of opinion that these comments constituted a libel on himself thereupon commenced an action for libel in the Queen's Bench Division against Miss De Pledge alone, without joining the association as defendants.

On the 5th of February, 1897, the executive committee at a meeting resolved to defend the action in the name of the association, and their resolution was adopted and approved by a large majority at the quarterly meeting of the general council of the association on the 9th of April, 1897.

Miss Breay, a dissentient member of the association, then commenced the present action, and moved for an injunction to restrain the defendants from expending the funds of the association in defending the action against Miss De Pledge.

North, J., granted the injunction.

The association appealed.

Vernon Smith, Q.C., and *Muir Mackenzie*, for the appellants.—Miss De Pledge is merely the servant and agent of the association, who are the publishers and proprietors of the journal. If this be a libel, it is the duty of the association to justify it and defend the action, and to indemnify their own servant.

Swinfen Eady, Q.C., and *Stewart Smith*, for the respondent.—Where there is a contract to indemnify against the consequences of publishing a libel, it cannot be enforced; each one is liable for his own tort: *Colburne* v. *Patmore*, 1 C. M. & R. 73; *Shackell* v. *Rosier*, 2 Bing. N. C. 634. This is different from the case where a master is liable for his servants' torts. There cannot be any liability for indemnity for costs or debt either by express contract or otherwise; that being so, this association is not justified in expending its funds in defending this action.

No reply was called for.

LINDLEY, L.J.—It appears to us, now that we understand the facts, that the law would be in a very unsatisfactory state if this judgment could be sustained. Here is a society called the Royal British Nurses' Association which was incorporated for certain objects. The association some time ago started the publication of a journal called the *Nurses' Journal*. Now it appears that in July, 1896, a meeting of the association was held, and an account of that meeting was published with comments in one of the numbers of this journal. How that came about is explained in the affidavit of the secretary. He says that the library sub-committee, or the journal sub-committee as it is sometimes called, were in the habit of employing a lady of the name of De Pledge as their honorary editor of the journal, and that they sent her for publication an account of the meeting with these comments. She put it into the journal. It is said that that reflected upon a member of the association, Dr. Fenwick, and he brought an action against Miss De Pledge for libel, the libel being the publication of the papers so put into her hands by the orders of the sub-committee. If the publication is a libel of course we all know that Miss De Pledge will be liable for it. But it is a most important fact in this case that the association will likewise be liable for the very same thing. They published it, there is no controversy about it at all. It was put into the journal of which they are the proprietors and the publishers, and it was put there by the authority of their sub-committee. To say that there is anything to be tried in the present action as to the liability of Miss De Pledge or the liability of the association is a mistake altogether. There is no question whatever to be tried. Their liability is obvious enough. Now, what takes place? The libel action having been instituted in November 1896, in February, 1897, there is a meeting of the executive committee, and they pass a resolution which is in substance that they resolve to defend that action against Miss De Pledge. Then on the 9th of April 1897, there is the quarterly general meeting of the council, which is, I understand, a larger body, and they approve of the action of the executive committee and resolve to defend Miss De Pledge in that action

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

of libel brought against her by Dr. Fenwick. Then some ingenious persons determine that they will try to stop that, and they get a member of the association to bring an action in the Chancery Division to restrain the association from applying their funds in defending Miss De Pledge.

The question is whether such an action can be supported. Now, the learned judge has held that for the present purpose there is some question to be tried, and he has granted an injunction. On reading his judgment I cannot help thinking that he has been influenced by a view which, I think, is incorrect—that is to say, that there was some unwillingness on the part of the association to be sued in the action for libel or to be made defendants in that action. They cannot make themselves defendants in a libel action; it depends upon the person libelled whether he will sue them or not. But, acting somewhat perhaps in deference to the learned judge's view, they did try to get themselves joined and they failed. They failed very properly in accordance with the ordinary practice relating to parties to actions. But I cannot help thinking that the learned judge was a little influenced by his view that they were not willing to be sued themselves for this libel. I will pass that over, as having nothing in it. Now we must look at the matter with a view to legal principles, and also not forgetting common sense. What is the grievance of Miss Breay, who is a member of this association who is seeking relief from the Chancery Division upon the ground that the funds of the association are being misapplied? What are the association doing? The association are, under the circumstances to which I have alluded, in the position of being themselves liable to be sued, and it is to me as plain as anything can be that if it had suited Dr. Fenwick to bring an action against Miss De Pledge and the association themselves, he could have done so. It is equally plain to me that under those circumstances the association could, of course, have defended that action. They need not have severed from their co-defendant, they were all in the same boat, and the circumstances to which I have alluded show that they are the persons who as between them and Miss De Pledge are really the persons to blame, if anybody is to blame, for this publication. To say that under that state of circumstances they could not have defended the action, including the action against Miss De Pledge as one of the parties, is to me an outrage on common sense. Then let us go a step further. Is it to depend upon Dr. Fenwick whether the association are to be at liberty to defend this action which he has brought against Miss De Pledge alone? Can it make any difference in principle whether they are sued together or sued separately or whether he prefers to sue Miss De Pledge alone? It appears to me that there is nothing whatever which justifies any such distinction being drawn. But let us look a little further. Let us look at the matter in a straightforward, untechnical way. What is it that the defendants are doing? A lady, acting under the instructions of the association's executive committee, has published a libel in their journal, and they say that they do not care whether Miss De Pledge could sue them and compel them to indemnify her or whether she could not, but that under the circumstances they think that it is right and just that they should defend her from the consequences of what she has done in their interests in their paper, and that they will defend her.

Now, supposing this association were not a corporation, is there anything illegal or immoral or improper in a master defending his servant or a principal defending his agent in such a case? Absolutely nothing. Can it be said, then, that is so unbusinesslike that we ought to draw a sharp distinction and say that although an ordinary principal can do it, a corporation cannot do it, even if it is in the same position towards the person whom it defends as if it were an ordinary individual? It would be saying that a corporation cannot do in any ordinary matter of business what everybody else conducting the same kind of business can do. That appears to me to be a proposition which cannot be sustained at all. The very same principle was endeavoured to be applied in the case of *Taunton* v. *The Royal Insurance Co.*, 12 W. R. 549, 2 H. & M. 135, where a gunpowder ship exploded in the Mersey and where an insurance office intended to pay the damages which occurred from that explosion although not covered by the policy of insurance which they had issued. Wood, V.C., ridiculed the objection. He said it was the ordinary course of business for such claims to be paid whether actually within the policies or not; that it was a good advertisement and a business way of getting business; and the objection was laughed at. Now, should not we be laughed at if we were to say that a corporation could not defend actions against their servants in a case such as this? It seems to me it would be an outrage on common sense. There is absolutely nothing to be tried in this action which justifies the view that the injunction should go until the trial. The appeal must be allowed and the judgment discharged, and the plaintiff must pay the costs of this application both here and below.

LOPES, L.J.—This case, when it is understood, to my mind appears perfectly clear. I arrive at the conclusion that the learned judge in the court below was wrong in the decision which he has given.

Now, the facts that need be stated to show what I mean are very few and very simple. Miss De Pledge is the editor of a certain journal published by this association. She had placed in her hands by a sub-committee of that association a certain document which is said to contain libellous matter. She published it, and she caused it to be circulated. Now, whose publication was that? She was the agent of the association, acting within her authority. In fact, the very document had been given to her by the association. Surely the publication is the publication of the association, and the association are liable in the action that has been brought against her. Why it was brought against her, and not against the association, I do not know. It might have been brought against both of them together, but beyond all question it is really the publication of the association, and they are liable.

Now, in those circumstances, an action, as I said, has been brought against Miss De Pledge, and thereupon a resolution was passed by which it was determined that the funds of the association should be applied in defending it. It is now said by a member of the association, who comes forward and seeks an injunction, that the funds of the association are being improperly applied when they are used for the defence of Miss De Pledge in that action, and that an *interim* injunction ought to be granted.

Now, just look at it in this way. If Dr. Fenwick had brought the action against the association either alone or together with Miss De Pledge, beyond all question, if a verdict was to be found in favour of Dr. Fenwick, the association would be liable for damages and costs. But is it to be said that because Dr. Fenwick, for reasons best known to himself, has thought proper not to bring the action against the association alone, or jointly with Miss De Pledge, but has determined to bring it against her alone, that the association is to escape entirely, and that Miss De Pledge is to be called upon to pay damages and

costs? It seems to me against common sense and justice. In my opinion it is a doctrine which cannot for a moment be entertained.

I think the learned judge arrived at a wrong conclusion when he held that an injunction ought to go.

CHITTY, L.J.—I agree. For the respondent it was suggested at the Bar that the publication of the journal was *ultra vires*. That point is not raised in the pleadings, nor was it ever suggested as far as I can make out until some time during the argument before North, J. There is nothing whatever in it. Now, what are the defendants in this action doing? They have resolved by the proper authoritative body that if Miss De Pledge will entrust her defence to them they will undertake it and pay the costs. Clearly the journal is the journal of the association, and it is clear that the association might have been joined as defendants in the action of libel which Dr. Fenwick has brought. I am unable to find out any special reason why, but Dr. Fenwick, quite within his rights, selected Miss De Pledge alone as the defendant. Now, what is her position? She is the honorary editor of this journal, and she published that which is alleged to be a libel, upon the instructions of a sub-committee, lawfully appointed by the executive committee, that has the management of the affairs of the association for the purposes of any question that is here raised before us. She, as honorary editor, merely took the manuscript which was entrusted to her, put in a number of paragraphs, and sent it in the ordinary way for publication. Of course she is liable if there has been a publication on her part, and I will assume without deciding it that she is responsible in the action. Then it is said that it is an action of tort, and that no contract of indemnity would be good. Let all that be granted; but what she has done has been simply—to put it in a legal form—done as the agent or the servant of the association. She is liable, of course, for her own acts according to the law of libel. But the association certainly, on the facts, are liable in respect of this libel if libel it be; and supposing that they had been joined as defendants there would have been a separate liability upon Miss De Pledge and a separate liability on the association.

I cannot conceive that it would be within the bounds of reason to hold that in such an action the association could not have applied its funds for the purposes of the defence generally. Mr. Swinfen Eady says they could not apply them for any part of the defence, so far as related to Miss De Pledge. I think, with great respect to him, that that is an absurd proposition. I agree that probably North, J., had it in his mind, and it formed some ground for his judgment, that the association were not willing to be made parties to the libel action. But an attempt has been made on their part since that judgment was delivered to get themselves made defendants in the libel action. That, however, was an application which could only meet with one fate if opposed by Dr. Fenwick—and it was opposed by him—it must be refused. Dr. Fenwick is entitled to say, "I will not sue anybody but one person in respect of this libel. There may be half-a-dozen persons liable to me, I care not; I will sue Miss De Pledge and Miss De Pledge alone." Now, I think it is a mere matter, as Lindley, L.J., says, of ordinary business, and it would be pushing the doctrine of *ultra vires* to an absurd extreme if we held that this was not a lawful application of the funds of the association. It is a defence by the masters of the servant—using the term servant in no invidious sense to Miss De Pledge. It is in respect of their act; it is in respect of their publication, because morally as between the two she is not to blame in any way. It seems to me a matter of ordinary common sense that the result is that they can expend their funds in defending this action for her, seeing that she was acting within the scope of her authority, and on the instructions of the body having the control of the journal within the terms of the charter. The result of the action if it were to succeed would be injurious to the association themselves. The association have a common interest in defending the journal in respect of this charge of libel. The only remaining point that I need mention is the suggestion that there is something to try. Mr. Swinfen Eady, when pressed upon the point, at the conclusion of his argument, could only find this, that the question to try was a question of law. So that we have all the facts before us, and it is a matter turning simply upon the documents. In my opinion this is not *ultra vires*, and I concur in the judgments that have already been delivered.

Appeal allowed.

Solicitors, *Pontifex, Hewitt, & Pitt; Mear & Fowler.*

High Court of Justice.

Chan. Div. } Romer, J. } Nov. 9, 10, 11.

ATTORNEY-GENERAL v. TEDDINGTON URBAN DISTRICT COUNCIL. (a.)

Local government—Purchase of land—Land acquired for sewage works—Land "not required" for purpose—Land not immediately required—User of land—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *s.* 175.

Circumstances under which lands acquired by a local authority under section 175 *of the Public Health Act,* 1875, *will be ordered to be sold as "not required for the purpose for which they were acquired" within the meaning of the section, in cases where the whole of the lands is not immediately required for the purpose.*

Consideration of the question what is a lawful interim *user of such land not immediately required.*

A portion of lands which were bought by the defendants, and as to the greater part used, for the purpose of permanent sewage works, was used by them to receive dustbin refuse, and works had been executed thereon for this purpose.

Held, (1) *that the whole of the lands were required for sewage purposes;* (2) *that the defendants had not dealt with any part of it so that it could not be used for sewage purposes, and the plaintiff was therefore not entitled to a declaration that any portion should be sold under section* 175; *and* (3) *that, though the works did not make that portion wholly unfit for sewage purposes, such user was injurious to its proper user for sewage purposes and inconsistent with the purpose for which the land was acquired, and was not a lawful user of the land.*

Another portion of the same lands was used as a recreation ground, and a path had been made and some benches put there, and the defendants were alleged to intend making a lake and a bathing-place there.

Held, that it was not unlawful to permit this portion, which was not at the time required for the ultimate purpose for which it was acquired, to be temporarily used as a recreation ground, provided that care was taken to prevent any rights from being acquired over it which would interfere with the user of the land for its ultimate purpose whenever required; but

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Held, on the evidence, that the defendants had contemplated using some of this portion for purposes which were not justifiable interim *purposes.*

Action.

This was an action against the Teddington local authorities, at the relation of a resident, to compel the defendants to sell a piece of land which adjoined his property, on the ground that it was not required for the purpose for which it had been bought—viz., the disposal of sewage.

It appeared that the land in question formed part of a piece of land consisting of some twenty-five acres which had been acquired in the year 1887, with the sanction of the Local Government Board, under the Public Health Act, 1875, for the purpose of permanent sewage works, and most of which had been used for the erection of tanks and machinery and for filtration beds for the purpose of the reception and disposal of sewage. It also appeared that some of the land had been sold as not being required for sewage purposes—in accordance with section 175 of the Public Health Act—but another part had been utilised by the defendants as a place of deposit for refuse collected from dustbins, to receive which trenches had been dug to the gravel surface and drawn to the level of the subsoil. A mound had also been raised. The plaintiff alleged that the defendants had also entertained a scheme for turning another part of the unused land into a public recreation-ground, with a lake, bathing-place, and promenade, and had constructed a temporary footpath over the land. The plaintiff alleged that the pieces of unsold land were, within the meaning of section 175 of the Public Health Act, 1875, "not required for the purpose for which they were acquired"—viz., the reception and disposal of sewage—and submitted that they should be ordered to be sold in accordance with the section.

The defendants alleged that their mode of using this land was not permanent, but merely temporary, and not such as to prevent the land from being used hereafter for sewage purposes; and, moreover, that, having regard to the rapid increase of Teddington in extent and in population, and to the necessity of having reserve land available for these purposes, the land was, in truth, still needed for the purpose for which it had been acquired.

The plaintiff claimed a declaration that the land in question, in all some eight acres, was not required for the purpose for which it had been acquired under the Act of 1875, an order directing its sale under section 175, and an injunction restraining the defendants from appropriating or using any portion as a site for a public promenade or recreation-ground, or for ornamental water, or for a footpath, or for the purpose of the deposit of house refuse, or for any purpose other than that of the reception and disposal of sewage.

The learned judge found on the evidence that all the land in question was land that should be kept by the defendants for sewage purposes, and would ultimately be required.

Neville, Q.C., and *F. R. Y. Radcliffe*, for the plaintiff.—(1) The land in question is "not required for the purpose for which it was acquired" within the meaning of section 175 of the Public Health Act, 1875. (2) The application of land acquired by a corporation under statutory powers for a particular purpose, but not immediately required for that purpose, to a totally different purpose to that to which it was applied at the time of acquisition is *ultra vires*. The *interim* user which the defendants make and contemplate making of this land, so far as it is not now required for sewage purposes, is therefore unlawful. Moreover, it is not a proper expenditure of the ratepayers' money. (3) As to the user for the disposal of dustbin refuse, that is a purpose inconsistent with the purpose for which the land was acquired, and injurious to it, and one which is not justifiable even as an innocent *interim* user.

They cited *Attorney-General* v. *Corporation of Southampton*, 1 Giff. 363, 8 W. R. Ch. Dig. 2; and *Bayley* v. *Great Western Railway Co.*, 26 Ch. D. 434, 450, 32 W. R. Dig. 227.

Macmorran, Q.C., and *Lewis Thomas*, for the defendants.—(1) The council may require the whole of the land at some future time for sewage purposes, and no part of it is within section 175. (2) The user made, as well as that proposed to be made, is a legitimate *interim* user.

Neville replied.

ROMER, J., after stating his finding as above on the evidence, continued:—It appears to me, therefore, that section 175 of the Public Health Act, 1875, does not apply to any portion of the land. No doubt at the time when the land was purchased with the sanction of the Local Government Board it was contemplated, as shown by the plan, that part of the land purchased would not be required for sewage purposes. But if I were to hold that the portions contemplated at the date of the purchase as not being then required to be retained for sewage purposes were on that account never to be so used at all, I fail to see what right the local authority had to acquire those portions of the land at all. But in my view the local authority did acquire the whole of the land for sewage purposes, though they contemplated that they might not require the whole of it, and would probably find that they could sell the portions referred to, and they were not conclusively bound to sell the land marked on the plan as not required if circumstances changed and it was found that they did require it. Apparently they have now changed their minds; and, in my opinion, they have come to a wise conclusion, and the land sought to be held is required for sewage purposes. No doubt the council, until very recently, thought that the whole of the land would not be required, and if they had committed themselves irrevocably to the position that part was not required, section 175 would probably have applied. I have considerable doubt on the point, but I give the council the benefit of the doubt, and the conclusion I come to is that they are not precluded from saying that the whole land is required, and they are entitled to retain it. Undoubtedly what they had done misled the plaintiff, and I shall remember that when dealing with the question of costs.

The next question is whether the defendants have dealt with any part of the land so that it cannot be used for sewage purposes. The only parts which that refers to are those on which the trench and mound have been made. Although I think that these works were improper, yet, at the same time, they did not make the land on which they were wholly unfit for sewage purposes. I think they could still be utilized, so that that part of the land cannot now be said to be remaining in the hands of the defendants for non-sewage purposes. The plaintiff is not, therefore, entitled to any declaration that any portion of the land should be sold.

A further question arises. The plaintiff or relator says that the defendants have dealt with parts of the land improperly, and ought to be restrained from further improper dealings with the land. With the exception of the mound and trench nothing has been done of a permanent character. They have made a footpath and put a few benches, and these things

only refer to parts not immediately required for sewage purposes. That use is, in my opinion, of a temporary nature only, and one not interfering with the land when required for sewage purposes.

But it has been argued before me that the defendants are not entitled even while retaining vacant land for sewage purposes to, in the meantime, use it for such purposes as are relied upon by the relator in this case. I think it right, therefore, to state shortly the views I take as to what the powers of the defendants are with reference to the *interim* user of the land not immediately required for use for sewage purposes. Now, I agree that the defendants could not apply the land to or use it for any purpose inconsistent with the purpose for which it was acquired, but in the present case those purposes did not require immediate use of every part of the land for sewage purposes. Some part only was required for immediate sewage works, and the remaining part has to be retained because needed hereafter for those works, and for the actual application of this remaining part for such purposes the defendants could retain it, and one of the purposes for which they acquired it might be said to be such *interim* retainer. Of course, while so retaining it they could not use or deal with it in such a way as to prevent or substantially interfere with its immediate use for sewage purposes whenever it was needed for those purposes. But, subject to that exception, while retaining it, I do not see how it was inconsistent for the purposes for which they acquired it to use it in any lawful manner in which in its then condition it could be used, provided it did not substantially interfere with the main purpose of drainage for which it was ultimately wanted. I know nothing which makes it unlawful for a council such as these defendants permitting vacant land in their possession, and not at the time required for the ultimate purpose for which they acquired it, temporarily to be used as a recreation ground, provided care is taken to prevent any rights being acquired over it by the public or otherwise which would prevent or interfere with the council using it for such ultimate purposes whenever required.

Now, the case of *Attorney-General* v. *Southampton Corporation*, to which I have been referred, in no wise interferes with this view. What was that case? There land had to be held by certain trustees solely for the purposes of recreation, and it was held that those trustees could not use the land even temporarily as a fair for the sale of cattle on the ground that that was not a purpose of recreation. Why? Because the land could not be used according to the trusts even temporarily except for the purposes of recreation.

It was as much a breach of trust in that case to use it temporarily as it was to use it permanently for a cattle fair. Moreover, in my opinion, nothing in the judgment of Cotton, L.J., in *Bayley* v. *The Great Western Railway Co.*, to which my attention has been called, in any way interferes with the views which I have previously expressed. It appears to me, therefore, that nothing has been done with regard to putting these temporary seats and making the temporary footpath there unlawfully. It is to be noticed that in this case I am not concerned with any question as to the money of the ratepayers having been applied in making a temporary footpath, or in placing those seats. It cannot be raised, and is not raised, in this action whether or not they have been acting wrongly in using money of the ratepayers. That I do not know. All that I am concerned with in this action is as to user of the land pending its ultimate user for sewage purposes. As I have said, I think an *interim* user, if lawful, and not interfering with the ultimate sewage purposes for which the land was required, is justifiable.

Now I have to consider what has been threatened by the defendants as alleged by the relator in respect of this land apart from the mound and trench. As to the camp-shedding and making up the frontage of the river, it is now agreed that that would have been necessary for sewage purposes, but as to the other purposes, especially the making of the lake and the proposed making the frontage up of the land for recreation purposes, and the building of a bathing place, all of which were in dispute, when the correspondence is looked at, and all the facts, I do think that the defendants contemplated using parts of the land not for sewage purposes, nor for justifiable *interim* purposes. The defendants now assert that they have no intention of making any permanent works or of doing anything which would prevent them from properly using the land for its ultimate purposes. I accept that statement. Therefore I do not think with regard to this part of the case any injunction or special undertaking is required.

With regard to the mound and trench those works clearly were not done for sewage purposes. On the evidence they were most injurious to the land for sewage purposes, and though they did not fatally interfere with the land so as to prevent it being ultimately used in some way for sewage purposes, those works are not justified as an *interim* innocent lawful user of the land, and are inconsistent with the purposes for which the defendants acquired the land. The defendants consenting to give an undertaking that they will not repeat those works or use this land for the purpose of further digging trenches, removing the gravel, and filling those trenches up with dustbin refuse, I make no order except that the defendants pay the costs of the action.

Solicitors for the relator, *Powell & Rogers*.

Solicitor for the defendants, *G. C. Sherrard*.

Chan. Div.
Romer, J. } Nov. 2, 4, 13.

RALEIGH v. GOSCHEN. (*a*.)

Crown, prerogative of—Action against Lords of Admiralty—Trespass—Right of subject to maintain—Action, form of—Amendment.

The head of a Government department is not liable for the neglect or torts of any subordinate official, unless it can be shown that the act complained of was substantially the act of the head himself, in which case he would be liable as an individual, despite of his being an officer of State.

The court holding that the above action, which was for trespasses to land, was against the defendants, the Lords Commissioners of the Admiralty and the Director-General of Naval Works, in their official capacity and not as individuals, and the plaintiffs having asked leave to amend, if necessary, by also suing the defendants individually, and by adding as parties the persons by whose hands the alleged trespasses had been actually committed,

Held, that leave to amend ought not to be given, for what the plaintiffs were seeking to do was to change one action into another of a substantially different character; and that the action must be dismissed.

Point of law and summons.

This was an action against the defendants, the Right

(*a*.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Hon. G. J. Goschen and others named and described in the title of the action as the Lords Commissioners of the Admiralty, and also against Major Raban, described in such title as the Director-General of Naval Works, for the purpose of establishing as against the Lords Commissioners and the Director-General that they were not entitled to enter upon, or take possession of, or acquire by way of compulsory purchase certain land of the plaintiffs at Dartmouth for a training college for naval cadets.

The plaintiffs alleged (par. 12 of the statement of claim) that the defendants had entered upon a portion of the estate and had placed certain stakes thereon, with a view to the acquisition of the site for the training college, and (par. 17) that the defendants had, by their servants and agents, wrongfully entered upon the property, and surveyed and staked out the site, and threatened and intended to take possession, and they alleged that the defendants contended that they had statutory powers of compulsory acquisition, which they threatened and intended forthwith to exercise.

The plaintiffs submitted that there was no right of compulsory purchase, and they claimed a declaration to that effect and an injunction and damages.

The defendants, by their statement of defence, submitted that the court had no jurisdiction to entertain the action, the Lords Commissioners of the Admiralty, although entitled in certain circumstances to sue, not being liable to be sued in any of her Majesty's Courts except in cases provided by statute; that the defendants were merely agents of the Crown and only responsible to her Majesty and Parliament; and that they were not liable to be sued in respect of acts done by them as the executive Government, but that the plaintiffs' remedy, if any, was by petition of right. They further submitted that the claim of the plaintiffs was in respect of an alleged tort, for which neither the Crown nor any agent of the Crown, as such, could be sued either by petition of right or otherwise, and that neither the Lords Commissioners nor the Director as such, were liable to be restrained by injunction of any court.

The defendants admitted that the site had been surveyed and marked out under the Defence Act, of 1842, but denied that they, or any of them, had done the acts complained of; and alleged that whatever had been done had been duly performed not by them but by the proper officers or agents of the Lords Commissioners of the Admiralty acting by the direction of the executive Government under the Crown.

The defendants obtained an order that the point of law raised by the defence—namely, whether the action was maintainable—should be set down and heard before the trial.

The plaintiffs had taken out a summons to amend the proceedings in the action by adding as defendants the civil engineer and two marines who had surveyed and staked out the land, and also by suing the existing defendants in their individual or personal, as well as their official capacity. The plaintiffs had also taken out a summons for the delivery of interrogatories with a view of ascertaining by whom or by whose directions the alleged wrongful acts were done. The point of law was now heard, and by his lordships' direction the summons to amend was also heard.

Sir R. E. Webster, A.G., A. T. Lawrence, Q.C., and *Ingle Joyce*, for the defendants in the action.—This is an action for tort against the defendants in their official capacity as members of the executive Government, and such an action will not lie: *Gidley* v. *Palmerston (Lord)*, 3 Brod. & B. 275, 286; *Whitfield* v. *Le Despencer (Lord)*, Cowper 754; *Canterbury (Lord)* v. *Attorney-General*, 1 Ph. 306, 321; *Sullivan* v. *Spencer (Lord)*, I. R. 6 C. L. 173; *Grant* v. *Secretary of State for India*, 25 W. R. 848, 2 C. P. D. 445, 461; *Palmer* v. *Hutchinson*, 6 App. Cas. 619, 30 W. R. Dig. 138). Lord Blackburn, in delivering the opinion of the judges in *Mersey Docks Trustees* v. *Gibbs*, 14 W. R. 872, L. R. 1 H. L. 93, 111, distinguishes that case from cases of the class mentioned above. *Nicholson* v. *Mounsey*, 15 East 384, 391, and *Walker* v. *Baird*, [1892] A. C. 491, 41 W. R. Dig. 62, were also cited.

Swinfen Eady, Q.C., and *S. Dickinson*, for the plaintiffs in the action.—Petition of right does not lie for tort, and the action is well founded. Acts of trespass were committed by the defendants' authority, and they cannot justify as servants of the Crown which can do no wrong, and are therefore liable to be sued: *Feather* v. *Reg.*, 6 B. & S. 257, 296, 13 W. R. C. L. Dig. 88; *Money* v. *Leach*, 3 Burr. 1742; *Mostyn* v. *Fabrigas*, Cowper 161; *Rankin* v. *Huskisson*, 4 Sim. 13; *Ellis* v. *Grey (Lord)*, 6 Sim. 214; *Rogers* v. *Dutt*, 9 W. R. 149, 13 Moo. P. C. 209, 236; *Musgrave* v. *Pulido*, 28 W. R. 373, 5 App. Cas. 102. Cases of contract do not apply; the remedy in such cases is by petition of right. *Grant's case* was founded on official responsibility and supports the plaintiffs here. In *Walker* v. *Baird* the court rejected the arguments for the defendants here. If the action is defective, the defendants ought to be given leave to amend.

Before hearing a reply his lordship stated the principles which he considered to be applicable to the case as follows:

ROMER, J.—The only question, to my mind, is whether this is not a case in which an amendment ought to be allowed. It appears to me, if any person commits a trespass (I use that word advisedly as meaning a wrongful act or one not justifiable) he cannot escape liability for the offence. He cannot prevent himself from being sued merely because he acted in obedience to the order of the executive Government or of any officer of State, and it further appears to me, as at present advised, if the trespass had been committed by some subordinate officers of a Government department or of the Crown by the order of a superior official, so that the trespass was caused by the order and was in substance the act of the superior official, that superior official, even if he were the head of the Government department in which the subordinate official was employed, or whatever his official position might be, could be sued, but in such case the superior official could be sued not because of, but despite of, the fact that he was an officer of State. I think it is clear that the head of a Government department is not liable for the neglect or torts of officials of the department unless it could be shown that the act complained of was substantially the act of the head himself, in which case he would be liable as an individual, as a stranger committing the act would be.

Sir R. E. Webster, A.G., in reply.—There are cases in which the head of the department, I think, could not be sued, but that is not the question before your lordship. I only want to guard myself in case it is said hereafter I have made an admission I ought not to. I should be disposed to put it in this way, that if any person, whether officer of State or subordinate, has to justify an act alleged to be unlawful by reference to the authority of an Act of Parliament or State authority or anything of that kind, the legal justification can be inquired into in this court. It does not matter whether the defendant is the head of a department or not. That is simply another way of stating

from a different point of view your lordship's proposition. In *Cowing* v. *The Secretary of State for War*, where they endeavoured to get an injunction against the Secretary of State for War by reason of the artillery trespassing on a man's land, Jessel, M.R., laid it down in the clearest way that an action would not lie (see the *Times* of the 23rd of January, 1877). The amendment sought by the plaintiffs ought not to be allowed. The pleadings show that the case sought to be made is a substantially different case from that originally made, and in the interests of the public leave ought not to be given to amend in an action against the heads of a Government department which, as it stands, is not maintainable.

Cur. adv. vult.

Nov. 13.—ROMER, J., after referring to the above statement of the general principles of law applicable to the case, continued: But I will apply those principles and point out shortly what kind of action the plaintiffs might have maintained, and what kind they were not entitled to bring, against the present defendants in respect of the matters referred to in the statement of claim.

The plaintiffs are complaining of an alleged trespass said to have been committed on their land, for which they claim damages, and they ask for an injunction to restrain further trespass on the land, which they say is threatened.

Now, in the first place, inasmuch as the plaintiffs could not sue the Crown for a past or threatened trespass, they could not in respect of any trespass sue the defendants in the capacity of agents for or as representing the Crown. Again, the plaintiffs could not sue the defendants merely on the footing that, as representing a branch of the executive Government, the defendants were responsible for a trespass committed or threatened by some officials or persons in the employment or under the control of the Government or of the Admiralty as a department of the Government, even though those officials or persons purported to act on behalf of or as representing the Crown or the Government or the Admiralty. And, further, even if some of the defendants, acting on behalf of the Crown or of the Government or of the Admiralty, had committed or threatened a trespass, that would not justify the plaintiffs in suing the other defendants, if they had taken no part in the transaction.

On the other hand, the plaintiffs could sue any persons actually committing or threatening the trespass, even though those persons only acted on behalf or by the authority of the Government or of the defendants as representing the Admiralty. Moreover, I do not think the rights of the plaintiffs would of necessity be confined to an action against those actually committing the trespass, who might be some very humble persons. If a trespass was committed by those persons by the order or direction of some higher officials, so as in substance to have been the act of those higher officials, then the latter could be sued. For example, suppose the captain of a ship unlawfully to have ordered some of his sailors to take possession of a house and they obeyed his order, he could be sued for the trespass, even though he himself remained on board his ship and did not personally go into the house. So if any of the defendants had themselves ordered or directed the alleged trespass now complained of by the plaintiffs, and it was in consequence of such order or direction that the alleged trespass took place, or if any of the defendants threatened to order or direct further trespass, then they could be sued. But in this case they could be sued not because, but in despite of, the fact that they occupied official positions or acted as officials. In other words, to sum up shortly the result of the above by the use of convenient phraseology, the plaintiffs in respect of the matters they are now complaining of could sue any of the defendants individually for trespasses committed or threatened by them, but they could not sue the defendants officially or as an official body.

The question, then, before me narrows itself down to this—is the present action one against the defendants as an official body, or is it an action against them as individuals? And in dealing with this question, I ought also to consider the summons to amend issued on behalf of the plaintiffs, and the affidavits filed in support of that summons. Now, on the facts before me, and dealing fairly with the writ and statement of claim, the conclusion I come to is, that the present action was intended to be and is a claim against the defendants in their official capacity, and not as individuals. They are described and sued, except as regards the defendant Major Raban, as the Lords Commissioners of the Admiralty, and he is described and sued as the Director-General of Naval Works. Throughout the statement of claim no distinction is drawn between them, and no act, order, direction, or threat by any of them individually is alleged. Paragraph 1 of the statement of claim sets forth the general nature of the plaintiffs' case, and shows that what the plaintiffs wish to do is to have some general questions decided as between them and the defendants as representing the Admiralty. The correspondence referred to in the statement of claim is with the Admiralty, or with certain officials in an official capacity only. Then, so far as regards trespasses alleged to have been actually committed or threatened, the only material paragraphs are those numbered 12 and 17. Paragraph 12 alleges that the defendants had entered upon some portion of the plaintiffs' estate and placed stakes there. Now, it was admitted before me on behalf of the plaintiffs that it was not suggested or intended to be suggested that the defendants themselves had done this. The paragraph shows that, in this action, when an act of the defendants is referred to what is meant and intended to be alleged is the act of the defendants treated as an official body—that is to say, as a body representing the Crown or Government or as responsible for the acts of all officials or persons acting or purporting to act on behalf of the Crown or of the Government or of the Admiralty. Then all that is contained in paragraph 17 is a general allegation that the defendants by their servants and agents have trespassed and threatened to trespass again. That is to say again, as I understand it, acts alleged against them as an official body on the footing above mentioned. But any possible doubt as to what kind of action this is appears to me to be set at rest by the plaintiffs' summons to amend their writ and subsequent proceedings, and the affidavits filed in support of that summons. The affidavits state that the alleged trespass was committed by two marines acting under the directions of Mr. Shortridge, a civil engineer employed in her Majesty's dockyard at Devonport. Those affidavits do not allege any personal participation in the alleged trespass or any threat of future trespass by, or by the order or direction of, any of the defendants. Then the summons asks for leave to amend the action by suing the defendants in their individual as well as in their official capacity, and by adding the two marines and Mr. Shortridge as co-defendants. In other words, the summons proceeds on the footing that the present action is one against the present defendants in their official capacity only, and I think the plaintiffs' own view as to their action is the correct one.

It follows that in my opinion the present action as

it stands is misconceived and will not lie, and the only further question I have to consider is whether I ought to give the plaintiffs leave to amend as asked by them. On consideration, I think I ought not. For what the plaintiffs are seeking to do is to change one action into another of a substantially different character. Apart from the fact that the present action cannot be sustained, while the other might lie, an action against the defendants in their official capacity, supposing it to lie, would differ in most material respects from an action against them as individuals, as will be seen when consideration is paid to questions of discovery, and to the form of any interlocutory injunction or final judgment that could be obtained by the plaintiffs, and as to how and against whom such injunction or judgment could be enforced. Moreover, as pointed out above, the affidavits in support of the summons to amend do not venture to allege any claim against any of the defendants individually. For these reasons I think I ought not to allow leave to amend as asked. If the plaintiffs have in fact any claim against any of the defendants individually, that claim will be more properly and conveniently enforced in a separate action. At the same time I will take care to provide by my order that the dismissal of the present action shall not prejudice any just claim the plaintiffs may have. I therefore order the present action to be dismissed with costs, without prejudice to any claim the plaintiffs may have against the two marines or Mr. Shortridge or against any of the defendants individually in respect of any trespass committed or threatened. The costs of the summons and of any pending interlocutory application will be costs in the action.

Leave to appeal was asked by the plaintiffs and given.

Action dismissed; summons dismissed.

Solicitors for the plaintiffs, *Petch & Smurthwaite.*

Solicitor for the defendants, *Solicitor to the Treasury.*

Q. B. Div.
(Wright and Kennedy, JJ.) Nov. 3.

LEWIS *v.* POOLE. (*a.*)

Local government—Custody of parish documents—Tithe map and apportionment—Tithe Act, 1836 (6 *&* 7 *Will.* 4, *c.* 71), *s.* 64—*Tithe Act,* 1846 (9 *&* 10 *Vict. c.* 73), *s.* 17—*Tithe Act,* 1860 (23 *&* 24 *Vict. c.* 93), *s.* 28—*Local Government Act,* 1894 (56 *&* 57 *Vict. c.* 73), *s.* 17.

Where no order has been made by quarter sessions as to the custody of a document which is required by section 64 of the Tithe Act, 1836, *to be kept with the parish documents, the parish council have now power to give directions as to its custody.*

A parish council gave directions as to the custody of the copy of a tithe apportionment and map, but the rector, in whose possession it was, refused to comply with such directions. The parish council then obtained an order from the county council confirming the directions of the parish council. As the rector still refused to give up possession of the document, an application was made to two justices by a person interested in lands and rent-charge comprised in the apportionment for an order for the removal of the document into the custody directed by the parish council. The justices decided they had no jurisdiction to make such an order.

Held—without deciding whether the power of the justices to make the order was discretionary or merely ministerial—that they had jurisdiction to make it.

Case stated by the justices of the Droxford Division of Hampshire under the Summary Jurisdiction Acts, on the hearing of an application by the appellant under section 28 of the Tithe Act, 1860.

The material facts were as follow: An application was made by Mr. Lewis under section 28 of the Tithe Act, 1860, that the justices of the Droxford Petty Sessional Division of Hampshire should make an order to remove the map and tithe apportionment of the parish of West Meon from the custody of the rector of the parish, the Rev. Canon Poole, and direct that the same should be deposited in the custody of the parish council of West Meon. The appellant was a person interested in the lands delineated in the tithe apportionment and map, and was the chairman of the parish council, but he made the application in order to enforce an order of the county council, dated the 22nd of February, 1897, and not as chairman of the parish council authorized to appear, nor by reason of being inconvenienced by the documents being in the custody of the respondent.

On the 15th of October, 1895, the parish council resolved that the documents should be placed in the custody of the parish council, and notice of this resolution was given to the respondent, but he refused to give up possession of the documents. On the 15th of April, 1896, the parish council applied to the county council, under section 17 (8) of the Local Government Act, 1894, to determine the difference which had arisen between them and the rector as to the custody of the documents, and by an order under seal, dated the 22nd of February, 1897, the county council directed that the said documents should be deposited in such custody as the parish council might direct. A copy of this order was sent to the respondent, but he refused to obey it, and retained the documents.

The appellant thereupon applied to the justices, under section 28 of the Tithe Act, 1860, for an order directing the removal of the documents from the custody of the respondent into that of the parish council or such custody as they might direct.

The justices decided that the order of the county council appeared to be good on the face of it, but that they, the justices, had no power to make the order applied for, and they accordingly refused to make such order, subject to the present case.

The question of law for the court was whether the justices, upon the facts stated, came to a correct decision in point of law, and if not, what should be done or ordered by the court in the premises.

Lord Coleridge, Q.C., and *Cancellor,* for the appellant.

Macmorran, Q.C., and *Gollan,* for the respondent.

The court allowed the appeal.

WRIGHT, J.—Two questions arise in this case. The first is whether the directions of the parish council as to these documents ought to be carried out. The second is whether the justices had power to make the order asked for. On the first question, which is the main one, I do not feel much doubt. The Local Government Act, 1894, by section 17 (8) provides that "documents directed by law to be kept with the public books, writings, and papers of the parish, shall either remain in their existing custody or be deposited in such custody as the parish council may direct," and the sub-section gives the county council power, in case anyone objects to the directions of the parish council, to decide which view

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

shall prevail. In the present case the parish council have directed in whose custody a tithe apportionment and map shall be deposited. These documents are documents directed by section 64 of the Tithe Act, 1836, to be kept with the public books, writings, and papers of the parish. The directions of the parish council have been confirmed by the county council, and it seems to me that on these grounds the first question is disposed of. Mr. Macmorran, however, contends that this tithe apportionment and tithe map do not come within the words in section 17 of the Act of 1894, "documents directed by law to be kept therewith," that is, with the parish books and papers. He submitted that under section 64 of the Tithe Act, 1836, though the documents are to be kept with the public books, writings, and papers of the parish, they are to be kept by certain specified persons. In my opinion, whether they are to be kept with the parish documents by one person or by another, they are equally documents directed by law to be kept with the public books and the like of the parish within section 17 (8) of the Local Government Act, 1894.

Then as to the procedure followed. On this part of the case Mr. Macmorran's first objection is based on section 17 of the Tithe Act, 1846, which provides that in certain cases the quarter sessions may appoint a place for the tithe documents to be kept. The quarter sessions have not made any such order here. By section 28 of the Tithe Act, 1860, the justices have jurisdiction, if the tithe documents were in the possession of any person not legally entitled to them, to order the documents to be deposited in such custody as they thought fit. That was a jurisdiction intended to be used judicially. Obviously, Mr. Lewis was a person "interested in the lands or rent-charge" within that section; but it is said, and with great force, that under the section the jurisdiction of the justices was a discretionary jurisdiction, while the jurisdiction they are now asked to exercise is substantially, under the Local Government Act, 1894, ministerial. That does raise a serious difficulty, but, to my mind, not an insuperable one. In my judgment the Local Government Act, 1894, has changed the jurisdiction of the justices, and they ought to hesitate long before overriding the resolution of the parish council, upheld, as in this case it is, by the order of the county council. At any rate I think that, whether that is so or not, the justices have power to make the order asked for. There remains the subsidiary question, whether the rector was a person not legally entitled to the possession of these documents? The answer to that depends on the question that I have already considered as to the meaning of the provisions of the Act of 1894. If the parish council had power to make directions as to the custody of the tithe map, that changed the right of the incumbent, and it was the person designated by the parish council who then became the person legally entitled to the custody of the documents. For these reasons I am opinion that the justices have certainly jurisdiction to make the order asked for.

KENNEDY, J., concurred.

Appeal allowed. Case remitted, with an intimation of the opinion of the court that the justices had power to make the order asked for.

Solicitors for the appellant, *Attree, Johnson, & Ward*, for *Shield & Mackarness*, Alesford.

Solicitor for the respondent, *W. R. Peterson.*

Q. B. Div. (Lindley, M.R., and Chitty, L.J.) — Nov. 2.

MURPHY v. ARROW. (a.)

Gaming—Betting house—Person found therein—Recognizance—Betting Houses Act, 1853 (16 & 17 *Vict.* c. 119) *s.* 11.

Persons found in a betting house are liable to the same treatment as persons found in a gaming house, and the magistrate has power, in the case of any person found in a betting house who is arrested therein and brought before him in pursuance of the Betting Houses Act, 1853, *s.* 11, *to order such person to enter into recognizances "no more to haunt, play, or exercise from thenceforth" at any gaming house.*

Case stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.

On the 12th of May, 1897, the appellant was brought before the magistrate under a warrant of arrest issued under section 11 of the Betting Houses Act, 1853, and the magistrate thereupon ordered him to be bound in his own recognizance in £20 "no more to play, haunt, or exercise from henceforth" at any gaming house, pursuant to section 14 of 33 Hen. 8, c. 9.

On the 4th of May, 1897, the appellant and eighty-eight other persons were arrested on premises known as the Frascati Club, 32, Gerard-street, Soho. The premises were kept and used as a betting house within section 1 of the Betting Houses Act, 1853. Betting had been going on just prior to the arrest of the appellant, which took place at 3.30 p.m.

All the men arrested were brought before the magistrates on the 5th of May. They were remanded on their own recognizances, and, in the case of nine of them, with two sureties in £10 each, to appear on the 12th of May.

On the 12th of May four of the men were charged with having kept the house for the purpose of betting with persons resorting thereto. Three pleaded guilty and were convicted and fined. The fourth was discharged.

The appellant and the eighty-four other persons applied to be discharged. This the magistrate refused to do, but ordered them to be bound in their own recognizances in £20 "no more to play, haunt, or exercise from thenceforth" at any gaming house.

33 Hen. 8, c. 9, prohibits the playing of certain unlawful games. Section 14 provides as follows: "It shall be lawful to all and every the justices of peace in every shire, mayors, sheriffs, bailiffs, and other head officers within every city, town, and borough within this realm, from time to time, as well within liberties as without, as need and case shall require, to come and enter and resort into all and every houses, places, and alleys where such games shall be suspected to be holden, exercised, used, or occupied contrary to the form of this statute; and as well the keepers of the same, as also the persons there haunting, resorting, and playing, to take, arrest, and imprison, and them so taken and arrested, to keep in prison, unto such time as the keepers and maintainers of the said plays and games have found sureties to the king's use, to be bound by recognizance or otherwise no longer to use, keep, or occupy any such house, play, game, alley, or place; and also that the persons there so found be in like case bound by themselves, or else with sureties by the discretions of the justices, mayors, sheriffs, bailiffs, or other head officers, no more to play, haunt, or

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

exercise from thenceforth in, at, or to any of the said places, or at any of the said games.

The Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 3, empowers justices, &c., to exercise the powers conferred by 33 Hen. 8, c. 9, s. 14, by means of their warrant issued to the police. The form of warrant to be used is given in the schedule and directs the person to whom it is addressed to arrest, search, and bring before the justices as well the keepers of the suspected house as also the persons there haunting, resorting, and playing.

The Betting Houses Act, 1853, s. 1, prohibits any house, office, room, or place from being opened, kept, or used for the purpose of the owner, occupier, or keeper, or persons using the same, betting with persons resorting thereto.

Section 2 provides: "Every house, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming house within the meaning of" the Gaming Act, 1845.

Section 11 provides: "It shall be lawful for any justice of the peace, upon complaint made before him on oath, that there is reason to suspect any house, office, room, or place to be kept or used as a betting-house or office, contrary to this Act, to give authority by special warrant under his hand, when in his discretion he shall think fit, to any constable or police officer to enter with such assistance as may be found necessary into such house, office, room, or place, and if necessary to use force for making such entry, whether by breaking open doors or otherwise, and to arrest, search, and bring before a justice of the peace all such persons found therein, and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises; and any such warrant may be according to the form given in the first schedule annexed to the before-mentioned Act (8 & 9 Vict. c. 109)."

Purcell, for the appellant.—There was no evidence before the magistrate as to the time the appellant had been on the premises, or whether he had been there before, so as to constitute "haunting" and "resorting to" the premises, and there was no evidence that the appellant was doing anything on the premises on the occasion in question so as to constitute "playing." Betting on horse-races is not a game or an unlawful game within 33 Hen. 8, c. 9, s. 14, or within 2 Geo. 2, c. 28, s. 9. Neither of those statutes affect any but persons playing unlawful games. The declaration in the Betting Houses Act, 1853, that betting houses are to be deemed to be gaming houses does not make the Act of 33 Hen. 8, c. 9, s. 14, extend to persons merely betting on horse-races in a house, office, room, or place.

Danckwerts, for the respondent.—It has been the practice of the police courts to treat persons found betting in a betting house in the same manner as persons found playing in a gaming house. That view is supported by Hawkins, J., in *Jenks* v. *Turpin*, 13 Q. B. D., at p. 526, 32 W. R. Dig. 84.

LINDLEY, M.R.—The question is whether the magistrate had power to deal with these persons in the way in which he did, that is, to order them to enter into recognizances, or whether he ought not simply to have let the appellant and the other persons go. That question turns upon the construction of a series of Acts relating to gaming and betting, including 33 Hen. 8, c. 9, s. 14, the Gaming Act, 1845, and the Betting Houses Act, 1853. Reading the sections referred to in these Acts in the inverse order, by section 2 of the Betting Houses Act, 1853, a betting house is to be deemed to be a common gaming house. What would be the conceivable object of saying that a betting house is to be deemed to be a common gaming house, unless, for some purposes, at any rate, people who go there are to be treated as persons going to a common gaming house. Section 11 gives the magistrate power to issue a warrant to enter suspected houses and to arrest persons found therein. The warrant is to be in the form given in the first schedule to the Gaming Act, 1845. Now we have to consider the object of that legislation. First, the houses are gaming houses; secondly, there is power to arrest persons found therein; and then, the warrant is to be in the form given in the previous Act. I pass from that Act to the Gaming Act, 1845. The important sections there are the 3rd and the 6th and the schedule. The 3rd section is this: "That in every case (except within the metropolitan police district) in which the justice of the peace," and so on, "now have by law authority to enter into any house . . . it shall be lawful for any justice of the peace upon complaint made before him on oath . . . if he suspect any house, room, or place to be kept or used as a common gaming-house to give authority, by special warrant, under his hand, when in his discretion he shall think fit, to any constable to enter, with such assistance as may be found necessary, into such house, room, or place in like manner as might have been done by such justices," and so on, "and if necessary to use force for making such entry, whether by breaking open doors or otherwise, and to arrest, search, and bring before a justice of the peace all such persons found therein as might have been arrested therein by such justice of the peace had he been personally present; and all such persons shall be dealt with according to law as if they had been arrested in such house, room, or place by the justice before whom they shall be so brought; and any such warrant may be in the form given in the first schedule to this Act"—*i.e.*, the same form which is referred to in the Betting Houses Act, 1853. The warrant (I leave out all the formal parts of it) authorizes and requires the persons to whom it is addressed "to enter and break open doors if necessary . . . and search and bring before me or some other of the justices . . . as well the keepers of the same as also the persons there haunting, resorting, and playing to be dealt with according to law." Therefore the power given by this section is to arrest persons who are found there—"persons found therein"—and then the warrant says you are to arrest the persons there haunting, resorting, and playing. That evidently has reference to some old Act of Parliament, and the old Act of Parliament is the 33 Hen. 8, c. 9, s. 14, of which is as follows: [reads].

Now, this is the concatenation of sections with which we have to deal, and it appears to me, having regard particularly to the form of the warrant, that the idea of the Legislature is perfectly plain, and that when these people are arrested—and everybody agrees that it is perfectly lawful to arrest persons found there whether they are gaming or not—the house is to be treated as a common gaming house; and the language of the warrant shows plainly that they are to be arrested and treated as if they were persons within the statute of Henry 8. That appears to me to be plain. I do not say they are subject to penalties, but the arrest is for the purpose there mentioned, that is to say, binding them over in recognizances. It appears to me that any other construction gives the go-by to the forcible language of the warrant. The warrant takes the form of the statute, and we are not driven to the farce of saying that by law a lot of persons shall be bound over simply for the purpose of saying that they shall be

bound over. Such a construction, to my mind, would be ridiculous.

CHITTY, L.J.—I agree. The appellant and some other persons were found in a betting house. He and they were arrested and taken before the magistrate. No complaint has been made or could be made that, under the warrant issued under the 11th section of the Betting Houses Act, 1853, this proceeding was not justified. There was no evidence against the appellant except that he was found in the betting house. It is not found that he haunted, or was in the habit going to the place.

His case is that he ought to have been then and there discharged; and, seeing that there was no information laid against him, as was the case with the keeper of the betting house who was engaged in the business of it, it is argued that in the circumstances there was no jurisdiction on the part of the magistrate to order him to enter into the recognizances; but I think there was such jurisdiction.

The Betting Houses Act, 1853, imposes penalties upon those keeping and conducting the business of a betting house, and it is quite true that there is no penalty imposed in the Act upon persons resorting thereto. But the 1st section enacts that a betting house is a common nuisance and contrary to law, and by section 2 a betting house is to be taken and deemed to be a common gaming house within the Gaming Act, 1845. That throws us back on that statute, and from that statute we have to trace the legislation as far back as the time of Henry 8. The Acts are for this purpose *in pari materiâ*; they ought to be construed together, and although possibly the language may not precisely fit, and may be open to some criticism of that nature, yet it seems to me that the intention of the Legislature is reasonably plain. Why is this house declared to be a gaming house within the Gaming Act, 1845? Not for the purpose of the penalties against the keepers and those conducting the business of the house, because that is provided for by the express language of the statute itself. There is some other purpose. It is to bring a betting house within the purview, and to bring the whole case within the reach of, the Act relating to gaming houses. Going back to the Gaming Act, 1845, the language is that persons found in the house may be arrested. Then, referring to the warrant, the warrant is also a matter of very considerable importance, because in its terms it refers back to the statute of Henry 8. The language is language taken from that statute itself. The Legislature seems to have thought that a warrant in that form was applicable to persons found in a gaming house. The statute of Henry 8 empowered the magistrates themselves to enter a gaming house, and to then and there make the arrest of persons found therein, and to bind over the persons so found. I think, putting the statutes together and dealing with them reasonably, the right view as to that which is not now done by the magistrate in person, but is done through the action, as here, of the police acting on a warrant, is that when the matter comes before the magistrate, the magistrate has the same jurisdiction sitting in his court as he had when acting in person under the old statute. I need not refer more particularly to the statute of George 2, which may be passed over.

What could be the object of justifying (which the statute does) the arrest and the taking of the persons resorting to this which we must take to be a gaming house, if the only result were that, unless some charge was preferred against them of being the keepers and conducting the business of the gaming house, they should be then and there discharged? This seems to be a reasonable conclusion, that, putting these Acts together, the result is that the statute of Henry 8 is brought into the Betting Houses Act, 1853, for the purpose of authorizing the magistrate to make such an order as he has made. He has made it in the language of that statute, but I think that the Betting Houses Act, 1853, on a just construction and putting the series of Acts together, gives him the authority to order that the recognizances should be entered into by a person who was found in the place. Upon these grounds I think the magistrate was correct.

Solicitors, *Pattinson & Brewer; Wontner & Sons.*

Q. B. Div.
(Wright and Kennedy, JJ.) } Oct. 27.

DAVIS v. REILLY. (a.)

Bill of exchange—Action on consideration—Bill outstanding—Dishonour.

Where a buyer of goods has given to the seller a bill of exchange for the price, and the seller has indorsed the bill over to a third party, an action for the price of the goods will not lie while the bill is outstanding, although it has been dishonoured, nor can the plaintiff succeed on the ground that he has got in the bill after action brought but before trial.

Appeal by the defendant from the decision of His Honour Judge Lumley Smith, sitting at the Westminster County Court.

The action was brought to recover a sum of £25 11s. 7d., the balance due for goods sold and delivered to the defendant by W. T. Burnley in July, 1896.

On the 4th of October, 1896, the defendant being unable to pay for the goods in full, a bill of exchange for £20 at three months was drawn by Burnley, accepted by the defendant, and handed by him to Burnley. This bill was indorsed over by Burnley to Bullock (to whom Burnley was indebted), and was presented for payment by Bullock on the 4th of January, 1897, and was dishonoured. Bullock then sued Burnley on the bill.

On the 21st of January, 1897, Burnley issued the writ in the present action in the High Court, the bill being still in the hands of Bullock. Shortly afterwards Burnley filed his petition in bankruptcy, and he was on the 3rd of February, 1897, adjudicated bankrupt.

On the 22nd of February Davis was appointed trustee in the bankruptcy. By an order of the county court, to which the present action had been remitted, Davis was added as a plaintiff. Bullock elected to give up the bill to the trustee in Burnley's bankruptcy, and to prove for the debt as an unsecured creditor. The bill thus came to the hands of Davis before the present action came on for trial.

The county court judge gave judgment for the full amount claimed, the bill to be handed over to the defendant on his satisfying the judgment. The defendant appealed as to £20, the part of the debt which was covered by the bill.

Abinger, for the appellant.—This action will not lie. When a debtor gives to his creditor a negotiable instrument in satisfaction of or as security for the debt, the creditor cannot sue for the debt while the instrument is outstanding (although dishonoured) in

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

the hands of a third party. Nor does he make his case any better by getting in the negotiable instrument during the currency of the action: Bullen and Leake's Precedents, 3rd ed., p. 540 *et seq.*; *Price* v. *Price*, 16 M. & W. 232; *National Savings Bank Association* v. *Tranah*, 15 W. R. 1015, L. R. 2 C. P. 556.

Grimwood Mears, for the respondent.—The rights of the creditors are not suspended after the negotiable instrument has been dishonoured. [WRIGHT, J.—But the dishonour does not affect the liability on the bill.] The bill was in the plaintiff's hands at the time of trial, and this is sufficient. The order of the county court judge, that the bill should be given up to the defendant, protects him from being sued on it as well as upon the debt; consequently the reason for the rule relied on no longer applies in this case.

WRIGHT, J.—There are no merits in the appellant's case, but on the point of law I feel bound to agree with his contention. It is settled that where a man is sued upon a debt it is a good defence to say that he has given a bill as security for the debt and that that bill is outstanding in the hands of a third party. When this action was brought the plaintiff was not the holder of the bill, and he cannot by afterwards getting it in give himself a cause of action at the date when he commenced his proceedings. Now that the bill is in his hands it is, of course, open to him to bring a new action; but in the present proceedings I think he must fail. We must, therefore, allow the appeal.

KENNEDY, J.—I agree.

Appeal allowed.

Solicitor for the appellant, *C. E. Kent.*

Solicitor for the respondent, *Japheth Tickle.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 13.

FIELDING & CO. *v.* CORRY. (*a.*)

Bill of exchange—Notice of dishonour—Reasonable time—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 49, *sub-section* 12.

In an action on a bill of exchange it appeared that the holders handed the bill to their bankers, the Cardiff branch of the G. Bank, who sent it to their agents, the L. and W. Bank, to present for payment. The bill having been dishonoured, the L. and W. Bank sent notice of dishonour on the following day to the G. Bank, but addressed it by mistake to the Cirencester branch. On the next morning, having discovered their mistake, they telegraphed notice of dishonour to the Cardiff branch.

Held, by the Court of Appeal (Collins, L.J., *dissenting*), *that, so far as regarded the giving of notice by the L. and W. Bank to their principals, the requirements of section* 49, *sub-section* 12, *of the Bills of Exchange Act*, 1882, *had been complied with.*

Application for judgment in an action tried before Ridley, J., and a jury.

The plaintiffs sued as indorsees and holders of a bill of exchange, dated the 7th of July, 1894, for £120, payable four months after date at the National Provincial Bank of England. One of the defendants, Mrs. Laura Emma Edwards, who was sued as the indorser of the bill to the plaintiffs, pleaded that she had not received due notice of dishonour.

It appeared that the plaintiffs kept their banking account at the Cardiff branch of the County of Gloucester Bank, and they left the bill at that branch in order that it might be sent up to London to be presented for payment. The County of Gloucester Bank forwarded the bill to their agents, the London and Westminster Bank, who duly presented it for payment at the National Provincial Bank of England on Saturday, the 10th of November, 1894. The bill having been dishonoured, the London and Westminster Bank, on Monday, the 12th of November, sent notice of dishonour by post to the County of Gloucester Bank, but by mistake they addressed the notice to the Cirencester branch of that bank, and not to the Cardiff branch. On the morning of the 13th of November, having discovered their mistake, they sent a telegram to the Cardiff branch, giving notice of dishonour. It was admitted that subsequent notices were duly given until notice reached the defendant Mrs. Edwards.

The question was whether the London and Westminster Bank had given notice to their principals in accordance with the requirements of the Bills of Exchange Act, 1882.

Section 49 of the Bills of Exchange Act, which deals with notice of dishonour, enacts as follows: "(12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. In the absence of special circumstances notice is not deemed to have been given within a reasonable time unless . . . (*b*) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter. (13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder."

At the trial of the action a verdict and judgment were entered for the plaintiffs.

The defendant appealed.

Woodfin, for the defendant.

Ashton Cross and *R. Edmondson*, for the plaintiffs.

A. L. SMITH, L.J.—It is said on behalf of the defendant that, though she received notice of dishonour within the time required by the statute, she is entitled to rely on a failure to comply with the statute in respect of any one of the links in the chain of notices, and that there is a blot in the plaintiff's case in that notice was not given on the 12th of November as required by the statute. A notice was given on that day, and it was given to the right persons, but it was directed to a wrong address. Section 49 of the Bills of Exchange Act, 1882, contains the rules as to notice of dishonour. Sub-sections 5, 6, and 7 show that a notice of dishonour need not be in any special form or in writing at all, and that an insufficient written notice may be supplemented and validated by verbal communication. Then sub-section 12 says that the notice must be given within a reasonable time after dishonour, and proceeds to say that in the absence of special circumstances (which do not exist here) notice is not to be deemed

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

to have been given within a reasonable time unless, where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day. Here the person to give notice was the London and Westminster Bank, and the person to receive notice was the County of Gloucester Bank, and of course it must be taken that there was a convenient post on the 12th of November, the day after the dishonour of the bill. The London and Westminster Bank gave notice to the County of Gloucester Bank on that day, but they addressed the notice to the Cirencester branch, and not to the Cardiff branch. On the following morning, having found out their error, they telegraphed notice of dishonour to the Cardiff branch, and this must have been received as soon as a letter posted on the previous evening would have been received. I cannot disjoin these two acts; I think that they ought to be treated as forming one continuing act, and that, inasmuch as the object of the statute has been satisfied, the judgment of Ridley, J., ought to stand.

RIGBY, L.J.—I am of the same opinion. The question seems to me to be one of substance rather than of form. If the Act said the address was an essential part of the notice, other considerations would arise. But I think that the real question is, whether the notice came to the knowledge of the person to whom it was addressed. If putting a wrong address does not prevent the notice arriving in proper time, I do not think it can be said that there has been a failure to comply with the Act. The County of Gloucester Bank sent the bill through their Cardiff officers to the London and Westminster Bank to present for payment. The bill having been dishonoured, the London and Westminster Bank sent notice to their principals on the following day, but they wrongly addressed it to Cirencester, and the next morning they corrected their mistake by telegraphing to Cardiff. I think it is clear that the County of Gloucester Bank received notice within the time intended by the Act. I say nothing about the case in which putting a wrong address might lead to delay.

COLLINS, L.J.—I differ from my learned brothers on one point, and I do so with great diffidence. The point is this—Are different branches of a bank to be treated as one and the same person or as different persons for the purpose of receiving notice of dishonour of a bill of exchange? I think they ought to be treated as different persons. In this case the Cardiff branch of the County of Gloucester Bank forwarded the bill of exchange to their agents, the London and Westminster Bank. In my judgment the true view of the case is that the relationship of principal and agent was entablished between the Cardiff branch of the County of Gloucester Bank and the London and Westminster Bank. I do not think that the principals were the County of Gloucester Bank as a single institution. Therefore, when the London and Westminster Bank sent notice to the Cirencester branch on the 12th of November, they sent notice to persons who were not their principals. I find very strong authority for so holding in *Clode* v. *Bayley*, 12 M. & W. 51, and *Prince* v. *Oriental Bank Corporation*, 26 W. R. 543, 3 App. Cas. 325. It is said that the mistake was cured by the telegram. But admittedly the telegram was not sent within the time mentioned in the statute, and therefore was not a good notice in itself. And in my opinion it cannot have the effect of supplementing the wrong notice sent on the previous day.

Appeal dismissed.

Solicitors for the plaintiffs, *Windybank, Samuell, & Behrend.*

Solicitor for the defendant, *G. J. Brocklesby.*

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 4.

BARING v. COMMISSIONERS OF INLAND REVENUE. (a.)

Inland revenue—Stamp duty—Foreign security issued in the United Kingdom—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-section* 1 (b) (i).

The appellant was the holder of one of a series of bonds given by a newly-formed American company in exchange for bonds in an old company which was being wound up under a reorganization scheme. It was stated on the bond that it should not be valid for any purpose unless authenticated by the trustee's certificate thereon indorsed. The bond was executed by the new company in the United States and delivered to a trust company, which was to act as trustee. The trust company did not immediately sign the certificates on the bonds which were destined for England; but, in order to avoid a heavy premium for insurance, forwarded the bonds unsigned, and at the same time sent over an official to sign the certificates in London. The appellant's bond was handed to him in London after the certificate had been so signed.

Held, that the bond was issued in the United Kingdom within the meaning of section 82, *sub-section* 1 (b) (i), *of the Stamp Act,* 1891.

Appeal from the judgment of a Divisional Court (Wright and Ridley, JJ.) on a special case stated by the Commissioners of Inland Revenue under section 13 of the Stamp Act, 1891.

The instrument upon which the commissioners were required to express their opinion was a bond unregistered whereby the Atchison, Topeka, and Santa Fé Railway Co., a corporation organized under the laws of Kansas (hereinafter called the new company), promised to pay to bearer, or if the bond should be registered as thereinafter provided, to the registered holder thereof, the sum of 1,000 dollars. It was recited that the bond was one of a series issued in pursuance of and secured by a mortgage or deed of trust dated the 12th of December, 1895, executed by the new company to the Union Trust Co. of New York as trustee. The following clause appeared on the face of the bond: "This bond shall not be valid for any purpose unless authenticated by the certificate hereon endorsed of the trustee under said mortgage or deed of trust." The endorsed certificate, as it appeared when the instrument was before the commissioners, was as follows: "Trustee's certificate. Union Trust Co. of New York hereby certifies that this is one of the series of general mortgage 4 per cent. 100-year gold bonds described in the within-mentioned mortgage or deed of trust dated December 12th, 1895. Union Trust Co., of New York, trustee, by E. H. Merritt, vice-president."

The Atchison, Topeka, and Santa Fé Railroad Co. (hereinafter called the old company) was a company incorporated under the laws of Kansas in the year 1859. It had issued a number of mortgage bonds payable to bearer, which were held by various bondholders in America and Europe. In 1895 the old company being in arrear in payment of the interest on their bonds, a scheme of reorganization was proposed, under which the old company was to be wound

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

up and its property vested in a new company. The bondholders who assented to the scheme were to deposit their securities with certain firms, who were styled depositaries, and to receive in exchange a certificate of deposit. By making such deposit each depositor became a party to the scheme, and was to be entitled, when the proper time arrived, to receive in exchange for his certificate of deposit securities in the new company as provided for in the scheme. Messrs. Baring Brothers & Co. were named as the depositaries of bonds for London, and agreed to act as such.

In pursuance of the scheme the new company shortly after April, 1896, executed in the United States a number of bonds, one of which was the bond in question, and delivered them to the Union Trust Co. in New York. At the time when the bonds were so delivered, each had endorsed thereon the trustee's certificate above set out, but such certificate was not then signed. The Trust Co., in further pursuance of the scheme, forwarded a number of the bonds to each of the depositaries in Europe. The Trust Co. were to countersign the bonds before forwarding them, but it was found that the premium to be paid for the insurance of the bonds on their transmission to London would be so heavy that it was arranged that the vice-president of the Trust Co. should proceed to London and countersign them there, and this was accordingly done in the case of all the bonds sent to Baring Brothers & Co., including the bond now in question, the vice-president signing each bond by adding the words "Union Trust Co. of New York, trustee, by E. H. Merritt, vice-president." The bond in question was subsequently delivered by Baring Brothers & Co. to the appellant, the Hon. John Baring, at their office in London in exchange for a certificate of deposit issued by them of which he was then the holder.

The question was whether the bond was issued in the United Kingdom within the meaning of section 82, sub-section 1 (*b*) (*i*) of the Stamp Act, 1891.

The commissioners were of opinion that it was issued in the United Kingdom, and they assessed duty at the rate of one shilling for every £10, but they stated this case on the requisition of the appellant.

The Divisional Court affirmed the decision of the commissioners.

The appellant appealed to the Court of Appeal.

Cohen, Q.C., and *R. M. Bray*, for the appellant.

Sir R. B. Finlay, S.G., and *Danckwerts*, for the Crown.

A. L. SMITH, L.J.—I am of opinion that this appeal should be dismissed. There was a company called the Atchison, Topeka, and Santa Fé Railroad Co., incorporated under the laws of Kansas. In 1895, this company having apparently got into difficulties, a scheme of reorganization was carried out, under which the old company was to be wound up and a new company was to come into existence in its place, the holders of stock and bonds in the old company becoming holders of stock and bonds in the new company. The new company accordingly issued bonds, the form of which is material. By each of them the new company promises to pay to bearer a thousand dollars, and there is an express stipulation on the bond that it shall not be valid for any purpose unless authenticated by the certificate thereon endorsed of the trustee under the mortgage or deed of trust by which it is secured. This certificate, which was to be endorsed upon the bond in order that it might be valid for any purpose, is as follows: "Trustee's certificate. Union Trust Co. of New York hereby certifies that this is one of the series of general mortgage 4 per cent. 100 year gold bonds described in the within-mentioned mortgage or deed of trust dated December 12th, 1895. Union Trust Co. of New York, trustee, by E. H. Merritt, vice-president." Now, that instrument, as it seems to me, is upon its face clearly not a bond at all; it is a mere piece of paper until this certificate has been signed by Mr. Merritt. It was brought into existence as a piece of paper in New York, and in order to avoid the high premium which would have been payable for the insurance of a complete and valid bond during its transit between New York and this country, the parties let it remain an inchoate instrument, and sent it over to this country as an inchoate instrument, and not as a bond at all, and they sent Mr. Merritt over to this country to convert it into a bond when he arrived here. It was so converted in the City of London when Mr. Merritt signed the certificate endorsed upon it in Messrs. Baring's office. Having signed the certificate, Mr. Merritt handed the bond over to Messrs. Baring, who handed it to Mr. John Baring, an old bondholder. The question arises, Where was that bond issued? It was not issued in New York when the piece of paper was given to the Union Trust Co. The piece of paper was handed to the Union Trust Co., but it cannot be said that it was issued. A document is not issued within the meaning of the Stamp Act, 1891, until it becomes an actual valid subsisting document. In my judgment this document was first issued when the certificate endorsed on it was signed by Mr. Merritt, which took place in this country. Until that moment the document had no more validity than if it had been a piece of blank paper. In my opinion this bond was issued in London, and when the certificate was signed it then and there became a marketable security, which it was not before. It is, therefore, a marketable security issued in the United Kingdom, and it is liable to stamp duty of a shilling on every £10. The judgment of the Divisional Court must be affirmed.

RIGBY, L.J.—I am of the same opinion. The sole question is whether this instrument which came into the appellant's hands as the person entitled to it under the scheme was or was not issued in the United Kingdom. I cannot entertain a doubt about it. A document is not issued, if it is sealed and put into a box and kept there, nor if it is handed over to an agent with instructions only to part with it on receiving some consideration for it. A document is issued when it gets into the hands of a person who can make it useful. I think that this is the ordinary meaning of the word "issue," and that it is its meaning in the Stamp Act, 1891. During the transit of these documents from New York to London, and down to the moment when the certificate endorsed upon them was signed, no one could have sued upon them or taken advantage of them. When the certificate was signed, and they became complete instruments, and when they were handed over to the persons entitled to them, then, and not till then, they were issued. But it is said that we ought to construe the Act as though it said "issued on behalf of the company." I do not think that that is the true construction of the Act, but assuming that it is, in my judgment this bond was issued on behalf of the company. It was so issued in the ordinary business sense. If a person purchases property and hands the money to an agent telling him to pay the money to the vendor to get the property, that would be a payment on behalf of the purchaser. With regard to *Grenfell* v. *Commissioners of Inland Revenue*, 24 W. R. 582, 1 Ex. D. 242, I think that the judgment

of Pollock, B., in that case involves the decision which we are arriving at here. There must be an instrument handed over under circumstances which give a right of action. In my opinion, in the present case there was no issue of this bond in New York, but there was an issue at the time when the instrument, being then a perfect instrument, was handed over to the appellant in London. The issue, therefore, was in the United Kingdom, and the case comes within the Stamp Act.

COLLINS, L.J.—I am of the same opinion. The question is whether this bond is a marketable security by, or on behalf of, a foreign company made or issued in the United Kingdom. The appellant contends that there was no issue in the United Kingdom, because there could be only one issue of the instrument, and that issue took place in New York. He further contends that, if there was an issue of a marketable security in the United Kingdom, the issue was not by or on behalf of the foreign company. I think that the grounds upon which I rest my judgment dispose of both points simultaneously. A scheme was arranged by which a new company was to take over the effects of an old company, and to give the bondholders in the old company its own bonds in substitution for their existing bonds. That involved certain machinery. It was necessary that the titles of the persons claiming as bondholders should be verified, and that no bonds of the new company should be handed over unless the new company was satisfied that the persons to whom they were being handed over had a proper claim to them. Accordingly forms of bonds were prepared by the new company, and on their face they bore a clause providing that they were not to be valid for any purpose unless authenticated by the certificate endorsed thereon. These instruments were delivered in New York with the intention that they should be so authenticated and then issued to the persons entitled to them. That was the scheme; where was it carried out? The document came into existence in an inchoate form in New York; but the company, owing to a difficulty about insurance, took steps to make it certain that it should not be deemed to be issued until it reached England. They sent it over to this country, and at the same time they sent over the trustee who was to sign the certificate; and, after the document had received authentication by his signing the certificate, it was handed by Messrs. Baring to the appellant. Was that an issue in England? It seems to have all the elements of an issue in England, and to have been done in pursuance of the general scheme. Although no doubt the trustees were, in a sense, the mandatories of the persons to whom the documents were to be handed over, their action was part and parcel of the general scheme which dealt with the operation as a whole, and they were merely conduit pipes by means of which this instrument was delivered on behalf of the company to the person entitled to receive it. In my judgment, therefore, the issue took place in the United Kingdom, and it was an issue on behalf of the company.

Appeal dismissed.

Solicitors for the appellant, *Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov 2.

MAYOR, &c., OF ASHTON-UNDER-LYNE *v.* PUGH. (*a.*)

Local government — Public health — Local statute — Implied repeal of special by general Act — Paving expenses in street—Highway repairable by inhabitants at large—Liability of frontagers—Ashton-under-Lyne Improvement Act, 1849 (12 & 13 *Vict. c. xxxv.*), *s.* 20 —*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 149, 150, 340.

Under a local Act passed in 1849, *if any street, whether repairable by the inhabitants at large or not, was not sewered, levelled, paved, and otherwise completed to the satisfaction of the urban authority, the latter might order the frontagers to execute the necessary works, and, upon the frontagers making default, might themselves execute the works and apportion the expenses among the frontagers.*

By section 149 *of the Public Health Act,* 1875, *all streets repairable by the inhabitants at large within any urban district were vested in the urban authority, who were bound to cause them to be levelled, paved, altered, and repaired as occasion might require. By section* 150 *the urban authority had power, in the case of streets not repairable by the inhabitants at large, to charge the expenses of sewering and paving them upon the frontagers.*

Held, that there was nothing in the Public Health Act, 1875, *which showed an intention to repeal the above provision of the local Act, and that, therefore, the urban authority could, under that section, charge the frontagers with the expenses of sewering, paving, and otherwise completing a street repairable by the inhabitants at large.*

Appeal from the judgment of the Queen's Bench Division (Grantham and Wright, JJ.) on a special case.

The defendant was the owner of land and buildings abutting upon a street, called Mossley-road, which was within the borough of Ashton-under-Lyne, and the action was brought to recover from the defendant as such owner the amount apportioned as his share of the expenses incurred by the plaintiffs, as the urban sanitary authority, in paving, levelling, flagging, and otherwise completing the street.

Mossley-road was a public highway repairable by the inhabitants at large, and the plaintiffs claimed power to execute the works and charge the frontagers with the expenses thereof under section 20 of the Ashton-under-Lyne Improvement Act, 1849 (12 & 13 Vict. c. xxxv.).

By section 20 of that Act: "If any street or part of a street, whether the same be a public highway* or not, and whether the same be already or shall at any time hereafter be laid out and opened to the public within the said borough, be not or shall not be sufficiently sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the mayor, aldermen, and burgesses," the corporation may order such street to be sewered, &c., according to such plan as they shall direct, and thereupon the respective owners of the buildings and lands alongside of or adjoining to such street shall, at their expense, doing the works so far as the same extends along their buildings and lands; and in default of the owners do the works, the corporation may do them, and recover the expenses from the said owners.

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* The court held, upon the construction of this section, that the words "public highway" meant a public highway whether repairable by the inhabitants at large or not.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

By section 24, when a street shall have been so sewered, &c., the corporation are to certify and declare the same to be a public highway, and it shall be for ever afterwards repairable out of the highway rate.

Mossley-road was not certified or declared a public highway until after the works in question had been completed.

By section 13 of the Ashton-under-Lyne Improvement Act, 1877 (40 & 41 Vict. c. clxxi.), section 20 of the Act of 1849 was amended in a manner not material to set out for the purposes of this report.

Mossley-road, not being paved, flagged, and completed to the satisfaction of the plaintiffs, they ordered the work to be done, and gave the defendant and the other frontagers notice of the order and required them to do the work in the parts of the street fronting their respective premises. As the frontagers did not do the work, the plaintiffs did it, and apportioned the expenses among them. The present action was brought to recover such apportioned expenses from the defendant as a frontager, the plaintiffs contending that the defendant was liable for the expenses so incurred under section 20 of the Ashton-under-Lyne Improvement Act, 1849.

The defendants contended (so far as material to this report) that section 20 of the Act of 1849, so far as it applied to highways repairable by the inhabitants at large, was inconsistent with and repealed by section 149 of the Public Health Act, 1875.

The Divisional Court gave judgment for the defendant.*

The plaintiffs appealed.

Sir R. T. Reid, Q.C., and *W. Graham*, for the plaintiffs.

Macmorran, Q.C., and *R. Cunningham Glen*, for the defendant.

A. L. SMITH, L.J.—In this case it is contended that section 20 of the Ashton-under-Lyne Improvement Act, 1849, was impliedly repealed by the provisions of the Public Health Act, 1875. The latter Act is a general Act, while the former is a local Act. The passage which has been read from Maxwell on the Interpretation of Statutes, 3rd ed., p. 243, shows that a general Act is not to be construed as repealing a special Act, unless that intention is manifested in clear terms. In *London and Blackwall Railway Co. v. Limehouse District Board of Works*, 5 W. R. 64, 3 K. & J. 123, Wood, V.C., said: "The Legislature, in passing a special Act, has entirely in its consideration some special power which is to be delegated to the body applying for the Act on public grounds; and the preamble of every statute of this kind contains a recital of its being for the public convenience that the particular powers should be granted. When a general Act is subsequently passed, it seems to be a necessary inference that the Legislature does not intend thereby to regulate all cases not specially brought before it; but, looking to the general advantage of the community, without reference to particular cases, it gives large and general powers, which in their generality might, except for this very wholesome rule of interpreting statutes, override the powers which, upon consideration of the particular case, the Legislature had before conferred by the special Act for the benefit of the public." The Vice-Chancellor there gave his reasons for holding that a general Act should not be held to repeal a previous special Act. The same principle was laid down in *Thorpe* v. *Adams*, 19 W. R. 352, L. R. 6 C. P. 125, and in the other cases cited in Maxwell. I cannot see any intention in the Public Health Act, 1875, to repeal section 20 of the local Act of 1849. There is a further circumstance in this case which tends to show that the Legislature did not intend to repeal the provisions in the local Act of 1849. Sections 340 and 341 of the Public Health Act, 1875, clearly express the intention of the Legislature in passing the general Act that the local Act should remain untouched, and that the powers conferred by the local Act should still remain in force and unaffected. In my opinion, therefore, the judgment must be reversed.

RIGBY, L.J.—I am of the same opinion. The Public Health Act, 1875, is a general Act containing general provisions, which, according to the ordinary rule as to the construction of statutes, are not to be taken as repealing a special Act containing contrary provisions unless an intention is shown to repeal it. When I look at the Act of 1875 I find nothing to warrant the argument that it repeals the local Act. Section 149 of the Act of 1875 imposes upon the local authority the duty of doing certain work, and it follows that, if they cannot impose the expenses of doing the work upon anyone, they must pay for it themselves. By section 20 of the local Act of 1849, the expense of doing that work is imposed on the frontagers. The Legislature never intended that the local authority should lose their rights under their local Act. Then, coming to sections 340, 341, it is clear that local Acts are not dealt with or affected by the general Act of 1875. The local authority are left by those sections to take proceedings under the local or general Act, whichever they may prefer. Section 340, so far from showing any intention that the local Act should be repealed, plainly shows an intention to preserve the rights given by it. It means that if the local Act contains provisions similar to those contained in the Public Health Act, 1875, the local authority may take proceedings either under the local Act or the general Act, with this proviso, that the local authority cannot set up the local Act to get rid of their obligations under the general Act. Section 341 seems to have been added for the same purpose, and to have been inserted *ex majori cautela*. The appeal must be allowed.

COLLINS, L.J.—The question is, are the frontagers still under the obligations imposed upon them by section 20 of the local Act of 1849 to pay for certain structural alterations in sewering, draining, &c., the street. Has section 20 been impliedly repealed by the Public Health Act, 1875? I can only say that I entirely agree with what has been said by the other members of the court. The case falls within the general rule stated by A. L. Smith, L.J., as to special Acts not being affected by general Acts. To make the matter still more clear, it seems to me that the express words of sections 340, 341 of the Act of 1875 show that the intention of the Legislature was not to repeal the local Act.

Solicitors for the plaintiffs, *Sharpe, Parker, & Co.*, for *C. Gartside*, Ashton-under-Lyne.

Solicitors for the defendant, *Bower, Cotton, & Bower*, for *H. G. Holl*, Ashton-under-Lyne.

* By section 340 of the Public Health Act, 1875, "Where within the district of a local authority any local Act is in force providing for purposes the same as or similar to the purposes of this Act, proceedings may be instituted at the discretion of the authority or person instituting the same, either under the local Act or this Act, or under both, subject to these qualifications: . . . (2) That the local authority shall not, by reason of any local Act in force within their district, be exempted from the performance of any duty or obligation to which they may be subject under this Act."

From Chan. Div. (Lindley, M.R., and Lord Ludlow and Chitty, L.JJ.) — Aug. 6, 7, 9, 10; Oct. 30.

London Freehold and Leasehold Property Co. v. Baron Suffield. (a.)

Deed—Escrow—Delivery to stranger, whether necessary to make deed an escrow—Misappropriation of consideration money by person who is agent of both parties—Money never received by grantor—Failure of consideration.

A deed, though delivered to a person who is one of the grantees, may, if such was the intention of the parties, be an escrow in his hands, and evidence is admissible to show upon what terms it was delivered.

A mortgage deed, duly executed and delivered to the mortgagee's solicitor, cannot be impeached in equity on the ground that such solicitor, who acted also in the capacity of banker as well as solicitor for the mortgagor and had authority to receive the mortgage money, becomes bankrupt without paying it to the mortgagor.

Wall *v.* Cockerell, 11 *W. R.* 442, 9 *Jur. N. S.* 447, *and* Coupe *v.* Collyer, 62 *L. T. Rep.* 927, 38 *W. R. Dig.* 133, *distinguished.*

Decision of Kekewich, J., *affirmed.*

Appeal by the plaintiff company from Kekewich, J.

Wynne & Son, solicitors, were the solicitors of the plaintiff company, and also its salaried managers and its bankers. Llewellyn Malcolm Wynne, one of the partners in the firm, was the managing director of the company.

L. M. Wynne was also one of the trustees of a settlement called Arthur's settlement, the continuing trustees of which were the defendants to the action, and Wynne & Son were the solicitors to the trustees.

In May, 1892, Wynne & Son, as the trustees' solicitors, received a sum of £9,500, which they paid into Child's Bank to the credit of their own account there. This sum was to be reinvested in the names of the trustees, and one at least of the trustees knew that it was in Wynne & Son's hands for reinvestment.

The plaintiff company had borrowed on mortgage at 5 per cent. sums amounting to over £9,000. Wynne, about this time, suggested that the money might be got at a lower rate, and the directors adopted his view. All the arrangements for raising the money to pay off the existing mortgages were left to Wynne.

At a meeting held on the 22nd of June, 1893, the directors resolved that a mortgage of certain property to the defendants to secure a sum of £9,000 should be sealed with the company's seal, and accordingly it was sealed, and was signed by two of the directors and the secretary. The date of the document and the days for payment were then blank, and the days for payment were never filled in. The document was given to or left with Wynne.

The plaintiff company never received any part of the £9,000, which was misappropriated by Wynne.

In March, 1895, Wynne became bankrupt.

The plaintiff company then brought this action, claiming to have the deed set aside.

The defendants contended that it had been delivered to Wynne, as their solicitor, and was a valid security in their favour.

Kekewich, J., gave judgment for the defendants, and the plaintiff company appealed.

Bramwell Davis, Q.C., and *H. C. Hawkins*, for the appeal.—The deed was delivered only as an escrow: *Watkins* v. *Nash*, 23 W. R. 647, L. R. 20 Eq. 262. The principle of *Wall* v. *Cockerell*, 11 W. R. 442, 9 Jur. N. S. 447, covers this case.

They also cited *Gordon* v. *James*, 34 W. R. 217, 30 Ch. D. 249; *In re Stenning, Wood* v. *Stenning*, [1895] 2 Ch. 433, 43 W. R. Dig. 9; *Coupe* v. *Collyer*, 62 L. T. Rep. 927, 38 W. R. Dig. 133; *Millership* v. *Brookes*, 5 H. & N. 797, 9 W. R. C. L. Dig. 32; *Wrout* v. *Dawes*, 25 Beav. 369, 6 W. R. Ch. Dig. 96; *Ex parte Swinbanks, In re Shanks*, 27 W. R. 898, 11 Ch. D. 525; *Lloyd's Bank* v. *Bullock*, 44 W. R. 633, [1896] 2 Ch. 192; *Kennedy* v. *Green*, 3 My. & K. 699; and *Murray* v. *Earl of Stair*, 2 B. & C. 82.

Renshaw, Q.C., and *P. O. Lawrence, Q.C.* (*Daniel Jones* with them), for the defendants.—A deed which is handed to one of the parties cannot be an escrow: Co. Lit., 36*a*; Shep. Touch., 58, 59. Here, moreover, there was no condition attached to the delivery, and the deed was complete when delivered, the blanks in it being quite unimportant. [Lindley, M.R., referred to *Hawksland* v. *Gatchel*, Cro. Eliz. 835. Lord Ludlow, L.J., referred to *Morice* v. *Leigh*, 1 Dyer 34*b*.]

Bramwell Davis, Q.C., replied.

F. Whinney, for Wynne's trustee in bankruptcy (who was not a party to the appeal).

Cur. adv. vult.

The judgment of the court was delivered by

Lindley, M.R., who, after stating the facts, proceeded: The plaintiff company seek to set aside this £9,000 mortgage on the following grounds—viz., first, on the legal ground that the mortgage never was executed as a deed, but was only an escrow; secondly, on the equitable ground that the mortgagees never gave and that the company never got the consideration for which the mortgage was given. As regards the invalidity of the mortgage as a deed, it is urged that, although sealed, the mortgage was handed to Wynne, not as one of the mortgagees nor as solicitor to the mortgagees, but as solicitor to the plaintiff company, to be delivered to the mortgagees or to be kept by him as their solicitor only when the £9,000, or at least some of it, reached the plaintiff company or was applied in paying off the other mortgagees which the company had arranged to pay off. Kekewich, J., decided this point against the plaintiff company. We take the same view. We are not prepared to go so far as to say that, as Wynne was himself one of the mortgagees and a party to the deed, it could not in point of law be an escrow in his hands. Counsel for the defendants contended that, owing to the mere fact that Wynne was himself one of the mortgagees, the delivery of the deed to him was fatal to its being an escrow. They contended that to be an escrow the deed must be delivered to some person not a party taking under it; in short, to a stranger. In support of this contention reliance was placed on Co. Lit., 31, 36; Shep. Touchstone, 65; and *Whyddon's case*, Cro. Eliz. 520. No doubt the language used in the authorities referred to, and reproduced in other works on real property and conveyancing, is in favour of this contention. But the language is very general, and we are not at all satisfied that the law is so rigid as to compel the court to decide that where there are several grantees, and one of them is also solicitor of the grantor and of the other grantees, and the deed is delivered to him, evidence is not admissible to show the character in which and the terms upon which the deed was so delivered to him. To exclude such evidence appears to us unreasonable; and we do not think we are compelled by authority to exclude it. We hold such

(a.) Reported by R. C. Mackenzie, Esq., Barrister-at-Law.

evidence to be admissible, and in so doing we believe we are acting in accordance with modern authorities, including particularly those beginning with *Murray* v. *Lord Stair* and ending with *Watkins* v. *Nash*. Upon the evidence, however, we come to the conclusion that the mortgage was a complete deed, and that it was given as such, to Wynne in order to enable him to carry out the arrangements to which we have before alluded, and to carry them out as he thought proper.

There remains the more difficult question whether the deed, being good at law, can be impeached in equity. The mere fact that no cash passed when the deed was executed is not enough to invalidate it. The directors knew perfectly well that no cash passed. They were not informed how Wynne intended to carry out the arrangement, but they left him to carry it out as he thought best. It is contended that he had no authority to receive the £9,000 except in cash; but he had the cash from the trustees for investment. Whether the plaintiff company got it from him is another matter. If the credit entry of the 1st of June, 1893, is a trustworthy entry made by Wynne & Son, who had the trustees' money to invest, and who were the plaintiff company's managers and bankers, the entry will represent a real transaction between the plaintiff company on the one side, and the Arthur trustees on the other; for Wynne & Son, as the managers and bankers of the company, had implied authority from the company to place to their credit any money placed in Wynne & Son's hands for the company or directed to be paid to the company; and Wynne & Son had ample authority from the Arthur trustees to deal with their money in Wynne & Son's hands by debiting them with it and carrying the amount to the credit of anyone who banked with Wynne & Son and who gave a proper mortgage for it. We have come to the conclusion that the credit entry was made to represent a real transaction, and that if it had been known and questioned at the time no one would ever have complained of it as in any way irregular or improper. But when Wynne & Son became bankrupt, and it was discovered that they had not carried out the arrangements which were contemplated, the plaintiff company very naturally quarrelled with every step in the transaction.

But the case does not by any means depend solely on the foregoing considerations. As between the plaintiff company on the one side and the Arthur trustees on the other, the plaintiff company have, in our opinion, no equitable right to set aside the mortgage. The plaintiff company have, in our opinion, enabled their managers and bankers to make representations to the mortgagees that their money was invested on the security of property belonging to the plaintiff company. Such representation has been made; the mortgagees had every reason for believing it to be true, they did believe it to be true, and they acted on that belief by ceasing to inquire after their money. They were not bound to make any further inquiry. Had they done so it is obvious that the deed would have been produced to them. These circumstances turn the scale against the plaintiff company, and distinguish this case from *Wall* v. *Cockerell*, which was so much relied upon by the counsel for the appellants. In *Wall* v. *Cockerell* there was no authority to borrow on the security of the impeached deed; there was no relation of banker and manager on the one side and customer on the other; there was no money of the mortgagees in the hands of the agent of the mortgagor; there was no credit in account. Moreover, the mortgagor was induced to execute the mortgage by misrepresentation. Lord Chelmsford distinctly said so, and Lord Westbury merely said it was not necessary to put the case so high. In *Coupe* v. *Collyer* the impeached deed was held to be only an escrow; there was no relation of banker and customer; and the mortgagees never placed money in the hands of the mortgagor's solicitor for investment. On these grounds we are of opinion that the decision appealed from was correct.

We have purposely abstained from saying anything about notice to either party through Wynne of what he did or knew. The case turns on the facts and not on any doctrine of notice. The appeal must be dismissed with costs.

Lord LUDLOW having agreed to this judgment before his retirement, it can be passed and entered as the judgment of the court which heard the case, and be dated August 10.

Appeal dismissed.

Solicitors, *Davidson & Morriss; Lawrence, Graham, & Co.; Hasties.*

App. Bankruptcy.
(A. L. Smith, Rigby, and Collins, L.JJ.) — Oct. 29.

In re CLARK.
Ex parte CLARK. (*a*.)

Bankruptcy—Judgment debtor—Foreign subject—Application for committal—Receiving order—Jurisdiction of court—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 6, 103, *sub-section* 5.

In the case of an application under section 5 *of the Debtors Act*, 1869, *for the committal of a foreign subject domiciled abroad, and who, within a year before the application, has not ordinarily resided in England or had a dwelling-house or place of business therein, the court has jurisdiction, under section* 103, *sub-section* 5 (d), *of the Bankruptcy Act*, 1883, *if it think fit, to decline to commit, and in lieu thereof, with the consent of the judgment creditor, to make a receiving order against the debtor.*

This was an appeal by the debtor, Matteo Clark, against a receiving order made against him by Day, J., on the 9th of August, 1894, under section 103, sub-section 5, of the Bankruptcy Act, 1883, upon an application by a judgment creditor, under section 5 of the Debtors Act, 1869, for the committal of the debtor.

The debtor was a member of a firm of Clark & Co., which carried on business as railway contractors at Buenos Ayres and in London. On the 11th of May, 1897, Messrs. Schultze & Co. recovered judgment against the debtor for £2,500, on a bill of exchange drawn up by the Buenos Ayres firm and accepted by the London firm. Being unable to obtain payment of the debt, Schultze & Co. took out a judgment summons against the debtor, and at the hearing of the summons Day, J., came to the conclusion on the evidence that the debtor had, since the date of the judgment, had the means of paying the debt, and that there was therefore a case for committal; but in the exercise of his discretion the learned judge made a receiving order in lieu of committal under section 103 (5) of the Bankruptcy Act, 1883. It was admitted that Clark was not at the date of such receiving order domiciled in England, or had within a year previous to it resided or had a dwelling-house or place of business in

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

England within the meaning of section 6 (1) (*d*) of the Bankruptcy Act, 1883.

The debtor appealed on the ground that he was not subject to the jurisdiction of the Court of Bankruptcy, and that the learned judge had no jurisdiction to make the receiving order.

Section 103 (5) of the Bankruptcy Act, 1883, is as follows: "Where under section 5 of the Debtors Act, 1869, application is made by a judgment creditor to the court having bankruptcy jurisdiction for the committal of a judgment debtor, the court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case, the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made."

Section 6 (1) (*d*) of the Bankruptcy Act, 1883, is as follows: "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . (*d*) The debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England."

Muir Mackenzie, for the appellant.—The debtor being a foreign subject, and not having ordinarily resided or had a dwelling-house or place of business in England within a year before the date of the application, the judge had no jurisdiction to make a receiving order against him. In *Ex parte Blain, In re Sawers*, 28 W. R. 334, 12 Ch. D. 522, it was held that the Court of Bankruptcy has no jurisdiction to make an adjudication of bankruptcy against a foreigner domiciled and resident abroad. This principle was recognized by the Court of Appeal in *In re Pearson*, 40 W. R. 532, [1892] 2 Q. B. 263. That is the broad principle of the law as contained in section 6, sub-section 1 (*d*), of the Bankruptcy Act, 1883; and section 103, sub-section 5, of that Act, which gives power to the court to make a receiving order in lieu of a committal order must be read subject to it. Even assuming that there was jurisdiction to commit, there was no jurisdiction to make a receiving order. In a previous case against the present debtor, *In re Clark. Ex parte Beyer, Peacock, & Co.*, 45 W. R. 118, [1896] 2 Q. B. 476, the issue of a bankruptcy notice and its service upon the debtor was held to be good, but no petition was presented, as there was no jurisdiction to do so.

Reed, Q.C., and *Hansell*, for the respondent, were not called upon.

A. L. SMITH, L.J.—I think this appeal must be dismissed. It is an appeal asking us to set aside a receiving order which has been made against one Matteo Clark, who formerly carried on business as a railway contractor in Buenos Ayres and London. In December, 1895, the execution creditor issued a writ against Matteo Clark on a bill of exchange. On the 11th of May, 1897, judgment was obtained for £2,500. On the 7th of July the debtor, not having satisfied the judgment, was served with a judgment summons asking for a committal order. Day, J., before whom the matter came, was satisfied that Clark had had some means since the judgment to satisfy the debt, and that on the evidence before him there was a case for a committal, and that being so, he had ample jurisdiction, in the exercise of his discretion, under section 103 (5) of the Bankruptcy Act, 1883, and with the consent of the judgment creditor, to make, as he did, a receiving order against him.

Now, the first point raised before us was that Clark did not come within sub-section 6 of section 103, upon the ground that he was not a person against whom a bankruptcy petition could be presented, because that could only be done in the case of a debtor who was at the time domiciled in England, or who, within a year before the date of presentation of the petition, had ordinarily resided or had a dwelling-house or place of business in England, which the debtor in this case had not, and that therefore a receiving order could not be made against him. In my opinion there was jurisdiction, notwithstanding, to make the order. The point we have to decide is as to the construction of section 103, sub-section 5, and my opinion is that where a judge has jurisdiction to commit a debtor under section 5 of the Debtors Act of 1869, he may, if he thinks fit, in lieu of making a committal order, and in mercy to the debtor, make a receiving order against him. This sub-section is in favour of the debtor, and to save him from going to gaol, and my opinion is that under it my brother Day had full jurisdiction to make this receiving order if he had evidence before him which satisfied him that the debtor had possessed means. I think it is clear that such evidence was before the learned judge, and I am of opinion that he was quite right.

This order must therefore stand.

RIGBY, L.J.—I am of the same opinion. We are here dealing with a man who evidently was not ignorant of the working of the bankruptcy laws, and who made preparations in anticipation of his financial difficulties by assigning his furniture to his wife. This evidence was before the judge, as also was the debtor's bank pass-book. I have no doubt whatever that Day, J., had jurisdiction to make the necessary order. The cases which have been cited appear to me beside the point. The debtor was within the jurisdiction at the time and was clearly in contempt, and might have had a committal order made against him, and in such a case the judge may, under this section, with the consent of the judgment creditor, in lieu of making such an order and in mercy to the debtor, make a receiving order.

COLLINS, L.J.—I am of the same opinion. On the question of jurisdiction I have no doubt. The true test seems to me to be, not whether the judgment debtor is domiciled within the jurisdiction at the time for the purpose of presenting a petition against him, but whether he is within the jurisdiction for the purpose of having a committal order made against him. On the question of evidence of means on the part of the debtor I think Day, J., was quite justified in coming to the conclusion he did, and I think that the receiving order ought to stand.

Appeal dismissed.

Solicitors for the appellant, *Harwood & Stephenson.*

Solicitors for the respondent, *F. W. & H. Hilbery.*

High Court of Justice.

Chan. Div. Romer, J. } Nov. 13, 27.

In re SMYTH.

LEACH *v.* LEACH. (*a.*)

Inland revenue—Probate duty—Proceeds of plantation in Jamaica—English testator—Share bequeathed to

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

English legatee—Death of legatee—Liability of estate to probate duty.

An English legatee of a share of the proceeds of sale of a West Indian plantation, which was devised by an English testator, after the expiration or failure of certain prior interests, in trust for sale and division of the proceeds, died before the expiration of prior interests for life.

Held, that his share ought to be regarded as an English, and not as a foreign, asset; and probate duty was consequently payable in respect thereof.

Sudeley (Lord) *v.* Attorney-General, 45 *W. R.* 305, [1897] *A. C.* 11, *applied and followed.*

Petition.

This was a petition for the distribution of funds, subject to the trusts of the will dated in May, 1837, of Francis G. Smyth, who died in June, 1839; but the only point with which this report deals is a question which arose as to the payment of probate duty on the death of a legatee under the will in respect of a share bequeathed to him of the proceeds of a plantation in Jamaica.

The facts and arguments are sufficiently stated in his lordship's judgment.

In addition to the authorities there referred to, the following were cited: *Laidley* v. *Lord Advocate*, 15 App. Cas. 468, 39 W. R. Dig. 196; *Attorney-General* v. *Hope*, 2 Cl. & Fin. 84; *Attorney-General* v. *Ailesbury (Marquis)*, 36 W. R. 737, 12 App. Cas. 672.

Neville, Q.C., and *R. J. Parker*, for the petitioners.

Vaughan Hawkins, for the Crown.

ROMER, J.—The question as to probate duty which arises in this case may be shortly stated as follows: A testator, who at the dates of his will and death was living and domiciled in England, made an English will whereby, in effect, he devised and bequeathed a plantation in Jamaica to trustees upon trusts for the benefit of certain persons for life and their issue, and upon the deaths of those persons and failure of issue upon trust to sell the plantation and divide the proceeds amongst several persons therein named. The trustees were at the above dates domiciled in the United Kingdom, and one of them after the testator's death proved the will in England and acted as trustee, and as trustee in this country held the plantation upon the trusts of the will. The trust for sale ultimately took effect, and the proceeds of sale of the plantation became divisible amongst the several persons named in that behalf in the will or their legal personal representatives. One of those persons (I will call him the legatee), who was at the time of his death living and domiciled in England, died while the persons entitled for life were in existence, and the question is whether probate duty is not payable here on his death in respect of his interest under the will. Now, that interest was admittedly of the nature of personalty, and the question, therefore, narrows itself down to this—Is the interest to be considered an English asset or to be treated as foreign because the plantation was situate in Jamaica? In my opinion it is to regarded as an English asset. The case is governed by the principles which led to the decision of the *Attorney-General* v. *Sudeley (Lord)*, 44 W. R. 340, [1896] 1 Q. B. 354, and the judgment of Lopes, L.J., as reported [1896] 1 Q. B., at p. 363, applies almost word for word to the case before me, and that judgment was approved of and adopted by the lords in the House of Lords when it came for consideration before them on appeal: *Sub. nom.*, *Sudeley (Lord)* v. *Attorney-General*, 45 W. R. 305, [1897] A. C. 11. At the time of his death the only right the legatee had in the case before me was to have the trusts of the will duly performed, and in particular to have the trust for sale carried into effect at the due time, and the net proceeds of the sale, after paying costs and the expenses of the trustee, divided between the legatee and the other persons entitled. As matters stood he was not entitled to the plantation itself or to any specific part of share of it. The trustee was not a trustee of the plantation or of any specific part or share of it for him; all the legatee was entitled to was his proportion of the net proceeds of the plantation after realization. He had no claim against the plantation to recover it or any portion of it; that was claim enforceable only by the trustee. The right of a the legatee as against the trustee was only to have the trusts of the will administered. Administered where? The testator was domiciled in England, his will was proved in England, his trustee was in England, and the money recoverable would in the ordinary and proper course be brought to England. The trustee could be properly and in the ordinary course sued in the English court by the legatee, who was in England. The asset was an English equitable chose in action, recoverable in England, and an English and not a foreign asset, and as such subject to probate duty here.

It was suggested as against the Crown, that possibly under some circumstances an action might have been brought by the legatee to enforce his rights in Jamaica. I am bound to say that at present I do not see what action could have been properly brought there. But even admitting that, under some conceivable circumstances or change of circumstances, some action might have been brought there, the question is not in what place under extraordinary circumstances an action might be brought, but what place under existing circumstances was the natural and proper place in which the legatee should enforce his rights? In other words, what was the proper forum for deciding upon the legatee's claim? and the answer to this clearly is that the forum was English. And in reference to this view I may refer to the case of *In re Cigala's Trusts*, 26 W. R. 257, 7 Ch. D. 351, and the observations of Jessel, M.R., in that case.

I therefore decide that the probate duty is payable.

Solicitors, *Norris, Allens, & Chapman; Solicitor of Inland Revenue.*

Chan. Div. } Nov. 24, 25.
Romer, J. }

LOVETT *v.* LOVETT. (*a.*)

Settlement — Voluntary settlement — Construction — Estoppel.

By a post-nuptial settlement in 1892 *the plaintiff, who was the only child of her parents, conveyed to the trustees property to which it was expressed she was entitled under her parents' settlement. At that time her only interest was a vested interest in reversion expectant on her mother's decease, liable to be divested by the exercise of her mother's power of appointment as the surviving life tenant under the parents' settlement.*

In 1897 *the mother exercised her power in favour of the plaintiff absolutely.*

Held, that the property the plaintiff thus took was not bound by her post-nuptial settlement.

Action to have a voluntary settlement set aside or rectified.

By a marriage settlement dated the 15th of April, 1874, made on the marriage of Maresco Lloyd

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Frederick and Maria Louisa Frederick, the parents of the plaintiff, certain lands at Cappagh, in the county of Dublin, were conveyed to trustees on trust to pay the rents, issues, and profits to M. L. Frederick for life as therein mentioned, and it was thereby agreed that the trustees should invest the residue which after certain payments therein mentioned should remain of the purchase moneys to arise from the sale of an undivided one-fourth share of certain other hereditaments situate at Lambeth and Camberwell, and pay the interest and annual profits to the said Maresco Lloyd Frederick for his life, and after his decease to the said Maria Louisa Frederick for life, and after the decease of the survivor should stand possessed of the said land and premises thereby granted and of the residuary money, stock, funds, and securities, dividends and income in trust for all such one or more exclusively of the others or other of the children or remoter issue of the marriage as therein mentioned in such manner as the said Maresco Lloyd Frederick and Maria Louisa Frederick should jointly appoint, and in default as the survivor should by deed or deeds with or without power of revocation and new appointment or by his or her will or codicil appoint, and in default of any such appointment in trust for all the children of the marriage as therein mentioned.

The only child of the marriage was the plaintiff, E. E. H. Lovett, who married when not quite seventeen on the 28th of January, 1892.

The voluntary settlement in question in the action was dated the 27th day of July, 1892, and was expressed to be made in pursuance of an order of the Lord Chancellor of Ireland and the Infants' Settlement Act, 1855, the settlement recited that the share in the lands at Cuppagh subject to the trusts of the settlement of the 15th of April, 1874, therein referred to as the principal indenture of settlement, were vested in the surviving trustee thereof on trust to pay the net rents to the said Maria Louisa Frederick for life, and after her death to hold the said lands on trust for the plaintiff. The indenture further recited that there was vested in the said trustee an undivided fourth part of certain lands at Lambeth and Camberwell, therein called the "London Estate," on trust to sell as therein directed and to invest the proceeds and pay the income to the said Maria Louisa Frederick for life and after her decease to hold such proceeds on trust for the plaintiff. By the operative part of the indenture the plaintiff, E. E. H. Lovett, as settlor, conveyed all her reversionary interest under the settlement of the 15th of April, 1874, to trustees on trust for conversion and to pay the income to the plaintiff for life and then to her husband for life, and on the death of the survivor upon the usual trusts for the benefit of their issue with a trust in default of issue in favour of the plaintiff. In the conveyance of the "London Estate" the words were used that the settlor conveyed to the trustees "all that the net residue of the proceeds of the sale and conversion of the said undivided fourth part of the 'London Estate' to which the said E. E. H. Lovett is entitled under the principal indenture in remainder expectant on the decease of the said M. L. Frederick." The settlement contained no covenant to settle after-acquired property and no power of revocation, and no reference was made in it to the overriding power of appointment which the plaintiff's mother, M. L. Frederick, had under the settlement of 1874.

By a deed-poll dated the 5th of August, 1897, M. L. Frederick, in exercise of the power contained in the settlement of the 15th of April, 1874, irrevocably appointed that the trustees of that settlement should stand possessed of the property therein comprised in trust for the plaintiff, her executors, administrators, and assigns absolutely.

The chief question was whether the interest taken by the plaintiff under this exercise by her mother of her power of appointment was comprised in the voluntary settlement of the 27th of July, 1892.

Neville, Q.C., and *O. Leigh Clare*, for plaintiff.—The plaintiff only intended to convey by the settlement such property as was then vested in or belonging to her: *Sweetapple* v. *Horlock*, 27 W. R. 865, 11 Ch. D. 745, is directly in our favour. It is not a case of estoppel—it was an innocent conveyance.

They referred to: *General Finance Mortgage Discount Co.* v. *Liberator Building Society*, 27 W. R. 210, 10 Ch. D. 15; *Heath* v. *Crealock*, 23 W. R. 95, L. R. 10 Ch. App. 22; *Citizens' Bank of Louisiana* v. *Bank of Orleans*, 22 W. R. 194, L. R. 6 H. L. 352, 360; *Mills* v. *Fox*, 36 W. R. 219, 37 Ch. D. 153.

Levett, Q.C., and *S. Dickinson*, for the trustees of the settlement of the 27th of July, 1892.—The appointment did not divest the interest of the plaintiff comprised in the settlement: *In re Frowd's Trusts*, 10 L. T. Rep. 367, 12 W. R. Ch. Dig. 92.

Ashton Cross, for R. J. A. Lovett.

ROMER, J.—The result at which I have arrived, no doubt, may appear somewhat startling, but after consideration, contrary to my first impression, I have come to the conclusion that the plaintiff is entitled to the relief she claims.

The cases that have been cited before me, I think, establish, and, in my opinion, it is now the law, that if a person assigns his interest in property whether real or personal to which at the time he is entitled in default of appointment by another person, and afterwards he obtains that property under an exercise of the overriding power of appointment, he can claim the property notwithstanding the assignment and even though the power was limited to a class of which he was one, and though that power and his interest in default of appointment were both created by the same settlement or instrument, the reason being that the interest he obtained by the exercise of the power was a distinct one from that he possessed at the date of the assignment.

Now I apply that principle to the case before me. I bear in mind that the deed was a settlement by an infant of her then property. *Primâ facie* it would only pass her then interest under the settlement referred to in the deed, and not an interest she had not then and only obtained afterwards—namely, the interest under the exercise of the power of appointment by the mother. Ought I, in the first place, to construe the deed, dealing with it as a question of construction, as one intended to pass this possible future interest, this expectancy. In the absence of some overwhelming reason to the contrary, I think I ought not to do so, bearing in mind, as I have already said, that the lady was an infant at the time, and seeing that the deed does not purport to pass anything but estates or interests then existing, and does not purport to settle or deal with after-acquired property. In the deed of settlement there is no reference whatever to the power of appointment. Had it been intended to release that power or to prevent its being exercised that could easily have been effected. The power could have been released, or, if so intended, the mother might have exercised it on the settlement, or immediately before it.

There is no covenant in this deed referring to a settlement, and nothing that I can find which binds the mother or the infant in any way to covenant that the power to appoint shall not be exercised.

The main contention of the trustees who have very

properly brought before me all the considerations which ought to bear in favour of those claiming under the settlement has been the recital in the deed of the lady's title. I look at that recital, and except that it does not go far enough, so far as it does go, it appears to me accurate. The infant was entitled as the matter then stood, subject to the life interest of her mother, to the property she purports to assign. What the recital does not say, and what no doubt it ought to have said, is this, that her estate and interest was something to be defeated by an exercise of a power of appointment. It appears to me, looking at the considerations I have already pointed out, the form of this deed and the position of the infant, that I ought to give a reasonable construction to this recital and make it accord with the facts, as in fact it does, if you treat it as an incomplete recital or as a recital not stating all the facts, and I think it ought to be treated as a statement of what her then interest was, and as omitting reference to the facts that that interest was defeasible.

Dealing, therefore, with this matter as a question of construction, it appears to me, as I have already said, that I ought not to construe this dsed as intended to pass anything more than the lady's then interest in the property, the property she was then entitled to, and, as I have already pointed out, that would not cover a property, an interest, or an estate which she had not then and did not acquire until after the settlement.

That appears to me really to dispose of this case, for I am satisfied that here there is no estoppel. Certainly, in my opinion, there cannot be any equitable estoppel. The principle of equitable estoppel has been, if I may say so, clearly stated by Lord Selborne in the case which has been cited before me of the *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, 22 W. R. 194, L. R. 6 H. L. 352, 360, and it shows that equitable estoppel is not applied in favour of a volunteer, nor in this case can I see any estoppel at all. I can find no estoppel by the terms of the conveying part of the deed, the conveyance being what is called an innocent one, and I can find no estoppel in the recital, for the reasons I have already pointed out, in dealing with the question of construction.

That recital can have a meaning given to it which is in strict accordance with the facts, and need not be construed as a statement of what was not true at the time.

It follows, in my opinion, as I have already said, that the plaintiff is entitled to the relief she has claimed—that is to say, the relief she has claimed at the bar, which is limited to the property which passed under the marriage settlement. There will be a declaration that the interest taken by the plaintiff under the exercise of the power of appointment is not comprised in the settlement.

Solicitors, *Cridland & Nell; Janson, Cobb, & Pearson; Godfrey & Robertson.*

Chan. Div. } Nov. 12, 15.
Byrne, J. }

CARLISLE CAFÉ CO. (LIMITED) AND TODD *v.* MUSE BROTHERS & CO. (*a.*)

Landlord and tenant—Rooms—Outer walls—Signboards—Derogation from grant.

A lease of rooms in a house constituting a dwelling by itself includes the outer walls of the house so far as they are solely appropriate to the rooms let.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

On the 7th of March, 1896, the plaintiff Todd signed a memorandum in writing as follows: "I, the undersigned, William David Todd, of 7, English-street, Carlisle, shoemaker, agree to let to Mr. Harry T. Muse, of 9, Eden-street, Stanwix, Carlisle, photographer, the studio, workroom, and dressing-room on the top floor of my new building, and the reception-room on the second floor thereof as from this date for one year at the rent of £35, payable quarterly, tenant to pay rates. And I, the undersigned, Harry T. Muse, agree to take the above-named premises on the above-named terms." During the negotiations the plaintiff Todd verbally represented to the defendants, as his lordship held proved, to the effect that the defendants were to have all reasonable facilities for advertising their business on the outside walls. Muse was a member of the defendant firm, and acted on their behalf.

By lease of the 8th of May, 1896, Todd demised to the plaintiff company so much of the house as consisted of the front entrance and the whole of the first and second storeys (except one room on the second storey) together with all fixtures and fittings thereon, as then in the occupation of the plaintiff company, for a term of years, with a verbal agreement that the plaintiff company might place on the front of the house such signboards or advertisements as they should think fit, in particular the sign "Silver Grill" in a position over the cornice above the second floor of the house.

Shortly afterwards the plaintiff company placed the sign with the words "Silver Grill" in large letters in the position mentioned. It thus covered the outer wall of the rooms let to the defendants to a height of two feet and a-half. The defendants objected to this being done, and subsequently requested its removal, but no notice was taken of their objection. They therefore had the sign removed in the night, and placed signs of their own in its place.

Thereupon the plaintiffs brought this action for an injunction against the defendants removing or interfering with the plaintiffs' signs on any part of the front wall, except a signboard over, and show cases about, the doorway.

Eve, Q.C., and *T. L. Wilkinson*, for the plaintiffs.—A demise of rooms only carries the space between the walls and the reasonable use of the inside walls: *Underwood* v. *Burrows*, 7 Car. & P. 26, 29. It does not include the outer walls or the external fabric of the house, which remains in the landlord: *Doe d. Freeland* v. *Burt*, 1 T. R. 701. [BYRNE, J., referred to Shep. Touch., 206, as showing that a feoffment may be made of an upper chamber.] If the outer walls were included in such a demise the tenant might enlarge the windows, subject to restoring them at the end of the tenancy. [BYRNE, J.—Could it be said that a tenant might not place flower pots outside his window?] It is said that we have derogated from our grant, but that is not so. Derogation from a grant is equivalent to a breach of a covenant for quiet enjoyment, the true rule as to which is laid down by Fry, L.J., in *Sanderson* v. *Mayor of Berwick-upon-Tweed*, 33 W. R. 67, 68, 13 Q. B. D. 547, 551, approved in *Robinson* v. *Kilvert*, 37 W. R. 545, 547, 41 Ch. D. 88, 96. If the plaintiffs have prevented the rooms being used as a photographic studio, they have derogated, but not otherwise: *Aldin* v. *Latimer, Clark, & Co.*, 42 W. R. 553, 554, [1894] 2 Ch. 437, 444.

Mulligan, Q.C., and *C. Gurdon*, for the defendants, cited the American case of *Riddle* v. *Littlefield*, 16 Amer. Rep. 388, the headnote of which is: "The owner of a building leased a 'store' therein. Held,

that the lessee had the right to the use and occupation of the outer walls belonging to that portion of the tenement, including the store, for the purpose of posting bills and notices thereon."

BYRNE, J.—The premises let to the defendants, with the exception of the room on the second floor, constitute a little dwelling by itself. It is said that the demise did not include the outer walls of the top story of the house. I think that it did include them so far as they were solely appropriate to the rooms let. No question arises as to whether the use made of the outer walls by the defendants was a reasonable one, for that is admitted. If, then, the defendants had a right to use the outer walls at all, they had a right to use them in the way they have done. I think that they had that right, and that the signboard put up by the plaintiffs was in derogation of that right. I also find that the plaintiff Todd, at the time of the letting, represented that the defendants should have all reasonable facilities for putting up signboards and advertisements, and that the action of the plaintiffs prevented them having these facilities.

Judgment for the defendants.

Solicitors for the plaintiffs, *Indermaur & Brown*, for *Blackburn & Main*, Carlisle.

Solicitors for the defendants, *Gray, Mounsey, & Fuller*, for *Wannop & Westmorland*, Carlisle.

Q. B. Div.
(Wright and Kennedy, JJ.) Nov. 2.

GALLAGHER v. RUDD AND OTHERS. (a.)

Licensing Acts—Theatre—Selling intoxicating liquors after closing hour—Licensing Act, 1872 (35 & 36 *Vict.* c. 94). s. 72—*Licensing Act,* 1874 (37 & 38 *Vict.* c. 49), *ss.* 3, 9, 16.

The appellant was convicted at quarter sessions of having sold intoxicating liquors at the bar of his theatre after the performance had ended and after closing hour for ordinary licensed premises in that borough.

Held, that section 72 *of the Licensing Act,* 1872, *which provides that nothing in the Act "shall affect or apply to the sale of intoxicating liquors by proprietors of theatres in pursuance of the Act in that behalf," did not affect the question of closing hours, and that the conviction under section* 9 *of the Licensing Act,* 1874, *was therefore right.*

This was an appeal by way of case stated from the decision of the quarter sessions of the county of Durham, affirming the conviction by the justices of the borough of Stockton-on-Tees.

The following were the facts: The appellant, Gallagher, was the manager of the Theatre Royal, Stockton, and on the 2nd of September, 1896, he was granted a licence to keep open the theatre for the public performance of stage plays pursuant to the Theatres Act, 1843 (6 & 7 Vict. c. 68). By that licence the theatre was to be closed every Saturday night at half-past eleven.

On the 11th of October, 1896, the appellant was granted a theatre Excise licence under 5 & 6 Will. 4, c. 39 and 43 & 44 Vict. c. 20, to sell intoxicating liquors by retail in the theatre.

On the evening of Saturday, the 23rd of January, 1897, the performance at the theatre concluded at 10.55 p.m., but the appellant kept one of the bars open until 11.20 p.m., at which time two police officers entered the theatre by a door at the back—the public entrance being closed—and found between thirty and forty people in the bar behind the dress circle. All the people who were in the bar at that time were either persons who were employed in the performance or had been *bonâ fide* attending the performance as spectators at the theatre that evening.

The appellant was convicted and fined in the nominal penalty of 3s. 6d. and costs.

The question for the opinion of the Divisional Court was whether that conviction was right, the borough of Stockton being a town within the meaning of the Licensing Act, 1874, and the appellant being convicted of an offence under section 9 of that Act.

Section 72 of the Licensing Act, 1872, enacts that "nothing in this Act shall affect or apply to (4) the sale of intoxicating liquor by proprietors of theatres in pursuance of the Act in that behalf."

By section 1 of the Licensing Act, 1874, that Act is to be construed as one Act with the principal Act of 1872, so far as is consistent with the respective tenors of such Acts.

By section 2 of the Act of 1874 all premises in which intoxicating liquors are sold by retail shall be closed as follows: (2) If situated in a town or in a populous place as defined by the Act (a) on Saturday night from eleven o'clock.

R. Luck, for the appellant.—The exemption contained in section 72 of the Licensing Act, 1872, is an absolute exemption from the provisions of the various Licensing Acts which apply to the closing at a particular hour of public-houses in provincial towns. This theatre was duly licensed for the performance of stage plays up to 11.30 on any Saturday night, and up to that hour the public attending the performance can reasonably expect to be served with refreshments. If the performance should be continued until past eleven o'clock on any Saturday, then, unless this conviction is quashed, the proprietor of any duly-licensed provincial theatre must see that all the bars are closed on the strike of the clock although the performance is going on. If the public were admitted after 11 p.m. to a theatre merely for the sake of getting "a drink," the matter might be altogether different, but no such question arises in the present case.

R. I. Simey, for the informant.—I submit that licensed theatres come within the provisions applicable to ordinary public-houses in the same district. The closing hour at Stockton was eleven p.m., and the sale of intoxicating liquor at the bar of the theatre was continued after that hour. The conviction in the case ought to stand.

KENNEDY, J.—I have been asked by my brother Wright, J., to deliver my opinion on this appeal first. I think the decision of the justices was correct, and the conviction must stand. I have come to that conclusion because I think that the true effect of the exemption to theatre proprietors, to whom licences to sell intoxicating liquors at the bars of these place of amusement have been granted—the exemption contained in sub-section 4 of section 72 of the Licensing Act, 1872—is not one which alters, extends, or otherwise affects the ordinary closing hour in a particular district. It is an exemption in their favour to this extent only, that theatre proprietors holding such licences are not bound to go to the justices for a licence for the sale of intoxicating liquor. The exemption is certainly not an absolute exemption from the various other provisions relating to the sale of intoxicating drinks. These places of amusement, when they have a licence, come within the provisions

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

of the Licensing Acts applicable to ordinary public-houses, and the licensees can claim any exemptions which on particular occasions could be obtained by an ordinary publican. There is, no doubt, a good deal to be said on both sides, but I fail to see any balance of general convenience or any reason founded on public policy in favour of a view contrary to the one I have already expressed.

The question of the closing hour is not expressly dealt with under a licence to sell intoxicating liquors granted to a theatrical proprietor, who can therefore sell liquors so long as he does not contravene any express enactment in the Licensing Acts and escapes any objection which may be raised to the way he conducts his business by the justices of the particular district. If this conviction were quashed it might be used as a precedent by other theatre proprietors to keep these places of amusement open after closing hours, where, for a time at any rate, liquor could be supplied to persons who chose to go there solely for the purpose of getting "a drink," and evading those provisions of the Licensing Acts which would be in force against publicans in the same district. It is worth noticing that there are similar limitations with regard to the sale of liquor on packet boats and at canteens, and that those licences are also granted for the sale of intoxicating liquors on special occasions, "but subject and pursuant to the provisions in the Act in that behalf enacted."

For these reasons I think the appeal must be dismissed.

WRIGHT, J.—There seem to me to be very great difficulties in deciding this question. On the whole, having regard to the findings of the justices in the particular case before us, I think the view expressed by brother Kennedy is right, and I concur with him in thinking that this appeal must be dismissed.

Conviction affirmed.

Solicitors for the appellant, *Hack & Morris*, for *Thomas & Malkin*, Stockton-on-Tees.

Solicitors for the respondent, *Eldridge & Sprott*, for *C. J. Archer & Parkin*, Stockton-on-Tees.

Prob. Div. & Adm. Div. Admiralty. } July 9, 1897.

"THE CLYMENE." (a)

Ship — Pilotage — London district — Vessel navigating within her own port not having passengers on board— Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 191, 192, 625—*Distressed seamen not passengers.*

The 625th section of the Merchant Shipping Act, 1894, *provides* (inter alia) *that the following ships, when not carrying passengers, shall, without prejudice to any general exemption under this part of the Act, be exempted from compulsory pilotage in the London district* (*that is to say*): "(5) *Ships navigating within the limits of the port to which they belong.*"

The term "passengers" in this section does not include "distressed seamen" for whom a passage home has been required to be provided under the sections of the above Act relating to distressed seamen; and the master of a ship belonging to the port of London, when navigating within the limits of that port, and only carrying, in addition to himself, his officers, pilot, and crew, "distressed seamen" placed on board in accordance with the last-mentioned sections, is not bound by compulsion of law to employ a pilot.

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

This was an action of damage instituted on behalf of the owners of the sailing barge *Phœbe*, against the steamship *Clymene*, of 895 tons, to recover for the damage sustained in a collision between *The Phœbe* and *The Clymene* in Galleons Reach in the River Thames, on the 26th of February last, when *The Clymene* was in charge of a duly licensed Trinity House pilot. The action was commenced in the City of London Court, and was transferred to this court by order on the 14th of April last.

The owners of *The Clymene* appeared to defend the action on the merits, and also raised the defence of compulsory pilotage; alleging in their defence that, at the time of the collision, *The Clymene* was carrying five passengers.

The action was heard on the 5th and 8th of July last, before Barnes, J., assisted by two of the Elder Brethren of the Trinity House.

Evidence was given to the effect that, at the time of the collision, *The Clymene* was proceeding up Galleons Reach bound on a voyage from Leghorn and Genoa to London, and had on board her, in addition to her pilot, master, officers, and crew, no other persons other than five distressed seamen, to whom the master of *The Clymene* had been required to afford a passage home, under sections 190-93 of the Merchant Shipping Act, 1894, by the British consuls at Leghorn and Genoa, and in respect of whose conveyance and maintenance the aggregate amount of three shillings a day for each distressed seaman was payable by the Board of Trade. These sections, so far as material to this report, are in terms as follows:

190.—The Board of Trade may make regulations with respect to the relief, maintenance, and sending home of seamen and apprentices found in distress abroad; and may, by those regulations (in this Act referred to as the Distressed Seamen Regulations), make such conditions as they think fit with regard to that relief, maintenance, and sending home. . . .

191.—(1) The following authorities—that is to say . . . British consular officers . . . may, in accordance with and on the conditions prescribed by the Distressed Seamen Regulations, provide for the maintenance until a passage home can be procured of the following seamen and apprentices (who are in this Act included in the term distressed seamen)—namely, (*a*) Seamen and apprentices to the sea-service, whether subjects of Her Majesty or not, who, by reason of having been discharged or left behind abroad or shipwrecked from any British ship or any of Her Majesty's ships, are in distress in any place abroad; and (*b*) Seamen and apprentices to the sea-service, being subjects of Her Majesty, who have been engaged by any person, acting either as principal or agent, to serve in a ship belonging to the Government or to a subject or citizen of a foreign country, and are in distress in any place abroad.

(2) For the purpose of providing a distressed seaman with a passage home, the authority shall put him on board a British ship, bound either to the United Kingdom or to the British possession to which the seaman belongs (as the case requires), which is in want of men to make up its complement; or, if there is no such ship, then the authority shall provide the seaman with a passage home as soon as possible in any ship, British or foreign, bound as aforesaid.

(3) The authority shall endorse on the agreement with the crew of the ship if a British ship, on board of which a distressed seamen is placed, the name of every person so placed on board. . . .

192.—(1) The master of every British ship so bound as aforesaid shall receive on board his ship, and afford a passage and maintenance to all distressed seamen whom he is required, under this Act, to take

on board his ship, not exceeding one for every fifty tons burden; and shall, during the passage, provide every such distressed seaman with a proper berth or sleeping place, effectually protected against sea and weather.

(2) On the production of a certificate signed by the authority by whose directions any such distressed seaman was received on board . . . and a declaration made by the master before a justice of the peace, and verified by the Registrar-General of Shipping and Seamen . . . the master shall be entitled to be paid in respect of the maintenance and passage of every seaman and apprentice so conveyed, maintained, and provided for by him, exceeding the number of any wanted to make up the complement of his crew, such sum per diem as the Board of Trade allow.

(3) If any master of a British ship fails, without reasonable cause, to comply with this section in the case of any seaman or apprentice, he shall for each offence be liable to a fine not exceeding one hundred pounds.

On the 8th of July, 1897, Barnes, J., found that the collision had been solely occasioned by the fault of the pilot in charge of *The Clymene*, and reserved the question of law—whether or not, on the facts given in evidence, such pilot was, by compulsion of law, acting in charge of *The Clymene*—to be separately argued by counsel.

July 9.—The reserved question of law was argued.

Sir Walter Phillimore and *Butler Aspinall* appeared for the plaintiffs.—They referred to section 625 of the Merchant Shipping Act, 1894,* and contended that under the provisions of that section *The Clymene* at the time and place of the collision was exempted from being compelled to employ a pilot, as she was not carrying passengers, but only five distressed seamen whom the master of *The Clymene* was forced, under a penalty, to take aboard his ship, and for whose conveyance nothing equivalent to fares has been paid.

They cited *The Lion*, 17 W. R. 577, L. R. 2 A. & E. 102, L. R. 2 P. C. 525.

Pyke, Q.C., and *A. E. Nelson*, for the defendants.—The distressed seamen on board *The Clymene* were passengers within the meaning of that term in section 625 of the Merchant Shipping Act, 1894. They were on board her in addition to her complement, and it is inmaterial that the master of *The Clymene* was compelled to afford them a passage, or that the amount payable in respect of them by the Board of Trade was not as great as the defendants would have charged in the absence of the Board of Trade regulations as to distressed seamen.

BARNES, J.—I have already decided that the collision in this case was solely the fault of the pilot of the defendants' ship. The defendants, however, allege that that pilot was employed by compulsion of law, and that therefore they are not liable for the collision. The plaintiffs, on the other hand, contend that the pilot was not on this occasion employed by compulsion of law, and that therefore the defendants are responsible for his acts. The whole question turns upon a very short point—namely, whether, upon the true construction of the pilotage clauses of the Merchant Shipping Act, 1894, pilotage was compulsory upon *The Clymene*, the defendants' vessel, at the time and in the place where the collision occurred. Now, whether pilotage was compulsory simply depends in this case upon whether *The Clymene* was, at the time of the collision, carrying passengers or not, inasmuch as under the 622nd section of the Merchant Shipping Act, 1894, "subject to any alterations to be made by the Trinity House, and to the exemptions under this part of this Act, pilotage shall be compulsory within the London district"; whilst by section 625 of the same Act a vessel navigating within the limits of the port to which she belongs is exempted from compulsory pilotage, when not carrying passengers. The facts of the case are that, at the time of the collision *The Clymene* had on board five distressed seamen, who had been placed on board her—one at Leghorn and four at Genoa—under the orders of the British consuls of those places respectively, made under the provisions of the Merchant Shipping Act, 1894, as to distressed seamen (sections 190-193). These men were on board *The Clymene* at the time of the collision, and the question is whether they were "passengers" within the 625th section above mentioned. It is agreed that *The Clymene* was a ship belonging to the port of London, and was, at the time of the collision, navigating within the limits of that port; and therefore, if she was not carrying passengers, she comes within the exemption I have referred to as contained in the 625th section of the Act of 1894; whilst if she was carrying passengers, she was subject to compulsory pilotage, being outside the exemption in question. Now, I have stated the circumstances under which these five men were on board *The Clymene*, and I do not think it necessary to again refer at length to the provisions of the Merchant Shipping Act, 1894, relating to distressed seamen—namely, sections 190, 191, 192, and 193. These sections speak for themselves, and impose upon the master of a British vessel, subject to restrictions as to number, the obligation to receive distressed seamen, as defined in the Act, on board his ship, and afford them a passage home and maintenance; such sum by way of payment being allowed to the master, on the arrival of the ship, as the Board of Trade sanctions. In this case the sum so paid was three shillings per day per man. Another section of the Act of 1894 to which I think it necessary to refer is section 237 (2). That section provides that every seafaring man whom the master of a ship is, under the authority of this Act, compelled to take on board and convey shall, so long as he remains in the ship, be deemed to belong to the ship, and be subject to the same rules and regulations for preserving discipline, and to the same fines and punishments for offences constituting or tending to a breach of discipline, as if he were a member of, and had signed the agreement with, the crew. There is no definition of the word "passenger" in the Merchant Shipping Act, 1894, except for the word when used in the third part of the Act—the part dealing with passenger and emigrant ships—and the expression "passenger" for that special purpose is, by section 267, to include "any person carried in a ship other than the master and crew, and the owner, his family and servants." It is obvious that this definition has no application to the special class of persons now under consideration, and it leaves the meaning of the term "passengers" in section 625 to be gathered from the ordinary interpretation of the word as applicable to the subject or occasion on which it is used. In my judgment, the use of the word in the 625th section is in the sense in which under ordinary circumstances persons are carried as passengers on board a ship, and involves the principle of an agreement to

* Section 625 of the Merchant Shipping Act provides (*inter alia*) as follows: "The following ships, when not carrying passengers, shall, without prejudice to any general exemption under this part of this Act, be exempted from compulsory pilotage in the London district and the Trinity House Outport district (that is to say) . . . (5) Ships navigating within the limits of the port to which they belong."

carry the passenger and the payment of a fare; and I am of opinion that these distressed seamen, whom the shipowner was compelled to take on board, and for whom he was paid what practically amounts to little more than maintenance, were not passengers within the meaning of section 625 of the Merchant Shipping Act, 1894. It follows that it was not compulsory on *The Clymene* to be placed in charge of a pilot, and the owners of *The Clymene* cannot be held free from liability for the damage occasioned by the pilot's sole fault or default.

Solicitors for the plaintiffs, *J. A. & H. E. Farnfield.*

Solicitors for the defendants, *Lowless & Co.*

House of Lords.

From C. A. (England). July 23, 1897.

KENT COUNTY COUNCIL *v.* LORD GERARD. (*a.*)

Highway—Extraordinary traffic—Person by whose order such traffic has been conducted—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.

The respondent contracted with several persons for the delivery to him at E. of various materials required for building and other operations, the price being payable by him on acceptance if according to sample, the price including free delivery at E. The respondent neither employed the persons who conveyed the goods there, nor did he pay them for such conveyance. The surveyor found, in pursuance of the provisions of section 23 *of the Highways and Locomotives (Amendment) Act,* 1878, "*that extraordinary expenses had been incurred by reason of excessive weight passing along the highway or extraordinary traffic thereon.*"

Held, that the respondent was not the person, within the meaning of section 23, *by whose order such weight or traffic had been conducted along the highway, and he was therefore not liable for the extraordinary expenses in repairing the road thereby occasioned.*

Decision of the Court of Appeal, 45 *W. R.* 513, [1897] 1 *Q. B.* 351, *affirmed.*

Appeal from an order of the Court of Appeal (Lord Esher, M.R., and Rigby, L.J.; Lopes, L.J., dissenting, reported 45 W. R. 531, [1897] 1 Q. B. 351) reversing a decision of the Divisional Court (Cave and Wills, JJ.).

The facts are stated in the report below, and also in the judgments of their lordships.

Asquith, Q.C., and *R. M. Bray* (*Hohler* with them), for the appellants.

They referred to *Hill* v. *Thomas,* 42 W. R. 85, [1893] 2 Q. B. 333. The judgment of Cave, J., which refers to all the cases, and particularly to *Williams* v. *Davies,* 44 J. P. 347. Lord Gerard intended that the trucks should be brought along this road: *Lapthorn* v. *Harvey,* 49 J. P. 709, is distinguishable.

Channell, Q.C., and *G. Edwardes Jones,* for the respondent, were not heard.

Lord HERSCHELL.—The only question that arises in this case is whether Lord Gerard was a person by whose orders certain extraordinary traffic had been conducted along a highway within the meaning of the Highways and Locomotives (Amendment) Act, 1878.

The facts are these: Lord Gerard was making considerable alterations on his estate in Eastwell Park, and in the dwelling-house which existed in that park. He entered into contracts with certain persons for the supply of materials. Under all those contracts the materials were to be supplied to him at a certain price at Eastwell Park. With the mode in which the materials were brought there he had nothing to do. The goods whilst they were being conveyed there were not his goods, and no property passed or could pass to him until delivery at Eastwell Park. Lord Gerard did not employ the persons who conveyed the goods there, and he did not pay them for such conveyance. What he did was to buy the goods which were brought to Eastwell Park, and to pay a certain price for them delivered at Eastwell Park.

The surveyor has found, in pursuance of the provisions of section 23 of the Act to which I have alluded, "that extraordinary expenses had been incurred by reason of excessive weight passing along the highway or extraordinary traffic thereon." The question then arises whether Lord Gerard is the person by whose order such weight or traffic had been conducted along the highway. There are various persons who might be mentioned connected with the conveyance of traffic along a highway about whom everybody would be agreed that traffic was conducted by their orders. I do not propose to define those persons. I do not propose even to give illustrations which will occur to every one of the persons to whom those words would apply, because I might be misunderstood as limiting the persons coming within the section to those whom I gave as an illustration; and as it would be impossible or inexpedient to give an exhaustive definition of the persons by whose orders the traffic would be conducted within the meaning of the section, I think it better not to attempt to give any definition at all. All your lordships have to consider is whether Lord Gerard was the person in the present instance by whose orders this traffic was conducted. It is contended on behalf of the appellants that he is that person, inasmuch as it is said that he ordered these goods which were to be delivered at Eastwell Park, and that order involved the necessity of bringing the goods to Eastwell Park, and therefore he was the person by whose order these goods were brought, and the traffic so conducted.

The word "order" is, of course, ambiguous in the sense in which it was used by counsel in the proposition to which I have just called attention. It is, no doubt, a word in frequent use with reference to the supply of goods by a tradesman, and even then it is used in different senses. If I give an order (as it is called) to a tradesmen for the supply of certain goods, I may have previously received a communication from that tradesman which will make my so-called "order" the completion of a contract, and will impose on him the obligation of supplying those goods. On the other hand, I may give an order (using as it is commonly used precisely the same word) to a tradesman for the supply of goods, and that order imposes no obligation on him at all; he is entitled, if he pleases, to do nothing upon it, because my order does not of itself create any contract until he has accepted it, and agrees to supply the goods I have ordered. Therefore the word "order" is frequently used with reference to ordering goods from tradesmen in a sense that cannot be called strictly legitimate, because it means an order which is no order; it imposes no obligation; there is no liability for disobedience to it, and no duty to obey it. But the argument on behalf of the appellants is

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

this—that whenever a person orders goods from a tradesman in either of the senses to which I have referred (and I will assume in the present case that the order was given in the former sense, although I am not quite certain that it was so in every case), upon such an order being given to a tradesman, then, if that order involves the conduct of extraordinary traffic along a highway, the person who gave that order or direction to the tradesman is the person by whose order the traffic is conducted along the high road. I do not think that is the natural meaning to give the words of the section. It seems to me necessarily to go this length—that whenever I enter into a contract for the supply of goods, and the performance of that contract involves the carrying of an extraordinary weight by any person along any highway, that traffic is conducted by my order within the meaning of the section. I do not think it is possible to stop short of that. In the course of the argument the length to which such a proposition would carry one was pointed out. It seems to me that this would be altogether an unreasonable construction of the section, and I do not think it is a legitimate construction, having regard to the language used. I observe that the learned judges in the court below who have been in favour of the appellant's view have altered the words of the statute in describing the transaction. Cave, J., alters the word "by" into the word "at"—"at whose order." Lopes, L.J., for the word "by" substitutes "in consequence of." The simple answer is, That is not what the statute has said. The statute has said "by whose order the traffic was conducted"; and if the person sought to be charged has had nothing to do with the conduct of the traffic or the mode in which it is to be conducted, and has had no power to give orders in relation to it or in reference to it, then I think it is impossible to say that it was by his order that the traffic was conducted. That, really, is the short ground on which I decide this case.

It has been suggested that, if this construction be the correct one, there might be extraordinary traffic along a road induced by the act of a particular individual who is building a house, for example; and if that traffic were distributed amongst several people owing to the orders being given to several different people for the goods, then, notwithstanding that there was extraordinary traffic, there would be no person who could be rendered liable for the injury caused by that extraordinary traffic. That may be true. On the other hand, if the words "by whose order the traffic was conducted" were referred to the person who gave the orders for the goods, you might have a man in business conducting a large traffic distinctly under his orders along a highway, and the several persons for whom he was building houses, for example, having only ordered an amount of goods, the carriage of which would not lead to extraordinary traffic, they would be under no liability.

It was suggested that under the terms of this section both the person by whose order the traffic was conducted in the strict sense of the word would be liable, and also the person whose purchase of the goods led to the excessive traffic. I think there would be considerable difficulty in working out the rights of the parties upon such a construction of the section; but the objection which I take to it is this: In that case you would be interpreting the words "by whose order the traffic has been conducted" in two entirely different senses—one, as it seems to me, the proper and natural sense, the other a strained and unnatural sense. The truth is that the contention of the appellants amounts to this—that "by whose order the traffic has been conducted" must be interpreted as meaning "at whose instance" or "for whose benefit the traffic has been conducted." That might or might not have been expedient legislation; but, at any rate, to my mind that is not the legislation to be found in the enactment. I think it is quite possible that some of the cases which the Legislature would have desired to cover by an enactment of this description are not covered by the language used. That is not an unknown experience in legislation. Certain obvious cases occur, and are intended to be met; other cases which might seem to fall within the same principle are found not to be met, the language being limited to those which were in view at the time the enactment was drawn up.

It would not be legitimate, in my opinion, to strain the language used in order to make it apply to a case to which it does not legitimately in its terms apply, on account of the supposed intention of the Legislature, and the theory that that supposed intention can only be effectually carried out by giving to the words a meaning which they do not naturally bear.

For these reasons I think that the judgment of the Court of Appeal must be affirmed.

Lord WATSON.—The special case stated by the court of quarter sessions for the eastern division of the county of Kent submits for decision a single question of law arising upon the construction of section 23 of the Highways and Locomotives (Amendment) Act, 1878. I have had little difficulty in arriving, with the rest of your lordships, at the conclusion that the question ought to be answered in the affirmative.

It must be assumed as matter of fact that extraordinary expenses to the amount of £750 have been incurred by the appellants in the repair of the Faversham and Ashford main road from its junction with the London and Dover main road at Faversham to the lodge-gate entrance to Eastwell Park, in consequence of the damage caused by reason of excessive weight passing along the same and of extraordinary traffic thereon. The traffic in question, whether excessive in weight or extraordinary in the sense of its being beyond the ordinary requirements of the district, consisted of materials conveyed along the Faversham and Ashford main road, in locomotives or in wagons hauled by locomotive power, to Eastwell Park, where they were used in improvements executed upon his estate by the respondent, Lord Gerard. Section 23 enacts that the appellants may recover these extraordinary expenses in a summary manner "from any person by whose order such weight or traffic has been conducted."

The court of quarter sessions held that the respondent was not within the meaning of the statute a person by whose order the excessive weight or traffic which did damage to the road had been conducted. A Divisional Court, consisting of Cave and Wills, JJ., quashed the order of the quarter sessions and restored an order of the petty sessions, by which it had been adjudged that the respondent should pay to the appellants the said sum of £750 with costs. In the Court of Appeal the Master of the Rolls and Rigby, L.J. (Lopes, L.J., dissenting) reversed that judgment and affirmed the finding of the quarter sessions.

It now becomes necessary to notice those findings of fact in the special case which tend to explain the connection which the respondent had with the traffic which has given rise to the appellants' statutory claim. The substance of these findings admits of being shortly stated. The respondent contracted with several persons or firms for the delivery to him at

Eastwell Park of the various materials required for his improvements, the price being payable by him on the acceptance of such materials as were according to sample, and including all claims of the sellers for carriage to their destination or otherwise. The property in these materials did not pass to the respondent until they were examined and delivery accepted at Eastwell Park, and he neither employed nor incurred any liability to the carriers by whom they were conveyed to that destination. The respondent was aware that it was the intention of the parties who had undertaken to supply the materials to forward them by the Faversham and Ashford main road; but it had not been expressly found, and it does not appear to me to be a matter of reasonable inference from any of the facts found, that the forwarding of the materials by that route was made a term of any contract for their supply, so that the respondent could have declined to accept them if they were sent from another place than Faversham or by a different route. On the other hand, I think it clearly appears that the respondent had no right to interfere either with the goods themselves or with the persons by whom they were conveyed along the road which is under the jurisdiction of the appellants.

The single point arising for decision in this appeal is whether, in these circumstances, the conveyance of the materials or their conduct along the appellants' road was ordered by the respondent within the meaning of section 23. The words of the clause must be construed according to their ordinary signification, unless the context of the statute is sufficient to show in the first place that some other meaning was intended, and in the second place what that other meaning was. Nor does it appear to me to be doubtful that, in cases where the order is not said to have been given by the owner who is forwarding the the goods, or by the person whom he has employed to carry them, but by the purchaser to whom the goods are to be delivered at the end of their transit, who, until they reach that point, has no interest in them, the latter cannot, in the ordinary sense of the words, be said to have ordered their conduct by a special route, unless he has interfered and given instructions to that effect which have been obeyed, or has made it part of his contract with the seller that the goods shall be forwarded by that route and no other. To construe the words otherwise would, in my opinion, be as unreasonable as to affirm that a person who ordered goods of a tradesman for acceptance on delivery had also given orders as to the route by which they were to be sent, if he happened to know the road to his house which must be used or was invariably used by the tradesman's carts. Lopes, L.J., who formed the minority of the Appeal Court, appears to have arrived at a different result from his brethren of the majority, by reading the word "order" as it occurs in section 23 as signifying not an order given with respect to the conveyance of goods either to a contractor for their supply or to his carrier, but the initial order given to the contractor which led to his sending the goods and employing a servant or carrier to convey them. The Legislature is no doubt competent to enact such a provision, but it would be a novel rule to make a person who has contracted to purchase goods, if they are found according to sample, responsible for all orders given with respect to the conveyance of the goods before they are delivered to him, if he happened to be aware that these orders would be given. With such matters the purchaser has really no concern. I am by no means satisfied that an enactment imposing liability upon the originator of the work for orders given by persons independent of him in relation to the carriage of materials which they had undertaken to deliver would be to the advantage of the road authority. One contractor for building materials or their carriage may be employed by fifty or a hundred different persons, and if he has actually ordered the transport by a particular road he will be liable for all the damage done to it, if excessive in the sense of the Act. But if the liability rested on his employers, each and all of them might escape on the ground that the amount of his carriages were not *per se* excessive or productive of damage.

But I entertain a strong objection to any canon of construction which introduces by implication into a statutory clause qualifying expressions which are not there, and alters the plain meaning of words which are to be found in it. I may add that, in my opinion, the intention of the Legislature must be inferred from the language which it has used; and that whilst I have been unable to discover for myself, the appellants' counsel did not attempt to direct my attention to any context which gives a colour to the interpretation suggested by Lopes, L.J.

I therefore concur in the motion that the order of the Court of Appeal be affirmed with costs.

Lord SHAND.—I am also of opinion that the judgment of the Court of Appeal should be affirmed.

In regard to the facts of the case I think it only necessary to say that it appears from the special cases stated by the justices, that Lord Gerard, in making his arrangements for the building of an addition to his house, stipulated with every one with whom he dealt that the materials which were to be brought to that house and ground should be purchased, and were purchased, at a price inclusive of delivery. In no case did Lord Gerard himself, by his servants, conduct any traffic upon the road in question, nor did he by hiring wagons or engines to go along the road by himself use the road in any way. Nevertheless, it is said that by virtue of the provision in section 23 of this statute he is responsible for the result to the road of the extraordinary traffic that passed over it.

I think with your lordships that there is nothing in the language of this statute which would warrant imposing liability in such circumstances. It is a condition of liability resting upon any one that the surveyor shall issue his certificate to the effect that "extraordinary expenses have been incurred" in repairing the highway "by reason of the damage caused by excessive weight passing along the same or extraordinary traffic thereon." The question here is—if such a certificate is issued, on whom does the liability rest? It is at once to be observed, I think, that the clause which follows does not say that the liability shall rest upon him who has caused the extraordinary traffic to be there. It is not that the liability shall rest upon him at whose instance or for whose benefit that traffic has been initiated. It is not even as Lopes, L.J., read it, for the purpose of giving a ground for his judgment, that there should be liability upon the person *in consequence of whose orders* the traffic has been carried on. The words used in the statute are these—that the expenses shall be recovered "from any person by whose order such weight or traffic has been conducted." One would naturally expect to find in a provision of this kind that the person who really used the road and did conduct the traffic would be responsible for the result, and for my part, I read the statute as meaning that and nothing less or more. A large contractor or other person with a number of vans and road engines which are in use does not work those vans or engines himself—he gives orders to the persons who are in his employment to work them. The words of the statute seem to me to

fit that very case. The additional expense rendered necessary for the repair is to be recovered "from any person by whose order such weight or traffic has been conducted." That appears to me to strike at or to apply to the master having himself ordered his servants to conduct the traffic upon the road, and to no one else. So far as I can see there is no recondite or secondary meaning to be attached to the words "by whose order." I agree with my noble friend Lord Watson that those words must be taken in their ordinary and natural signification; and taking them so, I think they lead to the result I have now stated. I think one cannot fairly interpret the words "by whose orders" by referring them to someone who has made a contract which leads somebody else to give an order to conduct the traffic on that road—namely, the contractors with whom he was engaged, or the persons who in fact conducted that traffic.

Upon these grounds, I am of opinion that the interpretation which was put upon this clause by the Divisional Court, and which had some sanction in one of the previous cases, is not sound, and I agree entirely in the view which has been taken by the Court of Appeal, that the interpretation of the statute is that which I have endeavoured to explain.

It was argued that Lord Gerard was aware that the materials must come by this road in the fulfilment of these contracts. Indeed, it was suggested that the contracts might be read as if he had so stipulated I agree with my noble and learned friends who have spoken, that the facts do not warrant any such observation. It was no term of the contract with Lord Gerard that the materials should come by that road, and for my own part I am not prepared to say, even if there had been in the contract with Lord Gerard a stipulation that these materials should be brought by that road, that would be in a sense within the meaning of the statute a bringing of the traffic by his order along the road, for I think that the person who conducts the traffic or gives his orders to his servants to conduct it, is the person who is liable under the statute.

Again, it was said that if this reading of the statute were adopted, as it must now be, mischief would result which was not anticipated. It was said that there would be a great deal of traffic which would wear down the roads, and for which there would be no means of recovering the cost of the repair. For my own part I can scarcely see that that evil will occur, or, if it does, it appears to me that it must be in a very limited degree. If there be any extensive work going on for which a road of this kind is used, and several contractors are using it each to a certain extent, and the surveyor gives his certificate that there has been extraordinary traffic, but it appears that two or three different persons have contributed to a material extent to the injury of that road, I, for my part, can see no reason why an action should not lie against each of those persons; and therefore the hardship suggested in this supposed case does not appear to me to have any substance in it.

For these reasons I concur in thinking that this appeal ought to be dismissed.

Lord DAVEY.—I cannot doubt that the judgment of the Court of Appeal in this case ought to be affirmed.

The question is, "By whose order" was the traffic conducted? I am of opinion that *primâ facie* the traffic was being conducted by order of the person to whom the goods at the time being belonged, at whose risk and under whose control those goods were being carried, and not the less so because the goods were being carried by the merchant in pursuance and in performance of a contract of sale and delivery to a purchaser at another place. In such a case the goods when on their way to a place of delivery are at the risk and under the control of the vendor, and I do not think, in the ordinary use of language, the traffic can be said to be conducted by the order of the purchaser, though no doubt the goods are being so carried in consequence of his order.

It appears to me that Lopes, L.J., in his dissenting judgment, puts very clearly the points upon which I venture to differ from him. He says, in the course of his judgment: "Is it to be said, if I order a truck of coals from a coal merchant, and his wagons, owing to the excessive weight of the coals, do damage, that the damage is to be attributed to the order given to his carter by the coal merchant, and not to my order, which is the effective cause of any action being taken by anybody? With great deference to the Lord Justice, I answer that question, "Yes, it is so to be said if the test of liability is to be by whose order the traffic is being conducted." The Lord Justice subsequently says: "I read 'by whose order' as if it was 'in consequence of whose order.'" I do not think that that is a legitimate change of the words used in the Act, and I do not think that Lush, J., and Bowen, J., as he then was, in the case which has been referred to—*Williams* v. *Davies*—so read the Act. At any rate, I think it is a wrong reading of the Act, and therefore I think that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Prior, Church, & Adams*, for *Warner & Turner*, Maidstone.

Solicitors for the respondent, *Meynell & Pemberton.*

From C. A. (England). July 26, 1897.

BOULTER v. JUSTICES OF KENT AND OTHERS. (a.)

Licensing Acts—Licence—Refusal to renew—Appeal to quarter sessions—Costs—Non-appearance of objector—Jurisdiction to give costs against objector—Summary Jurisdiction Act, 1879 (42 & 43 *Vict.* c. 49), *ss.* 31, 50—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 27—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict.* c. 43), *s.* 7—*Interpretation Act*, 1889 (52 & 53 *Vict.* c. 63), *s.* 13.

Justices at a licensing meeting are not a court of summary jurisdiction, and therefore section 31 *of the Summary Jurisdiction Act*, 1879, *does not apply to an appeal from them to quarter sessions; that court has no jurisdiction to order an objector to the renewal of a licence to pay the costs of the appeal.*

Decision of the Court of Appeal, 45 *W. R.* 4, [1896] 2 *Q. B.* 306, *reversed.*

Reg. *v.* Justices of Glamorganshire, 40 *W. R.* 436, [1892] 1 *Q. B.* 621, *overruled.*

This was an appeal from an order of the Court of Appeal (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.), 45 W. R. 4, [1896] 2 Q. B., 306, affirming a decision of the Queen's Bench Division discharging a rule *nisi* for a *certiorari*, 44 W. R. 603, [1896] 2 Q. B. 1.

The appellant Boulter, in August, 1895, served upon the holder of a public-house licence written notice of his intention to oppose the renewal of the licence at the general annual licensing meeting. The appellant appeared and opposed the renewal, which was refused. The licensee of the house appealed to

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law

the quarter sessions, and notices of appeal were duly served upon the objector and upon the clerk to the justices. Neither the appellant nor the licensing justices appeared upon the appeal, and the court of quarter sessions renewed the licence and ordered the appellant to pay the costs of the appeal. The appellant thereupon obtained in the Queen's Bench Division a rule *nisi* for a *certiorari* to bring up for the purpose of being quashed that part of the order which ordered the appellant to pay the costs of the appeal, but the rule was subsequently discharged by the Queen's Bench Division, and the decision of the Queen's Bench Division was affirmed, with costs, by the Court of Appeal.

Asquith, Q.C., and *Horace Avory* (*Blaiklock* with them), for the appellant.—This was not a matter within the Summary Jurisdiction Acts. Any one of the public or even a justice may be an objector: Licensing Act, 1872, s. 42, sub-section 2. It is only in the case of new licences that provision is made for the payment of costs by an objector. By the Alehouse Act, 1828, s. 27, it is only a person who thinks himself "aggrieved" that can appeal. There is no "conviction or order" within section 31 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

They referred to *Sharp* v. *Wakefield*, 39 W. R. 561, [1891] A. C. 173, ; section 7 of the Summary Jurisdiction Act, 1884; the Interpretation Act, 1889, s. 13; *Reg.* v. *Goodall*, L. R. 9 Q. B. 557, 22 W. R. Dig. 125; *Reg.* v. *London Justices*, 43 W. R. 387, [1895] 1 Q. B. 616; *Reg.* v. *Glamorganshire Justices*, 40 W. R. 436, [1892] 1 Q. B. 621.

They also cited *Reg.* v. *Somersetshire Justices*, 37 W. R. 492, 22 Q. B. D. 625; *Morant* v. *Taylor*, 24 W. R. 461, 1 Ex. D. 188; and *Reg.* v. *Edwards*, 13 Q. B. D. 586, 32 W. R. Dig. 105.

Lawson Walton, Q.C., and *H. F. Dickens, Q.C.* (*A. H. Bodkin* with them), for the respondents.—The definition of a "court of summary jurisdiction" has been expanded in 1884 and affirmed in 1889. It was made as comprehensive as possible. *Reg.* v. *Glamorganshire Justices* covers this case. The objector here initiates the litigation.

They referred to *Reg.* v. *Anglesea Justices*, 65 L. J. M. C. 12, 44 W. R. Dig. 89; and *Reg.* v. *Farquhar*, L. R. 9 Q. B. 258, 22 W. R. Dig. 38.

[Lord DAVEY.—You have got to show that it was an order made in pursuance of the Summary Jurisdiction Act. You come under the Licensing Act.]

Horace Avory replied.

The House took time for consideration.

Lord HALSBURY, C.—This case may be compendiously stated as raising the question whether justices at a licensing meeting are a court of summary jurisdiction, and I am of opinion they are not. I do not think they are a court at all. The whole licensing system has been conducted under a a code of its own, and the Act of 1828 has provided a variety of provisions, and has constituted a form of procedure which does not appear to me primarily to come under the description of a court. It is true that justices are selected as the persons who are to exercise the jurisdiction, whatever that jurisdiction is; and, indeed, the Act of 1828 appears to have been thought by its authors to require an interpretation clause of its own, as it says, "to remove doubts as to the meaning of certain words in the Act." Among other things, it was enacted that the word "justice" should be deemed to mean a justice of the peace. I think in the whole course of legislation the distinction between a court and something which is not a court has been preserved. In section 4 of that Act the words used are "licensing meeting." By section 9, "when at any of the meetings aforesaid any question touching the granting, withholding, or transferring of a licence shall arise, such question shall be determined by a majority of the justices who shall be present when such question shall arise, and every licence granted under the authority of the Act is to be signed by the majority of the justices present when such licence shall be granted." It will be observed, not an order of court, but merely the signature of the majority of justices. Section 21 draws a remarkable distinction between the licensing justices acting in their capacity as a licensing authority and persons acting as a court. A person charged with offences against the licensing laws can be summoned to the general annual licensing meeting to answer the charge. The justices at the general annual licensing meeting may bind the person to answer the charge, and others to give evidence upon the charge. But in certain events an offender is required to be tried by a court of quarter sessions. The difference between the procedure of a court and of the licensing meeting is not merely one of nomenclature. Where justices are acting as a court of any sort they must proceed according to the regular rules which are applicable to all courts of justice; but in respect of an application for a licence or its refusal they may, and constantly do, receive representations not on oath. Their meetings must be public, it is true; but Lord Kenyon, who in 1790—*Rex.* v. *Downs*, 3 T. R. 560—held a licence bad because it was granted at a private meeting, did not rely upon the general principle that all courts of justice must be open, but upon the ground that the statute directed it, and added that the construction of the then statute law was advantageous to the public, because "it is of importance to the public that licences of this sort should be granted openly, and not by stealth, in order that they may have an opportunity of objecting to the granting of the licences to particular persons on the ground of unfitness." And Mr. Justice Ashhurst says: "Though, perhaps, it was not necessary that such magistrates should be limited to the time mentioned in the Act for granting licences, yet, as the public are so much interested in the subject, the Legislatnre thought it proper to include all places in the general provisions of the Act, so that in no place whatever can the justices grant a licence but at a public meeting." The Acts referred to by the learned judges were repealed by the Act of 1828. But a careful distinction appears to me to always have been preserved between the same bodies acting as a court and deciding questions of licensing at a licensing meeting of the justices. If the Licensing Acts are to be looked to, it cannot be doubted that the order made in this case, condemning a person in costs because he had opposed a licence at a licensing meeting and given notice of his intention to do so, cannot be supported.

But the question, in truth, turns upon whether the meeting which I have described as a meeting of the licensing justices was a court of summary jurisdiction within the meaning of the Summary Jurisdiction Act, 1879. It appears to me that the Act of 1879 certainly never contemplated bringing within its provisions a meeting of justices under the licensing laws. A court of summary jurisdiction must, of course, be a court, and the words "summary jurisdiction" appear to me to refer to a procedure primarily, at all events, criminal, wherein the court does not proceed on the finding of a grand jury or information by the Attorney-General, but has the power to deal with an offence without those provisions which the original constitution of this country enforced as a security for the subject against criminal

procedure. I think no difficulty could have arisen but for the language of the Summary Jurisdiction Act, 1884, which enacts that the previous definition of a court of summary jurisdiction was to include "such justice, justices, or magistrate as therein mentioned, whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his or their commission, or by the common law." At first sight it would seem that these words would include everybody who is a justice of the peace "doing any act whatever which by law he was entitled to do" in the definition of a court of summary jurisdiction. But it is to be remembered that the definition of a court of summary jurisdiction was "any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by or who is or are authorized to act under the Summary Jurisdiction Acts or any of such Acts." The amended definition of the Act of 1884 must surely be read by the light of that which it is intended expressly by the later Act to explain, and no one could seriously contend that it would have been doubtful before the Act of 1884 whether a licensing meeting was included in the definition as it then stood. The amendment is obviously pointed to the doubt whether, where by some Acts a particular proceeding is authorized, a summary court is made the ultimate tribunal. Whether the definition of 1879 was not too narrow when it limited the definition to magistrates who are authorized to act under the Summary Jurisdiction Acts, or any of such Acts, undoubtedly jurisdiction was given to determine certain judicial cases, but the Acts could not have been properly described, in name or in substance, Summary Jurisdiction Acts.

But if I am right in the distinction I have drawn between a magistrate meeting for licensing purposes, and courts, although consisting of the same persons, it would be the height of absurdity to suppose that the Legislature intended to include in the definition, and to make applicable to that definition, persons who were in fact justices of the peace, but who in the particular matter here referred to—namely, "licensing"—were not occupying the position of judges at all, but were exercising the discretionary jurisdiction as to how many public-houses they would permit in a district, or what persons should carry them on. The distinction I am insisting on is only consistent with the language of the Summary Jurisdiction Act itself. Speaking of the appeal, the appeal is to be "against a conviction or order," words perfectly familiar to every person acquainted with the procedure of the courts in question, wholly inapplicable, as it appears to me, to the decision of justices at a licensing meeting. If the appeal still exists under the Act of 1828, as I think it does, the appeal must be conducted under the provisions of that statute.

I am aware that this view is in conflict with the decision, but I am not able to concur in the decision arrived at, in *Reg.* v. *Glamorganshire Justices*. It seems to me that neither popularly nor technically would a licensing meeting be a court of summary jurisdiction. To the lawyer as well as to the layman it would be an astonishing thing if at a licensing meeting the magistrates should proceed to hear and try a case, for example, in which a person was to be committed for trial, though if they are a court of summary jurisdiction they could enter on such an investigation. It would be said the whole proceedings of such a meeting are inapplicable to such a condition of things. Quite true. But the inapplicability of such a condition of things is to my mind ground for the conclusion at which I have arrived, that a licensing meeting never could have been intended to be included in the phrase "court of summary jurisdiction." It is what it purports to be, a licensing meeting; and inasmuch as the whole jurisdiction to make the order now under debate depends upon the supposed authority given to it as a court of summary jurisdiction, and as I am of opinion that it does not fill that character, the order is clearly bad. I am therefore of opinion that the order appealed from ought to be reversed, and that the respondents do pay to the appellant his costs both here and below.

Lord WATSON.—I am of the same opinion with the Lord Chancellor, and I agree in the judgment which he has proposed.

I have had an opportunity of considering carefully the judgment which has been prepared by my noble and learned friend Lord Herschell, and I think it sufficient to say that I entirely concur both in the conclusions of the noble and learned lord and in the reasons which he has assigned for them.

Lord HERSCHELL.—The appellant in this case served upon the licensee of a public-house called the Duke of Cambridge a notice of objection to the renewal of his licence, stating as the ground of objection that the licence was not needed to supply the legitimate wants of the neighbourhood.

At the licensing sessions held at Dover on the 26th of August, 1895, the appellant appeared and opposed the granting by way of renewal of the licence. The licensing justices refused to grant the licence. Thereupon the tenant of the public-house, and his lessors, served notices upon the licensing justices and their clerk, and upon the appellant, of their intention to appeal to the court of quarter sessions against the decision of the licensing justices.

At the court of quarter sessions neither the appellant nor the licensing justices appeared to support the decision of the justices. The court of quarter sessions granted a licence in respect of the Duke of Cambridge public-house, and ordered the present appellant to pay the costs of the appeal, amounting to £73 1s. 8d. The question to be determined is whether they had jurisdiction to make this order for the payment of costs, and this again raises the question whether the appeal was made under and was regulated by the provisions of section 31 of the Summary Jurisdiction Act, 1879.

There is no doubt that prior to that year appeals from the refusal to grant a licence by way of renewal were regulated by the Alehouse Act, 1828. By section 27 of that Act any person thinking himself aggrieved by "any act of any justice, done in or concerning the execution of the Act, may appeal against such act" to the next quarter sessions, provided he gives "to such justice" notice in writing of his intention to appeal within five days after the act shall have been done. It is clear that under the Act of 1828 the court of quarter sessions had no power to make an order for the payment of costs against a person who had opposed the grant of a licence at the licensing meeting.

It is contended, however, that the proceedings on an appeal to quarter sessions against the refusal to grant a licence by way of renewal are now regulated by section 31 of the Summary Jurisdiction Act, 1879. If this be so, the jurisdiction of the court to award costs is beyond question. It is conceded that the licensing justices are not, by virtue of the Summary Jurisdiction Act, 1879, standing alone, made a court of summary jurisdiction. The definition of a court of summary jurisdiction in section 50 of that Act is "Any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is or are authorized to act under the Summary Jurisdiction Acts, or any of such Acts." But the Summary Jurisdiction Act, 1884, by section

7, after reciting section 50 of the prior Act, and that doubts had arisen whether the section extended to justices acting under some Act other than the Summary Jurisdiction Acts, enacted as follows: "It is hereby declared that the above-recited definition of court of summary jurisdiction in section 50 . . . includes such justice, justices, or magistrate as therein mentioned, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his or their commission, or by the common law." This section was repealed by, but is practically re-enacted in, the Interpretation Act, 1889.

It is said that the effect of the provision contained in the Act of 1884 was to make the licensing justices a court of summary jurisdiction. I quite agree that if the words are to be read without any restriction being imposed upon them by reason of the subject-matter of the legislation of which they form part, they apply to every justice when acting as such, and therefore to the licensing justices. I will, for the present, assume that this is their effect, though I shall have something to say on the point hereafter.

It is said, next, that the licensing justices being a court of summary jurisdiction, an appeal from them to quarter sessions is regulated by and is subject to the provisions of section 31 of the Act of 1879. This was held to be the law by the Court of Appeal in the case of *Reg.* v. *Glamorganshire Justices*, and again in the present case. The question arose in the former case in this way: The appellant had given notice of his intention to appeal to the clerk and to some only of the licensing justices, which would not be sufficient under the Act of 1828, whereas a notice to the clerk alone was sufficient if the Act of 1879 applied. The Court of Appeal held, affirming the Queen's Bench Division, that the notice was sufficient.

It is remarkable that neither in the judgments in *Reg.* v. *Glamorganshire Justices*, nor in those delivered in the present case, is any reference made to the introductory language of section 31 of the Act of 1879, which limits the operation of that section to persons entitled to appeal from the "conviction or order" of a court of summary jurisdiction. It seems to have been assumed by the learned judges that if the licensing justices were a court of summary jurisdiction, it necessarily followed that all appeals from these decisions came within the terms of and were regulated by the provisions of section 31. I do not think this is so.

An applicant to whom a licence is refused has undoubtedly by the Act of 1828 a right to appeal, for that statute confers on him a right to appeal from "any act" of the licensing justices. But can it be said that he is thereby authorized to appeal from a "conviction or order"? The appeal authorized is certainly not one from a "conviction"; is it an appeal from an "order"? Even if I had to construe the language of the introductory part of section 31 alone, without the light thrown upon it by the subsequent provisions, my answer must be in the negative.

Section 31 forms part of an Act to amend the law relating to the summary jurisdiction of magistrates. What is meant by the summary jurisdiction of magistrates is, of course, perfectly well understood by every lawyer, and in relation to that jurisdiction the words "conviction" and "order" have a well-defined meaning. The conviction follows on an information; the order on a complaint. When the licensing justices grant an application for a licence they sign a certificate by means of which the licence is obtained. But where they refuse the application they make no order at all. They simply do not grant the licence applied for. An order is never drawn up, and to speak of the act of the justices in not granting a licence as an order would be, I think, a misuse of the term. When the other provisions of section 31 are examined the matter becomes even clearer. The first sub-section prescribes that the appeal must be made to the next quarter sessions holden not less than fifteen days "after the day on which the decision was given upon which the conviction or order was founded," thus showing that the words "conviction or order" are not even used as meaning the decision that a conviction shall take place or an order be made, but refer to the conviction and order themselves, in their technical sense. The refusal to grant a licence may be regarded as a decision of the licensing justices, but what is the "order" founded thereon? Sub-section 6, to my mind, puts the matter beyond doubt. No allusion was made in any of the judgments either to this sub-section or to that from which I have just quoted. Sub-section 6 requires that whenever a decision is not confirmed by the Court of Appeal, the clerk of the peace "shall endorse on the conviction or order appealed against a memorandum of the decision of the Court of Appeal." It is to be observed that the sub-section imposes the duty in all cases—the word is "whenever." How is it possible for this duty to be performed in cases like that under consideration, where no order is ever in existence?

That the word "order" is used in its technical sense and not in a loose fashion to cover every decision of magistrates, is shown by another provision to be found in the Act. Section 33 enacts that any person aggrieved who desires to question "a conviction, order, determination, or other proceeding" of a court of summary jurisdiction, on the ground that it is erroneous in point of law, may require a case to be stated. The words "determination or other proceeding" are here added, indicating that every determination of justices was not regarded as comprised in the word "order."

I have not yet referred to sub-section 2 of section 31, which was much discussed in the argument at the bar. That sub-section prescribes that the appellant shall give notice of appeal to "the other party." There is no difficulty in applying this provision in cases where magistrates exercise summary jurisdiction as commonly understood. Where proceedings are taken by way of information or complaint which end or may end in a conviction or order, there are always two parties—the person initiating the proceedings and the person against whom the proceedings are taken. It has been held that, where the appeal is against the refusal to grant a licence, a person who has objected to the grant of the licence before the licensing justices is "the other party" within the meaning of section 31. No doubt, if it be assumed that the section includes such a case, the words "the other party" could not very well apply to anyone else. But, to me, the provision for notice to the other party is an additional reason for thinking section 31 inapplicable to appeals against the refusal of justices to grant a licence. Persons objecting to the grant of a licence are not, I think, parties to the proceedings on the application in any proper sense of the term. The question is not one *inter partes* at all. The justices have an absolute discretion to determine, in the interest of the public, whether a licence ought to be granted, and every member of the public may object to the grant on public grounds, apart from any individual right or interest of his own. The applicant seeks a privilege. A member of the public who objects merely informs the mind of the court to enable it rightly to exercise its discretion whether to grant that privilege or not. A decision that a licence should not be granted is a decision that it would not be for the public benefit to grant it. It

is not a decision that the objector has a right to have it refused. It is not, properly speaking, a determination in his favour. It is, I think, a fallacy to treat the refusal as necessarily induced by a particular objector. Every member of the local community might object. Would they all then become "the other party"? There is, in truth, no *lis*, no controversy *inter partes*, and no decision in favour of one of them and against the other, unless, indeed, the entire public are regarded as the other party; for if a licence be refused on the ground that it was not needed to supply the legitimate wants of the neighbourhood, the decision is really in favour of the public at large. The provision contained in sub-section 2 seems then to me an additional reason for holding that an appeal from the "act" of the justices in refusing a licence is not an appeal from a "conviction or order" of a court of summary jurisdiction.

I see no inconvenience in such a conclusion; quite the reverse. It is said that the object of section 31 was to introduce uniformity of procedure in appeals to quarter sessions. A laudable object, and calculated to be useful when applied to a class of cases similar in their character. But there does not appear to me to be any reason for straining the language of section 31 so as to make it embrace a very different class of cases provided for by special legislation. That legislation has never been expressly repealed, and I do not think it has been repealed by necessary implication, for an enactment which regulates appeals against a "conviction or order" of a court of summary jurisdiction does not, in my opinion, conflict with an enactment which prescribes the method and conditions of an appeal against "any act" of the licensing justices.

The Court of Appeal arrived at the conclusion they did in the *Glamorganshire case* and in the present case because they felt bound to attribute to the words of the definition clause their natural meaning. I have been guided by the same principle in interpreting the language of section 31 of the Act of 1879, which seems to me to have been somewhat lost sight of.

Although the views I have expressed involve the decision that *Reg.* v. *Glamorganshire Justices* was wrongly decided, they do not necessarily conflict with the judgment in the case of *Reg.* v. *Pontypool Justices*, 40 W. R. 436, [1892] 1 Q. B. 621, in which it was held that the licensing justices were bound under section 33 of the Act of 1879 to state a case for the opinion of the court. That section, as I have already pointed out, entitles an aggrieved party who desires to question any "determination" of a court of summary jurisdiction as erroneous in point of law, to have a case stated. And a decision not to grant a licence is undoubtedly a "determination" of such court if the licensing justices are a court of summary jurisdiction. Though it is not necessary to decide the point, I feel bound to say that, as at present advised, I am not satisfied that the conclusion arrived at on this point in the courts below is a sound one. Looking at the scope of the Act of 1879, at the fact that section 7 of the Act of 1884 purports to be declaratory and not enacting, and that it is difficult to suppose that it was intended to enact that every justice when doing any act under any authority which he possesses is a court of summary jurisdiction, my present impression is that the enactments defining a court of summary jurisdiction may well be construed as meaning no more than this—that every justice is a court of summary jurisdiction within the meaning of the Act of 1879, or any other law relating to summary jurisdiction, in all matters pertaining to the exercise of summary jurisdiction by magistrates, however he may have derived his authority to exercise that jurisdiction.

I think the judgment should be reversed, and the appeal allowed with costs here and below.

Lord SHAND.—I also am of opinion that the judgment should be reversed, and I have nothing to add to the grounds of judgment which have been already stated by my noble and learned friends, in which grounds of judgment I entirely concur.

Lord DAVEY.—In this case the Court of Appeal, in deciding adversely to the present appellant, have followed a previous decision of their own in *Reg.* v. *Glamorganshire Justices*. The question in the earlier case was whether a notice of appeal against a refusal to renew a licence which had been served in the manner provided by the Summary Jurisdiction Acts, but did not comply with the requirements of the Licensing Acts, was sufficient. It was, therefore, in substance the same question as is involved in the present case. The Court of Appeal held that the question was concluded by the terms of the definition of "court of summary jurisdiction" contained in section 13, sub-section 11, of the Interpretation Act, 1889. The Master of the Rolls held that the provisions of the Summary Jurisdiction Acts as to procedure are intended to apply to all acts of justices where they are acting as justices in any matter in which an appeal may lie. Fry, L.J., agreed, but added these words: "I desire to observe that what we are holding is not that the Acts of 1884 and 1889 in substance make justices acting as such in all cases courts, but only that they put them in the same position as courts of summary jurisdiction for the purpose of certain provisions as to procedure."

It must be admitted that the words of section 13, sub-section 11, of the Act of 1889 are very wide, and are capable of the meaning attributed to them by the Court of Appeal. In order to ascertain whether they bear that meaning or a more restricted meaning, one must look to the scope and purpose of the Act, the subject-matter of the enactment itself, and the context in which they are used. By section 50 of the Summary Jurisdiction Act, 1879, a court of summary jurisdiction was defined as "any justice or justices of the peace or other magistrate by whatever named called, to whom jurisdiction is given by, or who is or are authorized to act under the Summary Jurisdiction Acts, or any of such Acts." There were, however, a great many Acts by which justices were authorized to deal with certain specified matters in a summary way, and in most of which a mode of procedure was prescribed. Doubts appear to have been entertained whether the section applied to such cases, and it was considered desirable to assimilate the procedure in all cases of summary jurisdiction. Accordingly, by the Summary Jurisdiction Act of 1884 a large number of earlier enactments enumerated in the schedule laying down a special procedure were repealed, and by section 7, after reciting section 50 of the Act of 1879, and reciting that doubts had arisen as to whether the said section extended to such justice, justices, or magistrate when acting under some Act other than the Summary Jurisdiction Acts, and it was expedient to remove such doubts, it was declared that the above recited definition of "court of summary jurisdiction" in section 50 of the Act of 1879 includes "such justice, justices, or magistrate as therein mentioned whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his or their commission, or by the common law." It is to be observed that the schedule of enactments repealed contains the provisions as to procedure of the sections of the Licensing Act, 1872, dealing with

the recovery of penalties for the infringement of the provisions of that Act, but does not include the sections in the Alehouse Act, 1828, and the Act of 1872 relating to procedure on the grant or renewal of licenses or appeals from the justices in such cases. It is obvious that the word "acting" may mean acting generally and in any capacity, or acting in the particular manner or capacity in question—namely, in exercise of summary jurisdiction. I am of opinion, on consideration of the context and the connection in which the word "acting" is used, that it should be read in the more restricted sense, and that it means in this section "exercising summary jurisdiction," and consequently that the section does not, according to its true construction, apply to justices except when sitting as a court and exercising summary jurisdiction. In other words, the only effect of the section is to apply the procedure of the Summary Jurisdiction Acts to the justices exercising summary jurisdiction, whether that jurisdiction was derived from the Acts themselves or from some other source. It did not, therefore, in my opinion, alter or affect the procedure laid down by the Act of 1828 for appeals from the act of justices concerning the granting or renewal of licenses.

I now come to the Act of 1889. Its title is "An Act for consolidating enactments relating to the construction of Acts of Parliament, and for further shortening the language used in Acts of Parliament." A most laudable object assuredly, but an Act for that purpose is the last place in which you would look for a substantive and important change in the law—imposing new liabilities on Her Majesty's subjects. Section 50 of the Act of 1879 and section 7 of the Act of 1884 are repealed, and for them is substituted the sub-section in question, which appears to be compounded out of the two repealed sections. I regard this section as being what it purports to be—a consolidation of the then existing law, and as not intended to extend or alter that law. I think that the words used in it must be interpreted in the same sense as that in which they are used in the repealed sections, and consequently that, according to the true construction of the section, it applies only to justices when exercising summary jurisdiction, whether under the Summary Jurisdiction Acts or any other authority. Agreeing with Fry, L.J., that it does not make justices in all cases a court of summary jurisdiction, I think, differing from that learned judge, that it does not either have the effect of putting them in the same position for purposes of procedure.

I do not dissent from what was said by Wright, J., in giving judgment in the present case: "It is incredible that any lawyer, or, I will add, the Legislature, should have meant to apply in that wholesale and rough-and-ready way the provisions of the Summary Jurisdiction Acts to matters to which they had never been adapted, and were not at all applicable." For the reasons I have given I do not think the Legislature has done so.

I also agree that the refusal of the justices to renew the licence was not an "order or conviction" within the meaning of the Summary Jurisdiction Acts; but I so entirely agree with what has been said by my noble and learned friend opposite (Lord Herschell) on that subject that I need not repeat the reasons for my opinion.

I therefore concur in the order which has been proposed.

Appeal allowed.

Solicitors for the appellant, *Hicks, Davis, & Hunt*, for *A. M. Bradley*, Dover.

Solicitors for the respondents, *Godden, Son, & Holme*, for *Mowll & Mowll*, Dover.

High Court of Justice.

Chan. Div. North, J. — March 3, 4, 9, 11, 16, 18, 23; Aug. 11, 1897.

ECROYD v. COULTHARD. (a.)

Inclosure Act—Award—Bed of river ad medium filum *—Several fishery.*

An award under an Inclosure Act dealing with moors, commons, and waste grounds will not by implication convey the bed of a river adjoining the land awarded usque ad medium filum.

A fortiori, *such an award will not convey the bed of the river where it has been treated as a separate tenement, and not subject to commonable rights, and is exclusively in the possession of lessees of the lord at the date both of the Act and the award.*

Action.

The plaintiff claimed to be the owner of a several and exclusive fishery in the half of the River Eden, in the manor of Cumwhitton, in the parish of Cumwhitton, in the county of Cumberland, adjoining an estate known as Edenbanks, belonging to the defendant, Mrs. Leach, and also claimed a right of way along the bed of the river on Mrs. Leach's property.

The action was brought to restrain the defendants from entering upon and trespassing upon the plaintiff's several fishery, and from preventing the plaintiff from using the alleged right of way.

The defendants Coulthard and Hodgkinson were members of an angling association, and claimed as licensees of Mrs. Leach, who claimed to be entitled to the stream opposite Edenbanks, *ad medium filum*, and they counter-claimed for an injunction restraining the plaintiff from trespassing on her estate or fishing in the stream.

In 1796 Frederick, Earl of Carlisle, lord of the manors of Cumwhitton and Cumrew, was entitled to the bed and soil of the Eden throughout the manor of Cumwhitton, which extended to the middle of the stream, and the several fishery in the same, subject only to certain rights of the predecessors of a copyholder named Ion to fish for lampreys in a portion thereof somewhat south of Edenbanks. The earl's right of fishery was territorial and not manorial or seignorial.

The present Earl of Carlisle conveyed the fishery to the plaintiff on the 14th of May, 1890, but the conveyance did not include the bed of the river opposite Edenbanks, which was expressly excluded by the particulars of sale. On the 26th of March, 1894, the plaintiff bought up Ion's rights.

Mrs. Leach's title was founded on an award under an Enclosure Act of 1796 (36 Geo. 3 c. xxxix.).

On the 16th of May 1799, the Edenbanks Estate was sold to Robert Leach (under whom Mrs. Leach claimed) under an appropriation for payment of expenses, and this sale was recited and confirmed by the award of the 13th of April, 1801. The bed of the Eden was not mentioned either in the Act or in the award, and the Eden was only mentioned as a boundary; but an island in the river was awarded to the lord.

The Edenbanks estate was described in the award as containing 105a. 2r. 35p., bounded on the west by the River Eden. The survey, which was incorporated with the award, showed the boundary by lines extending to the edge of the river, but not going over the bed. An addition of eight or ten acres would

(a.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

have to be made to the quantity if the bed of the river was included.

Cripps, Q.C., Swinfen Eady, Q.C., and *Stuart Moore*, for the plaintiff.—The Inclosure Commissioners only hold jurisdiction as to moors, commons, and waste grounds. The fishery and bed of the river were not part of the waste, but a parcel of the manor. There is no suggestion of any common of piscary, and clearly a fishery is not a moor. At the date of the Inclosure Act the fishery was let, so it was a separate tenement and not subject to commonable rights. The copyhold grant of the right to fish for lampreys shows that the stream was not waste.

They cited *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263, 36 W. R. Dig. 217; *Labrador Company* v. *The Queen*, [1893] A. C. 104, 41 W. R. Dig. 26; *Ewart* v. *Graham*, 7 W. R. 621, 7 H. L. Cas. 331.

Cozens-Hardy, Q.C., and *Micklem*, for the defendants.—The river was part of the waste along which it ran, *ad medium filum*: *Tilbury* v. *Silva*, 45 Ch. D. 98, 39 W. R. Dig. 60; *Royal Fishery of the Banne*, Davies, 149; *Lamb* v. *Newbiggin*, 1 Car. & K. 549; *Attorney-General* v. *Hanmer*, 6 W. R. 804, 27 L. J. Ch. 837. The bed of the river was within the Act, or the island could not have been allotted to the lord; it was part of his compensation. The grant of the waste passed half the bed of the river, as no contrary intention is proved: *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133, 35 W. R. Dig. 71. Robert Leach is directed by the award to fence his allotment on every side except the side of the river. The reservation clause did not preserve the lord's right of fishery: *Townley* v. *Gibson*, 2 T. R. 701; *Sowerby* v. *Smith*, 23 W. R. 79, L. R. 9 C. P. 524. The lessee's rights would not have been affected, but the rent might be apportioned.

Eady, Q.C., in reply.—The bed of the river belonged to Lord Carlisle as owner of the several fishery: *Attorney-General* v. *Emerson*, [1891] A. C. 649, 40 W. R. Dig. 90; *Hindson* v. *Ashby*, 45 W. R. 252, [1896] 2 Ch. 1. *Primâ facie*, the bed would have passed to the plaintiff without special words: *Blackett* v. *Clayton* (1891, B., 2,670, unreported); but the particulars of sale are admissible to rebut this presumption: *Pryor* v. *Petre*, 42 W. R. 435, [1894] 2 Ch. 11, although they would not be admissible to alter the effect of anything contained in the conveyance: *Leggott* v. *Barrett*, 28 W. R. 962, 15 Ch. D. 306.

He also cited *Poole* v. *Huskinson*, 11 M. & W. 827.

Cur. adv. vult.

Aug. 11.—NORTH, J., held that a good title had been traced in the Earls of Carlisle to the bed and soil of the Eden throughout the manor of Cumwhitton and the several fishery therein, subject only to the interests of the Ion family, the right of fishery being a territorial and not a manorial or seignorial right, and that the earl had granted to the plaintiff all his several fishery and fishery rights, but had retained the soil and bed of the river. [His lordship proceeded:] The defence is that the Edenbanks estate (including the bed of the Eden *ad medium filum*) was conveyed to Mrs. Leach's predecessors in title by the award, and that ever since the award they and she have been in sole and undisturbed possession of such bed and of the right of angling and fishing therein. There is no evidence of any preservation of the river before 1860, when the Carlisle Angling Association became tenants. They employed water bailiffs and watchers down to 1870, when the Eden Fishery Board was established and took upon themselves the preservation of the river. The Leaches never employed keepers or watchers. The association often interfered with and threatened to prosecute persons fishing without tickets, but in most cases the persons threatened took tickets, and they never did prosecute. Some of the Leaches or their licensees fished off Edenbanks without tickets and without interference, and they have discharged or warned off persons fishing there. Sometimes such persons went away, sometimes they continued fishing. Since the case of *Duke of Devonshire* v. *O'Connor*, 38 W. R. 420, 24 Q. B. D. 468—a case I do not think applicable, but which they considered as materially strengthening their position—the Leaches have been more vigorous in asserting their rights. Many of the cases of so-called discharge were occasions on which the complaint was of a trespass, not on the fishery, but on the soil of the Edenbanks estate, but some were for actual fishing. It is admitted, however, that none of the Leach family ever took legal proceedings against anyone for trespass. The result of the evidence is that neither party can say that their contention is supported by the acts or conduct of the other, and it is impossible for me to hold that the grounds upon which *Duke of Devonshire* v. *Pattinson* was decided apply to this case. On the other hand, the defence that from the date of the award the Leach family has been in sole and undisturbed possession of the bed of the Eden adjoining the Edenbanks estate and of the exclusive right of angling and fishing there is utterly without foundation.

I have now to deal with the defendants' contention that, although the land allotted to Robert Leach on the face of the award and plan does not include the bed of the river, there is a presumption of law that the bed of the adjacent half of the river passed to him by the award. The law on this subject is clearly laid down by Cotton, L.J., in *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133, 145, 35 W. R. Dig. 71. The defendants say that this precisely meets their case, but I do not think it does for two reasons. I have searched in vain for any decision in which the presumption in question has been applied in the case of an award, and I feel some difficulty in seeing how the statutory award which is imperatively required by the Act to express, specify, and contain the quantity in statute measure, of acres, roods, and perches contained in every respective allotment, can be held to operate as allotting not only the particular area correctly surveyed, measured, and described, but also an additional ten acres or so not included or mentioned in it. Lindley, L.J., seems to have assumed in a case I am going to cite that there may be such a presumption in the case of an award, though much must of course depend upon the language of the Act. Assuming this difficulty to be got over, I think it clear that the presumption can only apply where the land in respect of which it is invoked would clearly have passed if expressly mentioned in the conveyance. A conveyance of a field abutting on a road can only operate to convey half of that road when that half belongs to the party conveying. If it belongs to a third party, it would not pass even if expressly mentioned, and *a fortiori* it could not pass by presumption. In the present case the bed of the Eden was not, in my opinion, within the powers or jurisdiction of the commissioners, and could not have been allotted by them. The Act is merely for dividing the moors, commons, and waste grounds in the manors and parishes of Cumwhitton and Cumrew. The Eden itself is never referred to in the Act or in the award, except where it is referred to as bounding a lot. The bed of the Eden is not referred to either in the Act or in the award.

The question what is waste of the manor is a question of fact, to be solved by the consideration how the *locus in quo*, and other property of similar character in the vicinity, has been used and enjoyed.

I do not doubt that in some cases the bed of a river may be waste of a manor, as, for instance, in *Tilbury* v. *Silva*, where it was clearly proved that the copyhold tenants of the manor had a customary right of fishing in half a river, and the homage so presented at every yearly manor court. In the present case there is not a tittle of evidence of the sort, or that any tenants of the manor had any right of fishing or commonable rights of any kind over such bed. No entry from any court roll is produced showing that any common rights of the copyholders existed in the Eden, or that its bed was part of the wastes of the manor. The case of Ion's tenement in the immediate vicinity shows that, so far from being waste of the the manor, the bed of the river was part of the lord's demesne, of which a tenant had a special and exclusive grant by copy. *Jones* v. *Williams*, 2 M. & W. 326, shows that this evidence is admissible on the main question. And more, the fishery opposite Edenbanks was actually let at the date of the Act to one set of persons, and at the date of the award to another. It was a separate tenement of the lord, the rent of which belonged to the lord, the tenement being in the exclusive possession of his tenants. It was said that, according to *Townley* v. *Gibson*, 2 T. R. 701, the tenant would not be affected by the allotment, but the right to the rent would pass to the allottee of the reversion, and an apportionment would be necessary. This would be so if the subject demised was part of the waste to be allotted; but the lease is important, as showing that the fishery is a separate tenement, not subject to commonable rights at all, nor within the purview of the Inclosure Act. It is not conceivable that in the present case any apportionment of the rent of the lease was in contemplation. In fact there is nothing whatever in the Act, the award, or the evidence to indicate that the bed of the Eden was within the Act, or was intended to be affected by it, or that the Inclosure commissioners contemplated dealing with it in any way. This is my first reason for saying that the presumption of law upon which the defendants rely has no application to the present case.

[His lordship then referred to *Hindson* v. *Ashby*, 45 W. R. 252, [1896] 2 Ch. 1, and to the judgments of Lindley and A. L. Smith, L.JJ.] If the decision in that case was right, it follows that the defendants' contention in the present case is ununfounded. That the Earl of Carlisle was entitled to the bed of the river and the fishery above it at the date both of the Act and award seems to me established by the evidence. Moreover, the defendants cannot dispute this, for their whole claim is based upon the award, and they are nowhere if the earl was not then entitled to the river and fishery. To adopt the words of Lindley, L.J., "the bed of the river clearly did not pass to the defendants' predecessors by the allotment" made in 1801. In words it certainly did not, and any presumption which might have assisted the allottee is displaced by the evidence in favour of the owner of the fishery. Even if the bed of the river was waste of the manor, the result is the same, for it is not allotted to Mrs. Leach's predecessor, and there is no presumption to help her to it, and whatever was not allotted by the award must remain in the lord. In my opinion, therefore, the plaintiff has established his title to the fishery opposite Edenbanks, but this will not interfere with the enjoyment by Mrs. Leach of the usual rights of riparian owners other than the right of fishing. I have not thought it necessary to comment upon a section of the Inclosure Act upon which a great deal of argument was addressed to me referring to seignorial and manorial rights. I do not think that it affects the questions I have to deal with. The right to the bed of the river in this case seems to me to have been from the first a territorial right, the bed within the manor being part of the demesne lands of the lord. If, on the other hand, the lord's right to the fishery was in reality a seignorial or manorial right, it appears to me that it would be saved or reserved by that section which is almost identical with the section considered by the Court of Appeal in *Duke of Devonshire* v. *O'Connor*. On one point Mrs. Leach is entitled to succeed—as to the alleged right of way along the bank of the river. When the earl's access to the river across the common land was about to be interrupted by the allotment thereof, it is difficult to say why he did not claim to have a right of way or private way for fishermen, keepers, &c., set out in his favour along the bank. Such a claim would not have been rejected, but probably the professional fishermen had their boats and nets, and the anglers being few in number no interference was anticipated. But there is now no remedy by the award, the earl received a large allotment in lieu of and as and for full compensation of his right and interest as lord of the barony of Gilsland and the two manors in and to the soil of the residue of the said moors, commons, and waste grounds, and Edenbanks, thus freed and released from all rights of the earl, was allotted to R. Leach as his freehold to all intents and purposes whatsoever.

Declaration that the plaintiff is entitled to a several fishery in the half-stream of the Eden within the manor of Cumwhitton so far as it adjoins the Edenbanks estate. Injunction to restrain the defendants, their servants, and agents from entering and trespassing upon such fishery and interfering with the plaintiff and his tenants and licensees in the enjoyment thereof. Dismiss the action so far as it seeks other relief. On counter-claim injunction restraining plaintiff, his servants, and agents from entering and trespassing upon the Edenbanks estate. Dismiss counter-claim so far as it seeks to restrain the plaintiff, his servants, and agents from fishing in the half-stream of the Eden in the manor of Cumwhitton where its adjoins the Edenbanks estate. Parties to have costs of issues upon which they succeeded; costs to be set off. Judgment, was dated the day argument was concluded, as in *Turner* v. *London and South-Western Railway Co.*, L. R. 17 Eq. 561, 22 W. R. Dig. 209, the defendant, Mrs. Leach, having died since that day.

Solicitors for the plaintiff, *Harrison & Powell*, for *Saul*, Carlisle.

Solicitors for the defendants, *Flux & Leadbitter*, for *Dobinson & Walker*, Carlisle.

Chan. Div. } Stirling, J. } July 14-17, 20, 21; Nov. 23.

LONDON AND NORTH-WESTERN RAILWAY *v.* RURAL DISTRICT COUNCIL OF RUNCORN. (*a.*)

Local government—Sewers—Drains constructed by railway company—Vesting in local authority—Railway Clauses Act, 1845 (8 *Vict. c.* 20), *ss.* 1, 68—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4, 13 (2).

The special Act of a railway company expressly incorporated the provisions of the Railway Clauses Act, 1845, *and, pursuant to such last-mentioned Act, the railway company constructed certain pipes and drains for the purpose of carrying away water from lands lying*

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

near the railway. Down such pipes and drains, but without the knowledge of the railway company, some sewage from houses erected on adjoining lands found its way.

Held, that the special Act must be read as if by it all the provisions of the Railway Clauses Act were in terms re-enacted; that the pipes and drains in question were therefore made under a private Act of Parliament, and therefore fell within the second exception contained in section 13 of the Public Health Act, 1875, and had not vested in the local authority.

By the writ in this action the plaintiffs claimed an injunction to restrain the defendants from connecting certain new sewers of the defendants in the township of Helsby and parish of Frodsham, in the county of Chester, with certain land drains and ditches of the plaintiffs, and from causing or permitting sewage or water to flow from the said new sewers of the defendants into the said ditches and land drains of the plaintiffs.

There were no pleadings in the action.

The question at issue was whether the land drains and ditches mentioned in the writ (which were constructed in their own lands by the plaintiffs or their predecessors in title) were vested in the plaintiffs or (as the defendants alleged) under the provisions of the Public Health Act, 1875, had become vested in the defendants as the rural sanitary authority of the district.

At the trial a considerable number of witnesses were examined on behalf of the plaintiffs and defendants respectively.

The result of their evidence and the facts of the case are fully stated in his lordship's judgment.

Hastings, Q.C., and *Shearman*, for the plaintiffs, referred to *London and Blackwall Railway Co.* v. *Limehouse District Board of Works*, 5 W. R. 64, 3 K. & J. 123; *City and South London Railway Co.* v. *London County Council*, 40 W. R. 166, [1891] 2 Q. B. 513; *London County Council* v. *School Board for London*, 40 W. R. 604, [1892] 2 Q. B. 606; *Meader* v. *West Cowes Local Board*, 40 W. R. 676, [1892] 3 Ch. 18; *R.* v. *Godmanchester*, 13 W. R. 155, 14 *ib.* 375, 5 B. & S. 886, 936, L. R. 1 Q. B. 328; *Staffordshire and Worcestershire Canal* v. *Birmingham Canal*, L. R. 1 H. L. 254, 267, 15 W. R. H. L. Dig. 22; *Mulliner* v. *Midland Railway Co.*, 27 W. R. 330, 11 Ch. D. 611; *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623, 32 W. R. Dig. 112.

Jelf, Q.C., and *E. P. Hewitt*, for the defendants, cited *Acton Local Board* v. *Batten*, 28 Ch. D. 283, 33 W. R. Dig. 128; *Ferrand* v. *Hallas Land and Building Society*, 41 W. R. 580, [1893] 2 Q. B. 135; *Falconar* v. *Corporation of South Shields*, 11 Times L. R. Rep. 223; *R.* v. *Vestry of St. Matthew, Bethnal Green*, 44 W. R. 559, 74 L. T. Rep. 701; *Hornsey Local Board* v. *Davis*, [1893] 1 Q. B. 756, 41 W. R. Dig. 127; and *Travis* v. *Uttley*, 42 W. R. 461, [1894] 1 Q. B. 233.

Shearman, in reply, cited *Goldsmid* v. *Tunbridge Wells*, 14 W. R. 562, L. R. 1 Ch. App. 349.

The following cases were also referred to: *Queen* v. *Fisher*, 11 W. R. 69, 3 B. & S. 191; *Queen* v. *Brown*, 15 W. R. 988, L. R. 2 Q. B. 630; and *The Rhondda and Swansea Railway Co.* v. *Talbot*, [1897] 2 Ch. 131.

STIRLING, J.—The plaintiffs are the successors of a railway company constituted by an Act of Parliament passed in 1846 (with which the Railway Clauses Act of 1845 is incorporated) for the purpose of making a railway from the Chester and Birkenhead Railway to the Manchester and Birmingham Railway. This railway was made about the year 1850. Subsequently by an Act of Parliament passed in 1861 it was, together with all the rights and obligations of the original company, transferred to the plaintiffs. The railway runs from Chester to Warrington, in the direction from south-west to north-east, and passes near the village of Helsby, where there is a station. In the neighbourhood of Helsby the land on the south-east of the line slopes from a considerable height to the railway, which is constructed on an embankment. On the opposite side of the line the land is flat and marshy, and is locally known as "the marshes." A little to the south of Helsby station the plaintiffs are the owners of a strip of land on the south-east of the line abutting on a field (which was formerly two fields) now in the occupation of the Helsby Cricket Club, which I shall designate as the Helsby Athletic Field. This field is separated from the plaintiffs' property by a ditch, beyond which, and nearer the line, are a post, fence, and hedge. On the north-west side of the line the plaintiff's property extends to a flash or pool of water, formed by the excavation of the soil used in constructing the railway embankment. Between the railway and the flash is a second line of railway running from Hooton to Warrington, and between these two lines is a triangular space partly occupied by sidings and partly unused at present, but intended for the construction of accommodation works as the traffic develops. Previously to 1896 the athletic field consisted, as I have said, of two fields separated by a ditch which has now been filled up. At the north and south sides of the field are still existing pipes. These communicate by means of 9-inch pipes with a system of pipes and drains on the plaintiffs' land, and situate partly on the south-east and partly on the north-west side of the line. All of them, after passing under the first-mentioned railway ultimately join an 18-inch pipe which passes under the second line of railway and discharges into the flash or pool already mentioned.

It is as to the ownership of this system of pipes or drains that the dispute has arisen. There is no question that they have all been constructed by the plaintiffs or their predecessors in title. Those which lie on the south-east side of the first line and which pass under it were so constructed in 1850, at the time when the railway was originally made. Those which lie on the north-west side of the railway have had their course and position altered from time to time to suit the requirements and convenience of the plaintiffs, and are now some eight or ten feet under the level of the ground. On the south-east side of the line the average gradient is 1 in 25. On the north-west it is only 1 in 107, and for a considerable portion of their course the pipes or drains on the latter (that is, on the north-west) side are practically level. The ditches on the north and south sides of the athletic field were and are, and that which formerly ran down the middle of it was (apart from the user of which I shall presently speak), ordinary country ditches such as are found all over England, and, according to the evidence of the defendants' witness Mr. Brandreth, before the making of the existing line of railway, were continued down to the marshes.

At the trial the plaintiffs' case was rested on an alleged user of the ditches in the athletic field for the purpose of carrying off the sewage from eight houses on the south-east side of the line. This sewage, it is alleged, passed from the ditches to the system of pipes or drains already mentioned, and consequently it is contended that these have become sewers within the meaning of the Public Health Act, 1875, and are vested in the defendants.

Before dealing with any question of law I shall consider how the facts stand as regards the user of the two ditches and the pipes for the purpose of conveying sewage. Such user is said to have taken place in connection with the eight houses which I have

mentioned. These are numbered 1 to 8 on the plans in evidence, and may be dealt with in three groups, the first consisting of those numbered 1 and 2, the second of Nos. 3, 4, and 8, and the third of Nos. 5, 6, and 7. [His lordship then dealt in detail with the evidence as to the drainage of each of these groups, and stated the result of such evidence as follows:] It thus appears that the drainage of Nos. 1 and 2 was from the year 1872, and that of Nos. 5, 6, and 7 was from the year 1873, in connection with the ditch on the north side of the athletic field, and that the drainage of Nos. 3, 4, and 8 had from the year 1877 a connection with the ditch which formerly ran down the middle of the same field, and this state of things continued up till 1896. [His lordship then dealt with the evidence as to the passing of sewage down the ditches, and proceeded:] The conclusion appears to be that during the periods mentioned a certain quantity of sewage, not, I think, very great, did find its way from all the houses along the two ditches into the pipes or drains on the plaintiffs' lands, but at the same time there was nothing to affect the plaintiffs with knowledge that before 1896 such sewage did so pass into that system of pipes or drains. In 1896 the ditch down the middle of the athletic field was closed with the assent of the defendants, who also in that year proceeded to convey the sewage into the ditch at the south of the field, whence it passed into the pipes and drains in the plaintiffs' lands. This was objected to by the plaintiffs, and the defendants abandoned the use of the southern ditch and carried the sewage into that on the north side of the field. The question in this action is whether they are entitled, as a matter of law, to do so.

It is admitted by the defendants that, if they are so entitled, then they are bound so to deal with the pipes and drains, and the sewage passing through them, that no nuisance shall be caused to the plaintiffs or to any other person. In this action no question of nuisance is raised. Before examining the provisions of the Public Health Act, 1875, on which the defendants rely, I think it is desirable to consider what were the rights and obligations of the plaintiffs and their predecessors in title in respect of these drains and pipes under the special Act for constructing the railway and the general Acts incorporated therewith.

The special Act contains in itself nothing which directly relates to these drains, but there is incorporated with it, as I have already stated, the Railway Clauses Act, of which two sections are material. The first is section 16, which provides that: [His lordship read the section.]

Therefore the drains there spoken of are to be made for the purpose either of constructing the railway or the accommodation works connected therewith. Section 68 deals with accommodation works. [His lordship read the section, and also sections 69, 70, and 73.] It seems clear that all drains constructed under section 16 or section 68 were to remain under the control and management of the railway company.

Some discussion took place at the trial as to the purpose for which the system of pipes and drains has been constructed by the plaintiffs or their predecessors. There is no direct evidence on the point and it is obvious that a system of drainage such as now exists is necessary as well for the protection of the railway embankment as for the accommodation of the adjoining lands. The embankment of the plaintiffs must necessarily dam up the water (which in times of storm is of considerable amount) coming down the slopes to the south-east of the line, and the stability of the embankment might be endangered by reason of the great pressure if means were not taken to prevent the accumulation of water. At the same time the embankment would probably throw back the water on the adjoining lands, and certainly would prevent the water from being conveyed away from those lands (in the language of section 68) "as clearly as before the making of the railway."

It becomes, therefore, the duty of the railway company, under section 68, to construct drains and other passages sufficient to convey away the water. Seeing that, according to the defendants' own evidence, the ditches before the construction of the railway ran straight on to the marshes without any interruption, I cannot doubt that the pipes and drains were constructed for the purpose of fulfilling this statutory duty.

In the case of *The Queen* v. *Fisher* it was held that the drains and other passages for the conveyance of water which the railway company is bound to provide are to be such as are required at the time when the land is taken, and not such as might be necessary at a subsequent date when the land might be applied to uses of a totally different kind. This decision was followed in the case of *The Queen* v. *Brown*, and has been recently approved by the Court of Appeal in *Rhondda and Swansea Railway Co.* v. *Talbot*.

When the railway was made the only houses in existence were Nos. 3 and 4. Consequently the owners of the other houses have not any rights under the section. Further, as regards Nos. 3 and 4, there is nothing to show that the flow of liquid sewage from them was at that time substantial, or reached the site of the railway, or, indeed, any of the ditches which I have mentioned. Such overflow as then existed, if it crossed the road, passed into the field opposite the houses, and may well have been absorbed or evaporated there, and, in any case, would not reach the plaintiffs' drains or ditches in the shape of sewage. The overflow in the road did not attract the notice of the authorities till 1871, at which time, according to the evidence of Mr. Beswich, Nos. 3 and 4, were in the occupation of a tenant who kept a larger stock of cattle on the farm than before.

Looking at all the circumstances, I come to the conclusion of fact that these drains and pipes were not constructed for the purpose of carrying away sewage from any house, but were constructed (in the language of the Act of 1845) for the purpose of conveying the water "as clearly from the lands lying near or affected by the railway as before the making of the railway."

I now come to the provisions of the Public Health Act, 1875. The material sections are, first, section 4, which contains the following definitions of "drain" and "sewer." [His lordship read these definitions, also sections 13, 2nd exception, 15, 21, and 327.] Now, it is quite clear that the policy of this Act is that as regards sewers to which it relates they are to be vested in the local authority, and to be under their control, and under section 21 the public within the district, that is to say, such of the public as are owners or occupiers of premises within the district have certain rights given to them of making use of these sewers. The control and management, therefore, of such sewers as these, is quite different from the control and management which is provided for by the Act of 1845.

It was admitted in argument on behalf of the defendants that if the system of pipes and drains in the plaintiffs' land is a sewer within the meaning of the Act the duty of maintaining and repairing it falls upon the defendants. The contention on behalf of the defendants may be stated as follows: The pipes and drains are at the present time, and were previously to 1896, used *de facto* for the drainage of more than one building only. Consequently they are sewers

within the definition of section 4, and consequently, it is said, are vested in the defendants under section 13.

To this the plaintiffs make several answers. It is said, first, that none of the owners of the houses in question had acquired against the plaintiffs any legal title to send sewage into these pipes and drains, that, according to the doctrine of *Mulliner* v. *The Midland Railway Co.*, approved in the House of Lords in *The Ayr Harbour Trustees* v. *Oswald*, it was competent for the plaintiffs at any time to put an end to the user which had taken place, and that the vesting under section 13 does not put an end to this right. On this the case of *The Queen* v. *The Godmanchester Board of Health* was particularly referred to, and more especially the observations of Cockburn, L.C.J., at p. 899 of the report in 5 B. & S., where a strong opinion was expressed that the Public Health Act, 1848 (the provisions of which were very similar to those of the Act of 1875 in this respect), was not intended to interfere with rights of a private nature.

It was said, secondly, that the rights vested in the plaintiffs by their special Act for a specific purpose cannot be held to be overridden by a subsequent statute conferring upon a public body general powers for a different purpose, and on this were cited the case of *The London and Blackwall Railway Co.* v. *Limehouse District Board of Works*, and the more recent cases of *The City and South London Railway Co.* v. *London County Council*, and *The London County Council* v. *The School Board for London*.

Thirdly, it was contended that the pipes and drains in question, if sewers within the Act, are "sewers made and used for the purpose of draining land under a local or private Act of Parliament" and consequently fall within the second exception of section 13.

I have come to a conclusion on this last point in favour of the plaintiffs, and this being so it is unnecessary to express a concluded opinion on either of the other points. I may however say, with respect to the first, that as at present advised I am not satisfied that the plaintiffs' argument is consistent with the general scheme of the Public Health Act, 1875. It is well established by cases decided subsequently to that of *The Queen* v. *The Godmanchester Local Board*, that the Public Health Act does apply to sewers constructed by the owner of houses on his own land for the use of those houses, and consequently the Act does to some extent interfere with private rights. As regards the second, although the rule as to construction of statutes which is relied on is well established, still it is one which yields to indication of contrary intention

Now, section 13 of the Public Health Act, 1875, and also the definition in section 4 show, apparently, that the Legislature contemplated that the provisions of section 13 might possibly affect sewers which had been brought into existence under prior legislation, for there are excepted from the operation of the wide terms of the enacting part a class of sewers made under the authority of certain Acts of Parliament, and I am not at present satisfied that sewers of a different statutory origin than that mentioned in the Act were meant to be excepted.

I will proceed, then, to consider the exception contained in section 13 of "sewers made for the purpose of draining, preserving, or improving land under any private or local Act of Parliament."

I have already stated that in my opinion the drains and pipes in question were constructed for the purpose of carrying the water from the lands lying near or affected by the railway as clearly as before the making of the railway, or, in other words, for the purpose of conveying away the water which, as matters stood when the railway was constructed, did, or might, find its way into the ditches which intersected the land adjoining the line. The object of these ditches was to drain that land. I think, therefore, the pipes and drains were made for the purpose of draining the land through which these ditches ran. They have ever since been used for that purpose, and the adjoining owners have the right, it appears to me, to insist as against the railway company that they shall continue to be so used.

It was said, however, that they were made, not under a local or private Act of Parliament, but under a general statute—namely, the Railway Clauses Act, 1845.

That turns on the very first clause contained in that Act, by which it is enacted that "this Act shall apply to every railway which shall by any Act which shall hereafter be passed be authorized to be constructed, and this Act shall be incorporated with such Act, and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act, which shall be incorporated with such Act, form part of such Act, and shall be construed together therewith as forming one Act."

It is said that this enactment which I have read is part of the general law of the land, and therefore these drains, having been made under a power contained in that general Act, were not made under any local or private Act of Parliament.

How the matter would have stood if there had been no express incorporation of the public Act in the special Act it seems to me unnecessary to say, but it is obvious that the very first section contemplates an incorporation of the Act of 1845 in every subsequent railway Act, and it provides that the Act which is so incorporated shall be construed together with it as forming one Act. Now, the Legislature complied with that direction and incorporated in terms the Railway Clauses Act, 1845, with the special Act under which the railway was constructed. That special Act must therefore, it seems to me, be read as if the provisions of the Railway Clauses Act, 1845, had been repeated verbatim in it, and I think that these pipes and drains were under these circumstances made under this special Act.

But it was further said that the plaintiffs' special Act being one for the construction of a railway was not such an Act of Parliament as is contemplated in section 13, sub-section 2, or in section 327, sub-section 1.

Now, the language of the Act is "sewers made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament." This contention seems to me to be based on a transposition of the language, and to deal with the Act as if it ran in this form, "Sewers made or used under any local or private Act of Parliament for draining, preserving, or improving land." I see no sufficient reason for making any such transposition, and I think there may have been good reasons on the part of the Legislature for excepting sewers made for the purpose of draining land under any local or private Act of Parliament, even though the object of the Act of Parliament was not the draining, preserving, and improving the land, but was some other object.

I think therefore that the contention of the defendants is not well founded, and that the plaintiffs are entitled to judgment in their favour.

Solicitors, *C. H. Mason; Preston, Stow, & Preston.*

Chan. Div. Byrne, J. } Nov. 10, 11, 12.

HUNT AND ANOTHER *v.* FRIPP AND OTHERS. (*a.*)

Bankruptcy — After-acquired property — Assignment — Equitable chose in action—Bona fides—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54—*Colonial law.*

The principle that where a bankrupt deals bonâ fide *and for value with his property acquired subsequently to his bankruptcy, but before his discharge, the transaction is valid against the creditors under the bankruptcy, applies to a case where the property dealt with is an equitable interest in a trust fund; and the assignee for value may demand payment of the trust fund from the trustees.*

It makes no difference that the bankrupt had not informed his trustee in bankruptcy of his having acquired the equitable interest, and that the trustee was ignorant of the fact until after the assignment, and that the assignee for value was aware of the ignorance of the trustee, as the conduct of the bankrupt towards his trustee in bankruptcy is immaterial to the question of bona fides.

Cohen *v.* Mitchell, 38 *W. R.* 551, 25 *Q. B. D.* 262, *explained.*

Ex parte Ford, 24 *W. R.* 590, 1 *Ch. D.* 521, *and* Ex parte Clarke, [1894] 2 *Q. B.* 393, *distinguished.*

This was an action by the plaintiffs as the assignees for value of the interest in certain trust funds of one John Emery, who resided and carried on business in the colony of Victoria, in Australia.

The first two defendants were the trustees of the fund, and the third defendant, Cohen, was the assignee in insolvency in the colony, of the estate of Emery.

In April, 1892, Emery filed his petition in the Court of Insolvency in Victoria, and an order was made placing his estate under sequestration in the hands of the defendant Cohen, who was one of the official assignees of the court.

In March, 1893, Frederick Emery, the father of John Emery, the insolvent, died in England, and by his will appointed the defendants Fripp and Brandon the executors of his will, and gave them all his real and personal estate upon trust for sale and conversion, and out of the proceeds to pay, amongst other legacies, a legacy of £500, and one-eighth of the residue, to his son John Emery.

Emery heard of these facts in or about May, 1893, or at any rate previous to his discharge. He obtained his discharge in September, 1893. Prior to this the plaintiffs, who were wholesale paper merchants in London, had from time to time supplied goods to one Welch, who acted as their agent in the colony, and Welch thus became indebted to them in a large sum—£5,000 or thereabouts.

In May, 1894, Welch, desiring to give up his business sold it to Emery upon terms that amounted to Emery becoming owner upon payment of £400, payable by periodical instalments, the first of which was to commence in July, 1894. At the same time Emery purchased of Welch the stock-in-trade of the business for £520, also payable by instalments. These transactions were carried out by three agreements in the early part of the month.

On the 15th of March, 1895, by deed-poll reciting that the sums set out in the schedule thereto were due from Emery to Welch, and that the latter was indebted to the plaintiffs in an amount in excess of these sums, Welch, in consideration of the plaintiffs foregoing their claim for the money aforesaid, assigned to the plaintiffs all the said scheduled debts or sums of money, and all his interest in the said agreements between Emery and himself. The schedule set forth all the instalments payable for the sale of the business and stock-in-trade of Emery, amounting altogether to £925. Notice of this assignment was given to Emery.

By an indenture of the 25th of June, 1895, Emery, in consideration of the sum of £900, which was not stated in the deed to be then paid, assigned to the plaintiffs all his share and interest in the estate of his father under the said will. The legacy and share of residue turned out to be of the aggregate value of about £900.

Soon after hearing of his interests under his father's will, Emery had applied to the trustees for payment, and received from them before his discharge £50 on account. Subsequently the trustees hearing of his insolvency declined to pay the rest of the moneys in question either to him or to his assignees, the plaintiffs. Cohen, the assignee in insolvency, was not informed by Emery, and did not hear of the will, or of the interests of Emery under it, until after the assignment to the plaintiffs. When it came to his knowledge he claimed the moneys in the hands of the trustees, for the creditors under the insolvency who had not been paid to a considerable amount. The plaintiffs thereupon brought this action for a declaration that they were entitled to all sums of money payable to Emery under the said will. The trustees paid the money into court.

It was admitted at the trial that the plaintiffs were aware that Emery had not informed his assignee in insolvency of his interests under the will, and that the latter was ignorant of the fact till after the assignment.

The case originally came on on the 5th of August upon an admission by the parties that the law of the colony upon the matter was contained in the Insolvency Act, 1890, and in the decisions upon that Act, but his lordship refused to decide the case upon that basis, and it was adjourned for expert evidence of the Colonial law.

Evidence was now given by experts that the Colonial law was governed by the Insolvency Act, 1890; that there was no material difference between the phraseology of that Act and of the English Bankruptcy Act, 1883, as far as concerns the matters in question, particularly as to the sections of the Victorian Act corresponding with sections 44 and 54 of the English Act, that the decisions of the English courts were, if not strictly binding upon yet, were regarded with the highest respect by, the Colonial courts, and that in the case of *Trimble* v. *Hill*, 28 W. R. 479, 5 App. Cas. 342, the Judicial Commitee of the Privy Council had in effect decided that the decisions of the English Court of Appeal upon like statutes with Colonial statutes should be followed by the Colonial courts; and that the decision of the Court of Appeal in *Cohen* v. *Mitchell*, 38 W. R. 551, 25 Q. B. D. 262, as explained by subsequent cases, represented the law in the colony of Victoria upon the matter.

Eve, Q.C., and *Muir Mackenzie*, for the plaintiffs.—The case comes within *Cohen* v. *Mitchell* as the transaction was *bonâ fide* and for value, and the trustee had not intervened. The principle of *Cohen* v. *Mitchell* applies to leaseholds, *In re Clayton and Barclay*, 43 W. R. 549, [1895] 2 Ch. 212, although not to freeholds, *In re New Land Development Association and Gray*, 40 W. R. 551, [1892] 2 Ch. 138, and there is no reason for restricting its operation from an

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

equitable interest. *Ex parte Ford, In re Caughey*, 24 W. R. 590, 1 Ch. D. 521, and *Ex parte Beardmore, In re Clarke*, [1894] 2 Q. B. 393, were cases of second bankruptcies, and are distinguishable: see judgment of Lord Davey in latter case, [1894] 2 Q. B., at p. p. 410. Here the transaction was a dealing *bonâ fide*.

They cited also, *In re Rogers, Ex parte Collins*, [1894] 1 Q. B. 425: *Ex parte Dewhurst*, 20 W. R. 172, L. R. 7 Ch. App. 185; and, upon the question of *bona fides*, *Butcher* v. *Stead*, 24 W. R. 463, L. R. 7 H. L. 839.

Atherley Jones, Q.C., and *Compton Smith*, for the assignees in insolvency.—*Cohen* v. *Mitchell* stands alone, and is only an authority for the particular circumstances of that case. It is confined to transactions in the way of trade, which is not the case here. The cases of *Ex parte Ford; Ex parte Beardmore; Wadling* v. *Oliphant*, 24 W. R. 246, 1 Q. B. D. 145; *Meggy* v. *Imperial Discount Co.*, 26 W. R. 342, 3 Q. B. D. 711, are in our favour. The insolvent was bound, under the Insolvency Act, 1890, to inform his assignee in insolvency of the interest he had acquired, and the plaintiffs knowing that he had not done so, were parties to improper concealment, and were not acting *bonâ fide*. As to good faith, see *Tatum* v. *Haslar*, 38 W. R. 109, 23 Q. B. D. 345; and Lord Blackburn in *Jones* v. *Gordon*, 26 W. R. 172, 2 App. Cas. 628.

R. F. Norton, for the trustees, took no part in the argument.

BYRNE, J., after stating the facts and the result of the expert evidence as above stated, continued: I have, therefore, to consider whether the facts of this case bring it within the decision in *Cohen* v. *Mitchell*, having regard to other decisions upon the subject. That decision was, shortly, that transactions entered into by a bankrupt who has not obtained his discharge in respect of property acquired after the bankruptcy, with any person dealing with him *bonâ fide* and for value, whether with or without knowledge of the bankruptcy, are valid against the trustee in bankruptcy. This proposition, which was agreed upon by all the judges in that case, was not meant to be more than a new expression of old law. See the observations of the Master of the Rolls in *Cohen* v. *Mitchell*, 38 W. R. 552, 25 Q. B. D. 267. I do not consider that the court meant thereby to throw any doubt upon the earlier decision in *Ex parte Ford, In re Caughey;* and that is the view, as I understand, taken by the Court of Appeal in *Ex parte Beardmore, In re Clarke*. The proposition in *Cohen* v. *Mitchell* has been shown by later cases to be intended to apply to leaseholds, but not to real estate. Now can I distinguish that case from the case before me on the ground that the property in dispute here is money in the hands of trustees which has never been paid over to the insolvent, but has been paid into court to abide a decision as to the rights of the parties? This is undoubtedly an important point. The proposition in *Cohen* v. *Mitchell* was laid down in general terms, and Chitty, J., in the later case of *The New Land Development Association and Gray*, [1892] 2 Ch., at p. 143, speaks of *choses in action*, and other personal estate belonging to the bankrupt, and goods and chattels, as being within that proposition. I do not, therefore, feel justified in drawing so refined a distinction as to say that the fact that the money is outstanding, and has not got into the hands of the person by whom the assignment was made, constitutes a valid difference. The cases of *Ex parte Ford* and *Ex parte Beardmore* were cases not between a particular assignee and the trustee in bankruptcy, but between two trustees in bankruptcy, the debtor having been bankrupt a second time, and are therefore distinguishable from *Cohen* v. *Mitchell*. That this distinction was regarded by the judges in *Ex parte Beardmore*, as material appears from their judgments. See observations of Davey, L.J., in *Ex parte Beardmore*, [1894] 2 Q. B., at pp. 409, 410. *Ex parte Beardmore* recognizes the rule laid down in *Cohen* v. *Mitchell*.

I come then to the question whether the transaction in the case before me can be considered as a dealing *bonâ fide* and for value. Assuming that the earlier transactions were valid and not tainted with fraud, then there was a sufficient sum due to make a good consideration. Practically, then, all I have to consider is whether the transaction was *bonâ fide* within the meaning of the rule in *Cohen* v. *Mitchell*. "It will be seen, I think," says Lord Esher in that case, 38 W. R. 552, 25 Q. B. D. 267, "from the wording of that proposition that the stress of *bona fides* is laid entirely and solely on the person dealing with the bankrupt, and if he has dealt in good faith, the question of whether the bankrupt as between himself and the creditors is also dealing in good faith is immaterial." I do not therefore, except so far as it affects the conduct of the plaintiffs, propose to consider whether the insolvent was dealing fairly or otherwise, or whether he left undone what he ought to have done. It has been put to me, I think not unfairly, that "dealing *bonâ fide*" is equivalent to "dealing honestly"; and what I have really to consider is whether the plaintiffs were behaving honestly when they took the assignment from Emery. I think that they were. There is no obligation upon parties dealing with an undischarged bankrupt, although they knew that he had been a bankrupt, whether discharged or undischarged, to go to the trustee and make inquiries of him. There is nothing dishonest in a man dealing with a bankrupt, dealing fairly with him, as he would with any other customer. Now, looking at the origin of the transaction, I do not infer that the transaction between Welch and Emery was tainted with fraud. I do not impute to Welch that he wished to put upon Emery the indebtedness of a business which would have the effect of crushing him. I think that they both believed the business would be a successful one. As regards the conduct of the plaintiffs during the negotiations which led to the assignment, up to at least January, 1895, nothing, so far as I can see, can be said against their *bonâ fides* or honesty, unless it was dishonest on their part not to have gone to the assignee on insolvency, or given him notice that the insolvent was proposing to deal with the legacy in question. I do not think that they were called upon to do so, or that there was anything dishonest in their not doing so. And going even to a later date I think that the utmost that could be said against the plaintiffs from which I could draw any sort of inference would be that they had ultimately a strong suspicion that there were outstanding creditors of Emery under an old bankruptcy, who, if they thought it worth while to do so, might re-open the bankruptcy, put in claims, and put the assignee in motion. It is said that as Emery did not go to the assignee about the matter, he was in that sense concealing his legacy from the assignee. That is true, but I have nothing to do with any question between Emery and his creditors now. I think that the reasonable inference is that the plaintiffs were dealing honestly—that is to say, *bonâ fide*, within the meaning of the decision in *Cohen* v. *Mitchell*. The result is that the plaintiffs are entitled to succeed.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Whites & Co.*

Solicitors for the trustees, *Leslie & Hardy*, for *H. Pettit*, Leighton Buzzard.

Solicitor for Cohen, *H. A. Graham*.

Q. B. Div. (Lawrance and Collins, JJ.) } Aug. 10, 11, 1897.

REG. *v.* BURTON AND ANOTHER (JUSTICES). *Ex parte* YOUNG. (*a*.)

Justices—Pecuniary interest—Bias—Membership of the Incorporated Law Society—Proceedings against an unqualified person for acting as a solicitor.

On a prosecution by the Incorporated Law Society under section 12 *of the Solicitors Act*, 1874, *against a person for pretending to be a solicitor, one of the justices before whom the case was heard was both a practising solicitor and an ordinary member of the prosecuting society, but not one of the council of that society. The solicitor for the accused was aware the magistrate in question was a solicitor, but he did not raise any objection. He was not, however, aware that the magistrate was a member of the society. The evidence showed that the whole responsibility for prosecutions rested solely with the council of the Law Society.*

Held, on a rule for a certiorari *to quash, that the justice was not disqualified from adjudicating by reason of the fact that he was a mere ordinary member of the Incorporated Law Society; that he was not affected by bias or pecuniary interest; and that he was not the prosecutor.*

Rule *nisi* for a *certiorari*.

In this case a rule *nisi* had been obtained on behalf of one Alfred Young, calling upon John Burton and Frederick Cleve, justices in and for the borough of Tunbridge Wells, and the Incorporated Law Society of the United Kingdom, to show cause why a writ of *certiorari* should not issue in respect of a conviction on the 12th of April, 1897, whereby the said Alfred Young was convicted for wilfully and falsely pretending to be a solicitor, and why such conviction should not be quashed, on the ground that the said John Burton was interested in the matter of the conviction, he being a practising solicitor and a member of the Incorporated Law Society.

The facts of the case, as contained in affidavits, were that Young wrote a letter to a lady saying that he was instructed by her late butler to apply to her for a month's wages in lieu of notice, and further stating that if payment were not made within seven days he would take proceedings in the county court to recover the same.

The matter was brought to the notice of the council of the Incorporated Law Society, who decided to take proceedings against Young under section 12 of the Solicitors Act, 1874 (37 & 38 Vict. c. 68).

On the 12th of April, 1897, at the petty sessions at Tunbridge Wells, Young was summoned and appeared before the aforesaid two justices. Before the case was called on the defendant's solicitor directed the attention of the clerk to the justices to the fact that the chairman, the said John Burton, was himself a practising solicitor. The clerk replied that the defendant's solicitor could raise the objection if he liked, but no question was raised or objection taken by the said solicitor to the jurisdiction of the said John Burton.

The defendant was convicted of the offence, and a fine was inflicted upon him.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The magistrate, John Burton, besides being a practising solicitor, was also a member of the Incorporated Law Society, but the defendant's solicitor was not aware of this fact at the time when the summons came on for hearing.

It appeared from an affidavit of the secretary to the Incorporated Law Society that the society is managed by a council elected annually by the members, but that the members individually take no part in controlling or managing the affairs of the society. Burton, though a member of the society, was not a member of the council, and he therefore had no power to interfere with or control its proceedings, nor did he in any way have any voice in the institution or the conduct of the prosecution of the defendant. It was further stated that no part of the penalty was, or is, ever received by the society in such a case, and that the said John Burton could not in any way be benefited pecuniarily or otherwise by the success of the prosecution of the defendant, nor could he in any way become liable for any costs or expenses in reference to the proceedings in the event of their failure.

Hollams (*Frank Arnold* with him) appeared to show cause against the rule.—The magistrate Burton was not disqualified from adjudicating in the matter. He did not possess any pecuniary interest in the matter from the fact that he was a member of the Incorporated Law Society (*Reg.* v. *Justices of Deal*, 30 W. R. 154, 45 L. T. Rep. 439), nor was he affected with interest or bias from the fact that he was a practising solicitor. Moreover, any objection under that head must be taken to have been waived, as no objection was taken on that ground at the trial by the solicitor who appeared for Young. Further, it could not be said that Burton was in any sense a prosecutor of the accused: *Leeson* v. *General Medical Council*, 38 W. R. 303, 43 Ch. D. 366.

Hextall, in support of the rule.—It is not necessary that there should be a real and actual bias and interest; all that is necessary to disqualify a justice is that there should be a reasonable apprehension of such. The mere fact that he was a practising solicitor and a member of the body in whose interest proceedings were taken, would be sufficient to disqualify him: *Reg.* v. *Huggins and Another*, 43 W. R. 329, [1895] 1 Q. B. 563. Further, the fact that if the prosecution were dismissed the Incorporated Law Society, of which the said Burton was a member, might be ordered to pay the costs of the proceedings is quite sufficient to establish a pecuniary interest on his part, and therefore a disqualification: *Reg.* v. *Hammond*, 12 W. R. 208, 9 L. T. Rep. 423; *Reg.* v. *Gaisford*, [1892] 1 Q. B. 381, 40 W. R. Dig. 107. Further, there is a reasonable apprehension of bias where one of the magistrates is by himself or by one of his agents a prosecutor. A person cannot be both judge and prosecutor. That rule is established, and is so severe that even an ordinary member of the prosecuting body, though not one of the managers of it, cannot be a judge: *Company of Mercers and Ironmongers of Chester* v. *Bowker*, 1 Str. 639; *Reg.* v. *Fraser*, 9 Times L. R. 613.

The learned counsel also referred to the following cases: *Allinson* v. *General Medical Council*, 42 W. R. 289, [1894] 1 Q. B. 750; *Reg.* v. *Allan*, 12 W. R. 423, 4 B. & S. 915; *Reg.* v. *Henley*, 40 W. R. 383, [1892] 1 Q. B. 504.

LAWRANCE, J.—In this case Mr. Hollams showed cause against a rule obtained on behalf of a person named Young, calling upon the justices of Tunbridge Wells to show cause why a conviction of Young should not be set aside. The facts of the case appear

to be these: Young was convicted of the offence of pretending to be a solicitor. Undoubtedly he wrote a letter to somebody, threatening that if a sum of money which was said to be due from that person to someone else were not paid proceedings would be taken. This is the letter: "I am instructed by Mr. Summers, your late butler, to apply to you for a month's wages in lieu of notice, and if not forthcoming within seven days I shall take proceedings in the county court to recover the same." Upon that proceedings were taken against him in the name of the chief constable, but in fact taken by the committee of the Incorporated Law Society. Upon these proceedings being taken, Mr. Burton, who seems to be a practising solicitor, was sitting upon the bench. Mr. Burton, I think, was the chairman of the magistrates who were present upon that occasion, and this rule was obtained upon the ground that Mr. Burton was in some way interested so as to make it improper that he should be a member of the court deciding the case.

Now, I quite agree with what was said, by Wills, J. (I would rather use his language than mine), in *The Queen* v. *Huggins*, that it is impossible to overrate the importance of keeping the administration of justice by magistrates free from any suspicion of unfairness. It is desirable that those who are thought to have an interest of any kind in a case should not take part in it. The question here is whether this case comes within the principle in the cases in which it has been held that the presence of a person so interested would reduce the proceedings to a nullity. One of three things must be present in order to render such a state of things improper. First, there must be bias or the probability—the strong probability, I ought to say, because it has been held that a possibility of bias is not sufficient—but a probability of bias on the part of the person who is about to adjudicate in the particular case. There is no suggestion here, as I understand—indeed it would be rather difficult after reading that letter to make one—upon the affidavits that Mr. Burton did not act *bonâ fide*, and act as anybody else would. I do not say that is enough, but there is no suggestion of any bias. But it is said the fact of his being a practising solicitor, and the accused being a person who pretended to be a solicitor, would show a bias which prevented Mr. Burton sitting. Another thing which would make it improper for a person to occupy a position on the bench trying a case would be that he is interested pecuniarily or otherwise. It is said here with regard to Mr. Burton that he was interested, because not only was he a practising solicitor, but he was also a member of the Incorporated Law Society. Then the third head of impropriety, if I may so call it, is that if a person is taking any leading part in a prosecution himself he cannot hear the cause—that is to say, a man cannot be prosecutor and judge in the same cause. I was party to a decision in a fishery case, where a person at a meeting got up and proposed that proceedings should be taken against a person who was afterwards convicted, and having set the law in motion he appears at one end of it, and appears at the other end of it by adjudicating upon the case. It was held there that the conviction could not be sustained.

I will deal with Mr. Hextall's arguments in the order in which he advanced them. The first was that Mr. Burton was a practising solicitor, and he cites *The Queen* v. *Huggins* to show that he ought not to have sat. *The Queen* v. *Huggins* becomes important, as I will show in a moment. It was a case where a qualified pilot was sitting upon the bench to inquire into a charge against an unqualified pilot, and the ground upon which it was put was not that a person who was interested in that way was not to sit, but upon the ground that there were only six qualified pilots in that particular district, and Wills, J., specially guards himself by saying that, being a member of a small class made all the difference in the case, and then he puts this case. He says, supposing the six pilots had been all unlicensed pilots, nobody can doubt that that would have been an improper tribunal, and, there only being six licensed pilots, he says that to the presence of one of them there the same objection must exist as if they had been all unlicensed pilots. That is the ground that it is put upon. Wills, J., says: "It appears that Martin belongs to a small class of privileged persons for whose protection these proceedings were being taken."

What renders it unnecessary to deal further with this first point is that, when I called the attention of Mr. Hextall to the question of the waiver, he admitted that there was a waiver with regard to Mr. Burton being a practising solicitor, but not with regard to his being a practising solicitor and a mem- of the Incorporated Law Society. Therefore upon that ground it becomes unnecessary to decide the first point.

Then it is said that he had a pecuniary interest, because an order for costs might have been made against the society of which he was a member. The way in which it is put is an extremely ingenious one. It has been pointed out that he only subscribes a certain amount to the funds of the society, and has no interest in the Incorporated Law Society more than that. Then Mr. Hextall says: "Yes, but the time might come when the society would be dissolved; and, if it were dissolved, then the funds in their hands would be divided *pro rata* among all the members; and, if the costs were given against them, at some future date there might be some infinitesimal interest which Mr. Burton would have, or there might be some interest coming to Mr. Burton." Now, the answer to that is the case of *The Queen* v. *The Mayor and Justices of Deal*. That was a case where the person "had been convicted and fined for cruelty to a horse, upon the prosecution of an officer of the Royal Society for the Prevention of Cruelty to Animals. Some of the justices who heard the summons and took part in the conviction were subscribers to a branch of the said society, which received subscriptions in the country and forwarded them to the society's office in London. All prosecutions by the society were directed by the secretary or committee in London, and no subscribers had any authority over or responsibility for such prosecutions, and the society never accepted any part of the penalties inflicted under the Cruelty to Animals Prevention Act, 1849, ss. 2, 18, 21. Held, upon a rule for a *certiorari*, that there was nothing in these facts to create a real bias in the minds of the justices which could amount to a disqualifying interest." In this case we hear that being a member of the Incorporated Law Society gives no power either to institute prosecutions, or to take any part in, or to use any influence in regard to them. That is all done by the committee, and therefore it is said that Mr. Burton had no power in the institution of these proceedings. The same point was taken there. It was said in that case there might be a pecuniary interest if costs were given against the society, or if the penalty were paid into the funds of the society; and that, therefore, that would be a pecuniary interest in the persons who belonged to it. One of the learned judges seems to make a distinction because this was only a branch of the society, but I myself cannot see the distinction. I suppose it was a part of the London society to all intents and purposes. What Cave, J., says with

regard to that is this: "Any pecuniary interest, however slight or remote, is sufficient to disqualify, but here there seems to be none. Although the society's funds may be liable for the costs or be benefited by a penalty, the subscribers would not be thereby affected." That seems to me to be precisely the position here. No benefit is likely to accrue to Mr. Burton, excepting the very unlikely and remote possibility when the Law Society shall be dissolved. In the case referred to, the Society for the Prevention of Cruelty to Animals was in existence, and there was no question as to their sharing the funds of the society, but there was what would come much nearer to that — there was a chance of being called upon to pay the costs or of receiving the penalties. It was said there that they were not in the habit of receiving the penalties, and Field and Cave, JJ., although I cannot cast my eye upon the particular expressions they use, found that the liability to pay the costs would not be such an interest as to disqualify the magistrate. I think that the same reasoning applies here. There is no probability whatever of the Incorporated Law Society coming to an end. The infliction of costs would make no difference whatever to an ordinary member of the society, and the question of penalty does not arise; and, if it did, the penalty would go into the funds of the society, and make no difference to the individual member.

Then it is said, thirdly, that the society was prosecuting, and that Mr. Burton was a member of the society. That is dealt with, I think, in the case of *Allinson* v. *The General Council of Medical Education and Registration*. That case was a strong case in this sense—that the inquiry in that case was instituted at the instance "of a society called the Medical Defence Union, whose objects were 'to support and protect the character and interests of medical practitioners.'" One member of the council who took part in the inquiry had been a member and a vice-president of this society, and as vice-president was an *ex officio* member of the committee. He had, however, never attended any of the meetings of the committee, and until after he had been elected a member of the council he did not know that proceedings were being taken against the plaintiff. He was elected a member of the council on the 3rd of May, and on the same day he sent in his resignation of his membership of the Defence Union. By the articles of association of that society, any member might withdraw by giving two months' notice of his intention so to do; and, upon the expiration of such notice he shall cease to be a member. The inquiry was held on the 28th of May. Held, that such member of the council was not disqualified from taking part in the inquiry. What was done was this: He was a member of the council, if I understand the facts of the case, at the time that the inquiry was entered into. He did not continue a member of the council, but he was one of the persons prosecuting in so far as he was a member of the council, who only had a right to prosecute, and the fact of his ceasing to be a member of the council seems to me to make no difference. The question was whether he was engaged in the prosecution, and it was held by the court that was no disqualification.

I think here there was no bias. I think there was no interest, pecuniary or otherwise; and I do not think that Mr. Burton was engaged in any sense in the prosecution—that is to say, was so actively engaged in the prosecution as to disqualify him from sitting as a magistrate.

It is said in the affidavit of the solicitor for the defendant that if he had known that Mr. Burton was a member of the Incorporated Law Society he would not have tried the case before him. He knew he was a practising solicitor, and one would rather draw the inference that the reason he gave for not taking an objection to him on that ground would have been sufficient ground for him not taking the objection to his being a member of the Incorporated Law Society if it was a *bonâ fide* objection. However that may be, I do not think a case has been made out against this gentleman. We should be careful that the fountain of justice should be untainted in any way, and if I thought that the line was over-stepped at all here I should not hesitate to say so; but I think that this case does not come within the principle of the cases which have been decided upon the question of interest or bias. Therefore, in my judgment, this rule should be discharged.

COLLINS, J.—I am of the same opinion. It is contended that Mr. Burton was disqualified from sitting, on the ground of interest. That general ground is sub-divided into two. It is said, first of all, that he was a practising solicitor; and secondly, that he was a member of the Incorporated Law Society. Now, the second of those two objections is also sub-divided into these two points: that, being a member of the Incorporated Law Society, he was at once judge and prosecutor; and further, that he had a pecuniary interest in the result. To deal with those objections in order; first of all the objection that he was a solicitor was waived. That fact was known to the solicitor who represented the person accused, and being known, the objection was not taken, and after the hearing the justices were asked to state a case. So that it is perfectly clear that this case must be dealt with on the footing that all objections special to the fact that he was a practising solicitor are eliminated from the case. There remains then the objection that he was a member of the Incorporated Law Society, that objection being, as I pointed out, divisible into the two heads I have named. As to the first of those two, was he really prosecutor as well as judge? Judge he was undoubtedly. Was he prosecutor? That depends upon his relation to the Incorporated Law Society. He was a country subscriber to the Incorporated Law Society. We have an affidavit from the secretary to the Incorporated Law Society, who tells us that the whole and sole responsibility for prosecutions rests with the council of the Law Society, of which this gentleman was not a member. He had no more to do with the prosecution than any individual in the court. It was undertaken without his knowledge or consent. He had no voice either in forwarding it or stopping it. Therefore he was in no sense really prosecutor. But that is not enough, because, although we may be absolutely assured that he had no bias as prosecutor, we must go still further than that in order to put him in the position of a person who is entitled to adjudicate upon this matter. To use the language of the Master of the Rolls in what now must be regarded as the leading case upon this particular subject—namely, *Allinson* v. *The General Council of Medical Education and Registration*—he says, "The person alleged to be biassed must bear such a relation to the matter that he cannot be reasonably suspected of being biassed." He puts that qualification upon the language used by Mellor, J., which has been so often quoted in *The Queen* v. *Allan*—namely, "It is highly desirable that justice should be administered by persons who cannot be suspected of improper motives." The Master of the Rolls qualifies that by the words I have read, and that he must bear such a relation to the matter that he cannot be reasonably suspected of being biassed. In that case he came to the conclusion, and the other

Lords Justices agreed with him, that Mr. Allinson's relation to the society was such that he could not be reasonably suspected of being biassed. I think that all that is said in support of that conclusion in Allinson's case can be said more freely in the present case. Dr. Allinson was an *ex officio* member of the committee who instituted the proceedings, although he had never attended it. Although he had resigned, there was some question whether his resignation was effectual at the time he made it. The case was decided by myself in the first instance, and my judgment was confirmed by the Court of Appeal. It seems to me here that Mr. Burton's relation to the council gives less ground for any shadow of suspicion than there was even in Allinson's case.

That disposes of the two first points, and there remains the point of the possibility of pecuniary interest. As to the possibility of pecuniary interest, we must draw our inferences from the facts before us, and, recurring again to the affidavit of the secretary to the Law Society, I find it stated: "No part of the penalty was or is ever received by the society in such cases, and I say that the said John Burton could not in any way be benefited, pecuniarily or otherwise, by the success of the prosecution of the said Alfred Young, nor could he in any way have become liable for the costs in the event of the proceedings failing." That is a statement upon oath by the person knowing the constitution of the Law Society. Although I fully agree that actual pecuniary interest, however slight, will defeat the right of justices to sit in judgment, I think that interest must be actual—it must not be purely speculative and imaginary, based upon conditions barely conceivable, and certainly not conceivable as likely to exist within the life-time of the person who is said to be interested in the funds of the society—Mr. Burton in this case. It is suggested that if this corporation, to which he is a subscribing member, were dissolved, there might be a distribution of assets, and that on that distribution the share of Mr. Burton might be more or less according to whether a penalty was received or costs made payable out of the funds of the society. I think that argument is sufficiently dealt with in the passage which has been referred to by my brother in the judgments of Field and Cave, JJ., in *The Queen* v. *Justices of Deal*, where they distinguish the position of a shareholder whose fortunes are tied to the company, from that of a subscriber whose liability can be no more or less than his subscription. Dealing with the two points—both the right to receive the penalty if one is awarded, or the obligation to pay costs if costs are awarded against him—both the learned judges deal with those two elements—Field, J., with one, Cave, J., with both. Field, J., says this: "With regard to a pecuniary interest, however remote, however slight, the authorities are clear that, when it exists, the person possessing it is necessarily disqualified. Here it is said that such an interest must be inferred from the fact that the justices have powers, by section 21 of the Act, to direct a moiety of the penalty to be given to the society of which they are contributors." It is so stated in the case before us now, but the learned judge goes on: "Even if it were otherwise, and some of the penalty upon conviction were to go to the funds of the society, it is impossible to hold that subscribers to a branch having no control over, or responsibility for, the funds of the parent society, could have any pecuniary interest in such penalty." Now that case finds that, although the subscriptions were payable in the country to these affiliated societies, they were forwarded to the central office in London, and apparently there was no division of funds between the central society and its branches. Cave, J., deals with both points. He says this: "Any pecuniary interest, however slight or remote, is sufficient to disqualify; but here there seems to me to be none. Although the society's funds may be liable for the costs or be benefited by a penalty, the subscribers would not be thereby affected." I think, taking the facts deposed to on affidavit, and taking those pronouncements on the part of those two judges. I am perfectly justified in saying here that I can find no evidence of any pecuniary interest in Mr. Burton.

I have now dealt with all the points, and I am of opinion that this rule must be discharged.

Rule discharged.

Solicitor for the Incorporated Law Society, *E. W. Williamson.*

Solicitors for the defendant, *Lee, Ockerby, & Evertington*, for *E. Elvey Robb*, Tunbridge Wells.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 17.

BRICKWOOD & CO. (*Appellants*).
REYNOLDS (SURVEYOR OF TAXES) (*Respondent*). (a.)

Inland revenue—Income tax—Profits of trade—Deductions—Money expended for repairs of premises—Money expended for purpose of trade—Brewers—Tied houses—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D., case* 1, *r.* 3; *cases* 1 *and* 2, *r.* 1.

The appellants, a brewery company, were owners of a number of tied public-houses, which they had acquired for the purpose of increasing their trade. The tied houses were in the occupation of the appellants' tenants in part for the purpose of the trade of publicans and in part as the private dwelling apartments of themselves and their families. The appellants, in making up their return of profits for assessment to the income tax, sought to deduct the sum which they had spent in repairing the tied houses.

Held, that they were not entitled to make such a deduction.

Appeal from the judgment of a Divisional Court (Pollock, B., and Ridley, J.) on a special case stated by Commissioners of Income Tax.

At a meeting of the commissioners for general purposes held at Portsmouth on the 1st of December, 1896, for the purpose of hearing appeals under the Income Tax Acts for the year ending the 5th of April, 1897, Messrs. Brickwood & Co., a limited company carrying on business as brewers, appealed against an assessment of £20,973 made on them under 16 & 17 Vict. c. 34, s. 2, Schedule D., in respect of the profits of their trade. They claimed to have the assessment reduced by the sum of £1,492, being the balance of a sum of £2,496 expended by them in the repair of certain licensed houses of which they were the owners and which they had let to tenants, after deducting from such sum £1,004, being one-sixth of the annual value of such houses under 16 & 17 Vict. c. 34, s. 2, Schedule A.

The appellants had from time to time, in order to increase their trade, bought licensed houses, which they let to tenants under written agreements, one of

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the terms thereof being that such tenants should buy from the appellants all the ale, beer, and other malt liquors and spirits which should be consumed or sold in such houses.

The profits of the appellants were earned by manufacturing ale, beer, and other articles and selling them in part to private individuals, in part to the owners of what are generally known as "free" licensed houses, and in part to the tenants of their "tied" licensed houses—that is to say, the houses owned and let to tenants by them under the circumstances above stated. The whole of the profits so made were included in the assessment. Such profits had been materially increased by the increased sale of their goods due to the possession by them of their tied houses and also by their having been able to obtain and having in fact obtained for the same class of goods a higher price from the tenants of their tied houses than they obtained or were able to obtain from their other customers.

In no case had the tenants of their tied houses as a fact spent any money on the repairs to the tied houses let to them. Such repairs as from time to time became necessary to such houses were executed by the appellants, and after deducting that portion of the cost which had been in the nature of capital outlay, or which had tended to the permanent improvement of the premises, the balance properly attributable to revenue was the sum of £2,496 above mentioned.

The tied houses in question were in the possession of the tenants in part for the purpose of the trade of licensed victuallers and beer retailers, and in part as the private dwelling apartments of themselves and their families. The repairs in question had been executed indifferently to both parts of such houses.

In addition to their tied houses the appellants owned other licensed houses which they had during the year occupied by their managers or servants, and in respect of these and of the brewery and other premises admittedly occupied by the appellants for the purpose of their trade they had been allowed for repairs before the assessment was made the full sum to which they were entitled under 5 & 6 Vict. c. 35, s. 100, first case, r. 3. They had also received in respect of the whole of the licensed houses owned by them the deduction from the annual value under 16 & 17 Vict. c. 34, s. 2, Schedule A., to which they were entitled under the Finance Act, 1894, s. 35. Such deduction had, in the case of their licensed houses not let to tenants, and of their brewery and other premises aforesaid, been made before ascertaining the allowance to be made to the appellants for repairs under 5 & 6 Vict. c. 35, s. 100, first case, r. 3.

It was contended on behalf of the appellants: (*a*) That the purchasing and letting of licensed houses was an essential part of their business of brewers, and alternatively that it was a separate business; (*b*) that but for such purchasing and letting their profits as assessed under Schedule D. would not and could not have been earned; (*c*) that the repairs in question were a necessary outlay without which such profits could not have been earned, and formed a legitimate deduction in arriving at the balance of profits and gains in respect of which they were chargeable under Schedule D.; and (*d*) that the tied houses in question were "occupied" for the purpose of their trade, manufacture, adventure, or concern in the nature of trade, within the meaning of 5 & 6 Vict. c. 35, s. 100, first case, r. 3, and that in this respect there was no distinction between such houses and those licensed houses which, being owned by the appellants, were not let to tenants but were conducted on their behalf by their managers or servants.

The surveyor of taxes contended: (*a*) That the tied houses in question were not "occupied" by the appellants within the meaning of 5 & 6 Vict. c. 35, s. 100, first case, r. 3; and (*b*) that the appellants must be deemed to have executed the repairs in question not *qua* traders but *qua* landlords, and that as such they had received the one-sixth deduction from the annual value under 16 & 17 Vict. c. 34, s. 2, Schedule A., to which they were entitled under the Finance Act, 1894, s. 35.

The commissioners were of opinion that upon the facts above stated the tied houses were not occupied by the appellants within the meaning of 5 & 6 Vict. c. 35, s. 100, first case, r. 3, and that the appellants were not entitled to the deduction claimed.

The Divisional Court affirmed the decision of the commissioners, and gave judgment for the Crown.

The appellants appealed to the Court of Appeal.

Lawson Walton, Q.C., and *R. D. Muir*, for the appellants, cited *Watney* v. *Musgrave*, 28 W. R. 491, 5 Ex. D. 241; *Reid's Brewery Co.* v. *Male*, 39 W. R. 459, [1891] 2 Q. B. 1; *Russell* v. *Town and County Bank*, 13 App. Cas. 418, 36 W. R. Dig. 96; *Watson* v. *Royal Insurance Co.*, 44 W. R. 89, [1896] 1 Q. B. 41.

Sir R. E. Webster, A.G., and *Danckwerts*, for the Crown.

A. L. SMITH, L.J.—I am of opinion that the judgment of the court below must be affirmed. The appellants are brewers, and, like most brewers, they have tied houses, and they make their profits by selling their beer, first, to the public; secondly, to untied houses; and, thirdly, to their tied houses. The effect of a house being tied is that they are enabled to sell more beer than they would otherwise do, and they also get a better price for beer sold to a tied house than for beer sold in the other two ways. It is found as a fact in the case that the appellants have been buying tied houses for the purpose of increasing their trade. The question arises, how are they to return an account of their gains and profits under Schedule D. of the Income Tax Acts. It is said that inasmuch as they have let these tied houses to tenants, who have not contracted to repair, the appellants are entitled in estimating their gains and profits to deduct therefrom the cost of repairing the tied houses. I quite agree with what my brother Hawkins said at the end of his judgment in *Watney* v. *Musgrave*, that the trade of a brewery and the trade of a public-house are two distinct things, and that the expense incurred in respect of the latter cannot be deducted from the profit of the former. In this case the brewers suggest that, inasmuch as they keep up the independent trade of the publican, the cost of repairing his house is to be deducted from the profits of their trade. I am clearly of opinion that that argument is ill-founded and cannot prevail.

It appears to me that the Attorney-General is right in contending that there is an express prohibition to be found in the Income Tax Acts against the deduction which is now sought to be made. Without going through Schedule D., I will come at once to rule 1. under the first case in section 100 of the Income Tax Act, 1842, which relates to Schedule D. It says: "The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years." Then rule 3 says: "No sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises occupied"—I think the clear meaning of that is, occupied by the person assessed—"for the purpose of such trade"—that is,

for the purposes of the trade of the person assessed—"beyond the sum usually expended for such purposes according to an average of three years." The section, though drafted in the form of a prohibition, contains a permission; such a deduction may be allowed for repairs of premises occupied by the party assessed for the purposes of his trade. The present case does not come within the permission, and therefore it is within the prohibition. We may also refer to the first of the rules applying to the first and second cases, which says: "In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, for any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purposes of such trade." It is impossible, in my judgment, to say that the whole of the money spent on the repairs of these tied houses was laid out exclusively for the purposes of the appellants' trade. I am, therefore, of opinion that the deduction cannot be allowed.

RIGBY and COLLINS, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Godden, Son, & Holme.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

From Chan. Div.
(Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 10.

DAWSON v. THE AFRICAN CONSOLIDATED LAND AND TRADING CO. (LIMITED). (a.)

Company—Directors—Qualification—Casual vacancy—Calls on shares—Invalidity.

A clause in the articles of association of the A. Co. provided that any acts done at any meeting of the directors should, notwithstanding that it should be afterwards discovered that there was some defect in the appointment of such directors, or that they were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

N., who had been duly appointed a director of the A. Co., transferred all his shares, and for a few days was without a director's qualification. After re-acquiring his qualification he, without being formally re-elected, acted as a director, and, in conjunction with his co-directors, made a call on the shares.

Held (reversing Ridley, J.), *that the acts done by N. in his capacity of a director were validated by the clause in the articles of association (as above set out).*

Further, the clause operates not only as between the company and its members, but also as between the company and third parties.

Howbeach Coal Co. *v.* Teague, 8 *W. R.* 264, 5 *H. & N.* 151, *explained.*

Appeal of the defendants (other than A. Bifeldt) from an order of Ridley, J. (sitting as vacation judge).

Ridley, J., granted an injunction restraining the defendant company and the three other defendants, Thomas Thompson, A. B. Nielsen, and E. G. Sanders, until judgment in the action or further order, from forfeiting, or declaring forfeited, all or any portion of the shares held by the plaintiff and the other shareholders in the company, and from selling, or allotting, or otherwise disposing of such shares, or any of them, and from taking or continuing proceedings to recover the amount of an alleged call of 3s. on each share which had been made, or alleged to have been made, by the defendants, Thompson, Nielsen, and Sanders, and from parting with any proceeds of the call money in their hands, or to be received under the call.

The directors' resolution making the call was alleged to be invalid because Nielsen, who had been a director and purported to be one of the directors making the call had ceased to hold any shares from the 17th to the 23rd of June, 1897, and had never been formally re-elected a director after again acquiring his qualification. Further objection was made because Thompson was stated to be an undischarged bankrupt at the date of his appointment, and therefore vacated his seat on the board immediately on his appointment.

By article 90 of the articles of association the number of directors was to be not less than three, nor more than seven; and by article 93 "No person other than the first directors shall be qualified to be a director who is not the holder of shares of the company of the nominal value of £200."

Articles 96: "The office of a director shall be vacated . . . if he become bankrupt, or suspend payment, or compound with his creditors, . . . or or if he cease to hold the required amount of shares to qualify him for office."

Article 105: "Until otherwise determined, two directors shall be a quorum."

Article 114: "All acts done at any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it shall be afterwards discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they, or any of them, were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

The defendants appealed.

Alexander, Q.C., and *W. Higgins*, for the appellants.—The true construction of article 114 is that it validates the acts of persons who act as directors, though there may be some flaw in their appointment, and the intention is that all such trivial defects shall be rectified by the articles. They referred to *Briton Medical General and Life Association* v. *Jones*, 61 L. T. Rep. 384, 38 W. R. Dig. 35; *Howbeach Coal Co.* v. *Teague*, 8 W. R. 264, 5 H. & N. 151; and Palmer's Company Precedents, 6th ed., vol. 1, art. 111. [LINDLEY, M.R., referred to *In re London and Southern Counties Freehold Land Co.*, 34 W. R. 163, 31 Ch. D. 223.]

Bramwell Davis, Q.C., and *Stewart Smith*, for the respondents.—It is quite clear there was a vacancy on the board, and no resolution was passed to fill it up, so that there were only two directors acting, and calls made by them would be ineffective. The defect was known to the directors on the 17th of June. [LINDLEY, M.R.—In *York Tramways Co.* v. *Willows*, 30 W. R. 624, 8 Q. B. D. 685, the Court of Appeal thought *Howbeach Coal Co.* v. *Teague* was wrong.]

No reply was called for.

LINDLEY, M.R.—This appeal is against an order of Ridley, J., granting an injunction restraining the defendants from forfeiting the shares and from selling or re-alloting such shares, and from taking proceedings to recover money raised by calls; and the ground upon which the motion was made before him was simply that there were a great number of alleged irregularities in the appointment of the directors

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

making the call. Before us, other grounds have been urged to which I will allude presently. Now, these various suggestions of irregularity, when they come to be examined, are nothing more or less than small irregularities. There is no radical defect in any one of these points. Take one of them; take the best, the case of Neilsen. It appears that there were originally three directors appointed by the proper parties, by the subscribers to the memorandum of association. Those three were Bradford, Sanders, and Griffiths. Now nobody quarrels with their appointment. Bradford died on the 13th of April, 1897, and a Mr. Thompson was appointed director in his place under an article which clearly authorized that appointment, subject to the point that he was an undischarged bankrupt. What I mean is this, That it was a casual vacancy which the other two directors had power to fill, and they filled it up by appointing him. There was a meeting afterwards of the shareholders, and Mr. Thompson then retired and was re-elected. It was said that the shareholders did not know that he was an undischarged bankrupt; and our attention is called to a clause that a director vacates his appointment if he becomes bankrupt, but that clause does not apply to the facts with which we have to deal, and it appears to me to be perfectly competent for these shareholders if they chose to appoint Mr. Thompson. Mr. Neilsen was appointed in succession to Mr. Griffiths, who died in December, 1896. That was all right, and Mr. Neilsen was a competent man, and remained a competent man and a properly-qualified director till the 17th of June, 1897, when it appears that he transferred all his shares, and for five or six days from the 17th of June to the 23rd of June he had no shares. So under one of the articles of association he vacated his office. On the 23rd or 24th of June he acquired other shares and became qualified. There was a meeting of the directors on the 24th of June at which he was present and acted as a director. Then again there was a casual vacancy which the other two directors had power to fill up; and although it is true that they did not go through the form of passing a resolution appointing him a director, they accepted him as a director, and they allowed him to act as one; and when this call, which is impeached, was made—namely, on the 13th of June, 1897, it was made by Mr. Thompson, Mr. Sanders, and Mr. Neilsen; and Mr. Neilsen then was a properly-qualified director, so that this irregularity which is supposed to upset everything that was done is reduced to this, that two of the directors who might have passed the resolution appointing Mr. Neilsen did not go through the form of passing a resolution to appoint him, but acted with him as a duly-appointed director. If that is not an irregularity in his appointment such as is attempted to be cured by article 114, I cannot conceive what is. These objections are, to my mind, trivial and unbusinesslike, and have not a shade of substance in them, but they are technical defects which have been laid hold of for the purpose of upsetting what has been done.

Now I pass to article 114, which is that all acts done at the meeting of the directors, or at the committee of the directors, or by any person acting as a director, notwithstanding that it shall be afterwards discovered that there was some defect in the appointment of persons acting as aforesaid, or that they or any of them were disqualified, shall be as valid as if every such person had been duly appointed and was a qualified director. Now, it is reducing that clause to a nullity to say that it does not apply to such trumpery defects and trivial irregularities as those with which we have to deal here; but then we are told that we must, under the stress of the case of *Howbeach Coal Co.* v. *Teague*, hold that this article does not apply here. I do not understand how the case of *Howbeach Coal Co.* v. *Teague* can be cited as an authority to the effect that such an article as article 114 only applies to outsiders dealing *bonâ fide* with the company without notice. Of course it applies to and covers all such transactions, but there is nothing that I can discover in the judgments in that case which warrants the contention that this clause does not apply to calls and things of that kind as between the company on the one side and the shareholders on the other side. *Howbeach Coal Co.* v. *Teague* is intelligible up to a certain point, and as to the rest of it, it is so reported that I confess I do not thoroughly understand it. But the defect which the court put their finger down upon there was this, that it was said that the persons there who made the call had been improperly appointed by three out of seven of the subscribers to the memorandum of association, which was all wrong. It was all wrong, and the validating clause there, which was clause 60, which was similar in its terms to article 114 here, did not cure that radical defect in their appointment. The court having held that, upset the call and declared the call was invalid. So far it is plain enough, and that was the *ratio decidendi*, and that I follow perfectly well. Then comes a part of the case which I do not follow with equal ease. Granting that the appointment of these gentlemen was altogether wrong, as it obviously was, and granting that the validating clause there did not apply, I do not see myself that it necessarily follows that what they did, although they had been improperly appointed, would not be validated; and I do not see that any of the judges, in giving judgment in that case, addressed himself to that point. There may be very good grounds for it —it may be that the clause did not apply even to that, because there was no subsequent discovery about it. The whole thing was aboveboard and the defect was taken to be known to everybody. I do not know how that may be, but it is no authority to my mind for the proposition for which it was put forward; and which will alone assist the respondents in this case—namely, that article 114 does not apply to such matters as forfeiture of shares—that is to say, to matters between the company on the one side and the shareholders on the other. I cannot conceive why we should cut down such general language as that, and say that it applies only to outsiders, I think that is wrong. It appears to me, therefore, that these trumpery objections, whatever they might be worth, but for this clause—and I do not think they would be worth much if it were not for this clause—are absolutely nothing at all with it. Now, there is another point taken before us which is perhaps a much more serious one or would be a much more serious one if there were any evidence to support it. We are asked to restrain this proceeding of forfeiting shares and making calls and so on, because the calls had been made for an improper purpose, and not for the purpose of *bonâ fide* carrying on the business of the company, but for the purpose of recouping the people who have paid off the promoters under agreements which are sought to be rescinded. When you look at the writ, the writ impeaches the agreement. This is a case which might have become important. What we are told is this, that the agreement has been carried out and everything done under it, and it is a little difficult for one shareholder to sue on behalf of himself and others to rescind an agreement between the company on the one side and the promoters on the other, which the company might have chosen to carry out in form. That form of action has to be justified, and there is no justification that I can see, even for suggesting it. But apart from that there is no evidence to support such a case as this. It is a

difficult case to prove, and it must be proved, if at all, at the trial. This is a mere suggestion of fraud and misconduct—a mere suggestion as to which we have nothing reliable to act upon. This part of the case was not dealt with by the learned judge in the court below at all, and we are left to deal with it as best we can. We have heard Mr. Bramwell Davis describe what took place in the court below, and it is far from sufficient to enable us to grant an injunction. The appeal must be allowed, and the order discharged with costs here and below.

CHITTY, L.J.—I agree. One word as to the 114th article in the articles of association. That clause in the articles is not framed so as to render valid a resolution passed by any persons who assumed to act as directors of a company. As to the case which was put by Mr. Stewart Smith during the argument that it necessarily follows that where any three or four persons went into the board-room and said, "Here we are directors," and they passed a resolution that the clause would, according to the contention on the other side, support their acts and make them valid; the mere reading of the clause disposes of that. The clause is addressed, as is shewn by these words, "notwithstanding some defect in the appointment of the directors or persons acting as aforesaid" to cases of that kind. The point arose on the facts with reference to Neilsen, and Neilsen was six days without the qualification—namely, from the 17th to the 23rd of June. There is no evidence whatever to show that the other two directors were aware that he had parted with all his shares so as no longer to hold his qualification. It is rightly said, upon reading the articles, that he ceased to be a director because he ceased to hold the qualification of shares, but on the 23rd of June he held the qualification, and he went on acting as director with the other directors, and to take the material date, the 24th of June, when the resolution for the call was passed, they treated him as a director. They had not appointed him formally, the power to do so being vested in them on the occasion, but they appointed him and treated him as a director. There cannot be the slightest question that if the defect had been pointed out they would have appointed him then and there to fill up the vacancy. Now, the exact point here is the defect in the appointment. There is no defect in the appointment if you treat him as appointed originally. The defect was that he had become disqualified. It was agreed that there was no distinction between the defect in the appointment and the words relating to disqualification; but the words are "disqualification" and not "non-qualification at the time of appointment," which plainly refers to subsequent loss of the qualification which is required in order to enable him to act as a director. That is exactly within the words of the article. It is just one of those defects, irregularities, or whatever name of that kind one ought to call them by, which is protected by the clause. It is then said the article is not to operate as between the company on the one hand and the members of the company on the other, it is only to be applied to outsiders.

The answer to that is that on the clause itself no such distinction is made. Whether in any case a distinction might be taken is quite another matter. It cannot be taken upon the facts of this case, and I am quite satisfied that the article does apply as between the company on the one hand and the member who is being sued for a call in the present case on the other. It is hardly necessary to add any words about the *Howbeach case*. There it was quite plain that the directors who were purporting to act, and whose appointment was derived from the acts of the signatories, were not well appointed, and it may well be in that case that, having regard to the 60th clause, the court considered that that was not a defect within the meaning of the 60th clause. The reasons are not given by the learned judges why they said that the 60th clause in that case did not apply. It is quite open to say that in that particular case the appointment was so radically bad that it did not fall within the protection. For these reasons, and in conformity with what has fallen from the Master of the Rolls, I think that all these points with reference to irregularity and the like fall to the ground and are abortive, and I think it is quite unnecessary to go through any somewhat similar matters which have been mentioned. This seems to me to be the only one that requires anything like a formal judgment. Then there is the other point which was put forward at the bar before us on this appeal, that the call was made for a fraudulent or improper purpose, that the directors made the call in the interests of some one of them, and that the call on that ground could not be supported. Having regard to the position of the company as well as other matters it would require a strong case on the motion to justify us in saying that in such circumstances the call was fraudulently made. The simple answer that we have to give is that the evidence has not proved in any material degree the kind of case that was shadowed out by the counsel for the respondents. I reserve to myself the full power of considering whether three shareholders can sue effectively on any such materials as have been presented to us for the rescission of the company's contract. But really the point does not arise, because there is no case brought forward to show a preponderating control over the company's affairs by those who now have the direction of them. Nothing of the sort has been presented to us which would justify two or three of the shareholders instituting this action against the company and asking that the company's contract should be rescinded.

WILLIAMS, L.J.—I entirely agree. I only wish to say that it is not necessary to decide anything about the true meaning of the words "afterwards discovered," because, as the Master of the Rolls has already pointed out, in this case there is no evidence whatever that the directors did know of this defect at the time of the passing of the resolution in question.

Appeal allowed.

Solicitors, *Burgoyne, Watts, & Co.; Wyatt, Digby, & Co.*

From Chan. Div. (Lindley, Lopes, and Chitty, L.JJ.) — June 28, 30, 1897.

DURRANT *v.* BRANKSOME URBAN DISTRICT COUNCIL. (*a.*)

Local government—Drainage—Surface water—Pu[illegible] Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, [illegible] 17, 308.

A local authority has power to make such sewers [illegible] may be necessary for draining their district, and [illegible] carry such sewers into, through, or under any la[illegible] whatsoever within their district, provided that the wa[illegible] conveyed by them is free from all excrementitious or o[illegible] foul or noxious matter.

Surface water charged with sand or silt is not wit[illegible] the above proviso, and may be discharged by a lo[illegible] authority into a natural stream or watercourse.

Decision of North, J., *affirmed.*

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Appeal of the plaintiffs from a decision of North, J.

The plaintiffs, as trustees, are the owners of the Durrant estate, a large building estate situate partly in Bournemouth and partly in the district of the defendant council. The river Bourne flows through the plaintiffs' property, the present channel of the river being in a great measure artificial. The defendants had recently made up certain roads in their district, and had drained the surface water into the Bourne, where it passed through the Durrant estate. Part of the drainage works as completed in June, 1895, and part in October, 1895.

By reason of the drainage the plaintiffs complained that the increased flow of water caused flooding and an extra deposit of sand and silt, and claimed an injunction to restrain the defendants from causing or permitting any water with sand, silt, or other solid matter to flow or be carried through any channels, &c., or other works constructed by the defendants into the Bourne.

The defendants, while pleading that they were entitled to discharge their surface-water into the Bourne, denied the damage, and submitted that if any damage did arise it would be a case for compensation under section 308 of the Public Health Act, 1875. The defendants further relied upon their statutory powers under the Public Health Act, 1875, and the Private Streets Works, Act, 1892 (which had been adopted by them).

Section 15 of the Public Health Act, 1875, provides that "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." By section 16, "Any local authority may carry any sewer through, across, or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriageway of any street, and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into, through, or under any lands whatsoever within their district." By section 17, "Nothing in this Act shall authorize any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond, or lake, until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse, or in such canal, pond, or lake." And by section 308, "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers." By section 9 of the Private Streets Works Act, 1892, "The urban authority may include in any works to be done under this Act with respect to any street or part of a street any works which they think necessary for bringing the street or part of a street, as regards sewerage, drainage, level, or other matters, into conformity with any other streets (whether repairable or not by the inhabitants at large), including the provision of separate sewers for the reception of sewage and of surface water respectively."

North, J., held that the defendants were justified in doing what they had done by virtue of the sections of the Acts above set out, and dismissed the action, with costs.

The plaintiffs appealed.

Swinfen Eady, Q.C., and *Hadley*, for the appellants.—The result of the judgment of North, J., is that he has forgotten that the stream is artificial and not natural at these places. Even if the defendants have a statutory right to discharge water on our land, they have no statutory right to discharge sand and silt with the water. Section 17 of the Public Health Act, 1875, is not an enabling section, but prohibitive, and does not authorize this deposit of sand and silt: *Glossop* v. *Heston and Isleworth Local Board*, 28 W. R. 111, 12 Ch. D. 102; *Ainley* v. *Kirkheaton Local Board*, 60 L. J. Ch. 734, 40 W. R. Dig. 133; *Attorney-General* v. *Cockermouth Local Board*, 22 W. R. 619, L. R. 18 Eq. 172. There is no statutory duty on the defendants to construct sewers at all, and the principle of *Metropolitan Asylum District* v. *Hill*, 29 W. R. 617, 6 App. Cas. 193, applies. Moreover, there has been no report of a surveyor, as directed by section 16 of the Public Health Act, 1875.

Vernon Smith, Q.C., and *Rowden*, for the defendants, were not called upon, on their admission, in answer to the court, that if they injured the plaintiffs they were entitled to compensation under section 308 of the Public Health Act, 1875.

LINDLEY, L.J.—It appears to me that the learned judge was quite right in the construction he has put upon these sections of the Public Health Act, 1875. It is, however, very important to bear in mind that by section 308 the plaintiffs, if they are damnified by what has been done, can obtain compensation. Section 308 throws a great deal of light on any language that may be ambiguous in the clause I will refer to presently: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made," and so on. Then we have to consider sections 15, 16, and 17 of the Public Health Act, 1875. It is admitted that all these roads which the defendants are draining into this Bourne are in the district of the defendants. With reference to the point made about the Poole-road, I think it comes to nothing at all. But when you look at the Local Government Act, 1888, s. 11, clause 4, it appears to me that the road is just as much a road within the district, as to which the defendants are under duties and have powers, as if it were not a main road at all. I say no more about it, because it is obvious, when you read the section, that there is nothing in the point at all. Now, what have they done? The plaintiffs have evidently canalized the bog which did exist up this Bourne which runs through Bournemouth, and in 1877 they drained that bog and cut this ditch (for it is not much more, about four feet wide) into the old Bourne, which did not come up so high. It is an artificial stream which was made by them in the year 1877. Why it is not properly described as a canal I do not know.

Now, section 15 imposes on the defendants the duty of making such sewers as may be necessary for effectually draining their district for the purposes of this Act, and, by the definition clause, "sewer" does not mean a sewer for the conveyance of filth alone —human excrement and so on, but for drainage purposes. The word "sewer' is contrasted with "drain." The word "drain" means something applicable to one house, and a sewer to more. They are draining certain roads in their district, and they are making what, under the Act of Parliament, is called a sewer. The duty of doing that is thrown on them. Now, section 16 is important. That gives them powers which enable them to perform that duty. Section 16 enables them to—[His lordship read the section, and continued:] Now, Mr. Hadley has raised a point which I will notice here

and deal with. He says that there has been no report made by the surveyor. If that point had been raised, there might have been something in it. It might have caused a temporary delay, and if the defendants had insisted that they had a right to do what they are doing without the report of the surveyor they probably would be wrong, but obviously this action was not brought on the ground thas there has been no report of the surveyor, but for the far more important purpose of contesting this alleged right of the defendants. However, I pass that over. In point of fact there is no notice and no report of the surveyor. Nothing turns on that at all. Then the word "lands" here is, by the definition clause, extended so as to mean any tenement or hereditament, and obviously includes land covered with water. There is a further portion of section 16 which does not refer to this case, and which refers to what the defendants may do out of their district. Then comes section 17 which, as I understand it, is not an enabling section although the inference to be drawn from that section, taken in connection with the enabling section, is very strong. Section 17 is a prohibitive clause—[His lordship read it, and continued:] I read that shortly in this way: Notwithstanding the enabling clause to which I have referred you shall not pour filth into any natural or artificial stream or watercourse. Now, what is the inference? The inference is that you may pour any other water into any natural or artificial stream or watercourse. That is the inevitable inference from the 16th and 17th sections; and, to my mind, that is the view taken by the learned judge. It is said that he has not referred specifically to section 16, but it is not to be supposed for a moment that he was deciding this case on section 17 without reference to the sections preceding it, and without which it means nothing at all. Taking all these sections together, I think that the defendants are in the right and the plaintiffs are in the wrong, and, therefore, this appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. I think this case is a clear one. I have no doubt that the effect of what has been done by the defendants will be to bring a large quantity of silt or sand into the Bourne, a substantially larger quantity, at any rate, than came there before. According to the evidence, a considerable quantity must indirectly have gone into the Bourne before anything was drained into it by the defendants. What the defendants have done, and are about to do, is that what was carried through before will now be carried more effectively and directly. Whether you call it a watercourse or a canal, all I can say is, if it is not a watercourse, beyond all question it is a canal. Then the question arises: Does the Public Health Act of 1875 authorize the defendants in doing what they have done? In my opinion it clearly does; and whether it does or not depends on the construction to be placed on three sections in that Act—sections 15, 16, and 17. Now, section 15 is very large. It says every local authority "shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." That is very clear, very distinct, and very large. "Sewer" is interpreted in the Act, and the interpretation is that it means every sewer and drain which is not expressly interpreted by the Act to be a drain. Then comes section 16, which is again most important. That is the section which confers powers for making these sewers. It says, "Any local authority may carry any sewer through, across, or under any turnpike road"—I need not read any more—and other places, and then come these words, "into, through, or under any lands whatsoever within their district." So that, according to that, first they are told they may cause sewers to be made, and then power is given them to carry them "into, through, or under any lands whatsoever within their district." Then section 17 is said to be an enabling section, but if it is an enabling section it is to a certain extent a prohibitive one. If there was any doubt upon the effect of what section 16 is, it would be made clear by section 17, which says: [His lordship read the section, and continued:] What is the irresistible inference to be drawn from that section, coupled as it is with section 16? It is, that if that which is conveyed does not contain those things which are prohibited, or, in other words, if it contains water free from those things, it expressly authorizes them to do it. In this particular case can it be said that there is anything noxious, or excrementitious, or foul that is carried in this water? All that is carried, according to the evidence, is sand and silt, the natural belongings, as it were, to water in a soil like this—nothing that is noxious, or nothing which would affect, or deteriorate, the purity of the water. It might make it muddy for the time, but in due course it would fall to the bottom, and leave the water as it would have been if that matter had not been brought there. But it has been suggested that the powers conferred by this Act, if carried into effect in the way they have been carried out by the defendants, would be harsh and unjust to a landowner in a similar position to the plaintiffs. There might be a good deal to be said about that if it were not for the 308th section of the Act, which appears to me to cover entirely any difficulty of that kind. That section says that full compensation is to be made to anybody who is not in default for any damage sustained by reason of the exercise of any of the powers of this Act. That entirely meets, to my mind, that objection. With regard to the Poole-road, and the point that was taken with regard to the Poole-road, it is unnecessary to say anything further than this—that I think it is entirely met by section 11, sub-section 4, of the Act of 1888. I think, therefore, the decision of the learned judge was perfectly right, and this appeal should be dismissed.

CHITTY, L.J.—The question raised on the appeal is whether the defendants, in exercising their statutory duties and powers, are justified in sending down sand and silt through their sewer into this Bourne? The Bourne is partly artificial, and as to the rest of it natural, although, I take it, so much of it as is natural has been subsequently improved in the course of time. The question turns upon sections 15, 16, 17, and 308 of the Public Health Act, 1875. I shall deal with them very shortly, because I have formed a clear opinion that the defendants are justified in what they are doing. The 15th section imposes on the local authority the duty of causing such sewers as may be necessary for effectually draining their district for the purpose of the Act to be made. The 16th section confers powers with reference to the carrying of the sewer that may be so made. The sewer as mentioned here, according to the definition, is not a sewer merely for carrying off foul and excrementitious matter and the like, but also for carrying off surface water. I agree with what has been already stated, that the word "lands" is used there generally not only by reason of the definition, and not only by reason of the ordinary common law that "land" includes land covered with water, but even if those two grounds should fail, and I think neither of them does fail, by reason of the 17th section itself, which may be read partly as a proviso and partly as an enabling clause. I will explain what I

mean. Section 17 says: [His lordship read the section, and continued:] The first part of that is prohibitory, and it is by way of proviso of something that has gone before. The second part is explanatory. I do not say that, by itself, confers that power. I think the better reading is that the power is conferred by the 16th section, and in this portion of the section which says that the sewage is not to be poured in until it is freed from foul or noxious matter; the Legislature assumes it had already said something that would justify the pouring of pure water, or water not fouled or noxious, into the stream or canal.

On the question whether sand and silt come within these excepted words—namely, whether it is excrementitious or other foul or noxious matter, I cannot conceive that there is any question whatever. I think it does not. But whether this be a natural stream, as it may be in part, or whether it be water running in a canal, I think in either case, having regard to both parts of the case, the authority is conferred by the 16th section of the Act. The value of the 308th section is very great because, as a rule, Parliament does not interfere with private rights without compensation. It was properly admitted by Mr. Vernon Smith, and I express my opinion quite apart from the admission, that the 308th section does entitle the plaintiffs to obtain in the manner pointed out by the section, and not by action, compensation for any damage they may suffer by the sand and silt being increased through the operations of the defendants' works. I need not say anything about the Poole-road. I entirely concur with what has been said on that point. With reference to Mr. Hadley's point that the report of the surveyor had not been obtained, I am rather sorry that that point should have been even mentioned upon the appeal, because the action has not been brought in any way to determine such a question as that. It would, as Lindley, L.J., said, have only gone to a short delay, and it is not right, I think, to raise points of that kind upon an appeal. At any rate, in my opinion we ought to decide, as we do decide, this case without reference to the question thus raised.

Appeal dismissed.

Solicitors, *Withall, Trotter, & Patteson*, for *Overbury & Steward*, Norwich; *Peacock & Goddard*, for *Trevanion, Curtis, & Ridley*, Poole, Dorset.

High Court of Justice.

Chan. Div. } Stirling, J. } July 6; Aug. 3, 1897.

HILL v. HICKEN. (a.)

Partition action — Occupying co-owner —Mortgage of share—Occupation rent—Set-off as against mortgagee.

Where one of several co-owners was in occupation of premises and mortgaged his share, and, on a partition action being subsequently brought, an inquiry was directed as to what was due from him in respect of such occupation,

Held, that the sum found to be due could only be set off against what the occupying co-owner was personally entitled to receive, and could not be set off to the detriment of his mortgagee.

This was a further consideration of a partition action.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

James Hicken, one of the defendants to the action, was owner in fee of three-twelfths of the hereditaments, the subject of the action, and as to other three-thirteenths tenant for life with remainder in fee to his two children, one of whom was Philip James Hicken.

On the 30th of October, 1890, James Hicken and Philip James Hicken executed a legal mortgage of their interests to secure £1,400.

On the 4th of December, 1890, the writ was issued in the action.

According to the statement of claim in the action, James Hicken was and had for some time been in occupation of the hereditaments in question, and it was asked that he should be charged with an occupation rent.

Judgment was given in the action on the 30th of January, 1892, and the ordinary accounts and inquiries were directed, including an inquiry what sum was due from the defendant James Hicken in respect of his occupation of the hereditaments since the 29th of September, 1890, having regard to any previous tenancy of the hereditaments.

On the 11th of July, 1893, the chief clerk made his certificate finding that the sum of £325, being rent at the rate of £150 per annum, was due from James Hicken as occupation rent.

The action now came on for further consideration, and the question arose whether this sum could be set off as against James Hicken's share in the premises to the detriment of his mortgagee.

Procter, for the plaintiffs.

Howard, for the mortgagee.—The legal mortgagee is in the same position as if he were a petitioner, and ought not to be charged with the rent. *Heckles* v. *Heckles*, W. N., 1892, p. 188, is the only authority on the point, and that was the case of an equitable mortgagee. [STIRLING, J., referred to Seton, p. 1541, form 19.]

A. H. Jessel (*A. Underhill* with him), for the defendants.—The present case is covered by *Heckles* v. *Heckles*.

Cur. adv. vult.

Aug. 3.—STIRLING, J., stated the facts, and continued: The question is, Can this sum be set off as against James Hicken's share to the prejudice of Herbert Charles Owen, his mortgagee? The defendant, James Hicken, not having been tenant or bailiff of his co-owners, nothing could have been recovered from him at law; nor did the statute of Anne (4 Anne, c. 3, s. 27) apply: see *Henderson* v. *Eason*, 17 Q. B. 701. It has, however, long been the practice of the Court of Chancery to direct such inquiries as have been directed in the present case: see, as to occupation rent, *Turner* v. *Morgan*, 8 Ves. 145; and, as to expenditure on improvements, *Swan* v. *Swan*, 8 Price 518. The principle on which allowance for improvements is made is stated by Cotton, L.J., in *Leigh* v. *Dickeson*, 33 W. R. 538, 15 Q. B. D. 60. [His lordship read the judgment at p. 67 from "Therefore no remedy exists," and continued:] Where the property is sold the allowance is paid out of the proceeds of the whole property: *In re Jones*, [1893] 2 Ch. 461, at p. 476, 41 W. R. Dig. 143; *In re Cook's Mortgage*, 44 W. R. 646, [1896] 1 Ch. 923. The principle laid down by Cotton, L.J., does not apply to the occupation rent, and the question does not appear to have been discussed in any case. It is, no doubt, proper that where one of several co-owners is charged with an occupation rent he should not be allowed to take any part of the fund without paying what is charged against him; but, on the other hand, it does not seem right that the rent should be charged

against a fund which does not belong to him. Suppose that an actual tenancy existed between one of the co-owners and the others, and an arrear of rent was due from him, I see no ground for saying that his co-owners would be entitled to have a charge on his share for those arrears. They may be entitled to insist that nothing should be paid to him personally until he has made good the arrears due from him; or, in other words, to have the arrears set off against what he personally would be entitled to receive. But this seems to me to be their whole right. Here there was no tenancy, but the court has ascertained what the occupying co-owner ought to pay in respect of his occupation; but it is difficult to see why the co-owner should be in a better position than if he had been their tenant. If, again, the co-owner had conveyed to a purchaser the share of which he was co-owner, I do not see how the rent could be charged as against what was coming to the purchasers. A legal mortgagee is for this purpose a purchaser *pro tanto*; and, if the mortgagee is to be charged with the rent, I do not see why a purchaser should not be charged with it also, assuming that the vendor is allowed to remain in possession. Upon the whole, I have come to the conclusion that this rent ought not to be set off as against the mortgagee. The only cases which were cited to me in argument were *Graham* v. *Cole*, in Seton, p. 1541, where a declaration was made that "the share of the defendant, E. W. (wife), was liable to make good the sum of £ , being the £ by the chief clerk's certificate, dated, &c., certified to be due from the defendant, J. W. (husband), in respect of rent and occupation of the hereditaments, &c., from the death of B. down to the 4th of February, 1872, the £ appearing by the affidavit of, &c., to be due from the said defendant for occupation rent of the said hereditaments." As to that case we know nothing of the facts, and I think that it must have been decided under special circumstances. The other decision is one of my own, *Heckles* v. *Heckles*, which is only reported in the *Weekly Notes* for the 15th of December, 1892. That dealt with an equitable mortgage, and there may be differences between the case of an equitable mortgage and a legal mortgage; but, upon further consideration, I am not sure that that case is not wrong.

Solicitors, *Ullithorne, Currey, & Currey*, for *Henry Birch*, Thame; *Wainwright & Co.*, for *H. C. Owen*, Wolverhampton, and for *Gould & Elcock*, Stourbridge.

Chan. Div. Stirling, J. — July 1, 2, 28, 1897.

In re ASHTON.
INGRAM *v.* PAPILLON. (*a.*)

Appointment—Rule against double portions—Appointment by mother—Person in loco parentis.

A lady, under a special power for the purpose in her father's will, appointed by will £10,000 equally among her three children. Subsequently, by deed-poll, she appointed sums equal to one-third to one daughter.

Held, that the burden of proof lay on those who asserted that the mother intended to put herself in loco parentis *to her daughter, and that, there being no proof that she did so intend, the rule against double portions did not apply, and the daughter was entitled to share in the unappointed residue equally with the other children.*

This was a summons taken out by the trustees of the will of Samuel Ashton to determine the manner in which a legacy of £10,000, bequeathed to his daughter Elizabeth for life with a power of appointment, was payable, and raised the question whether the rule against double portions applies to the case of appointments made by a mother in favour of one of her children.

The testator, by his will dated the 11th of November, 1846, bequeathed £10,000 to his trustees upon trust for investment and payment of the income to his daughter Elizabeth for her separate use for life, and after her death in trust for all or any one or more of the children, grandchildren, or other issue of his said daughter in such shares and proportions as his said daughter, whether covert or sole, should by deed or will appoint, and in default of appointment to such children as and when they attained twenty-one years, or, if daughters, on marriage, in equal shares.

Provision was made for the case of there being no child, and the will contained a hotchpot clause.

The testator died in 1849. His daughter Elizabeth (then Mrs. Mackenzie) made her will on the 15th of August, 1879, and directed that the trustees of her father's will should stand possessed of the £10,000 legacy upon trust to divide the same equally between her three children, the defendant, Elizabeth Papillon, the plaintiff, A. M. Ashton, and Edith Loumyer.

On the 11th of June, 1881, Mrs. Mackenzie executed a deed-poll by which she irrevocably appointed that the trustees of her father's will should stand possessed of the said sum of £10,000 upon trust to raise thereout £2,000 and pay the same to the defendant, Elizabeth Papillon, as soon as conveniently might be after the death of the appointor.

By another deed-poll of the 7th of January, 1885, she made a similar appointment of £1,333 6s. 8d. also in favour of Mrs. Papillon.

Mrs. Mackenzie died on the 5th of December, 1896. She made two codicils to her will dated respectively the 31st of July, 1884, and the 4th of October, 1895, but neither of these codicils in any way affected the appointment of the £10,000 legacy made by the will.

G. Henderson, for the trustees.

Graham Hastings, Q.C., and *R. B. Phillpotts* (*W. F. Phillpotts* with them), for Mrs. Papillon.—We are entitled to the £3,000 and one-third of the residue as well. The doctrine of election cannot be applied in the case of a limited power except where the testator has some property of his own to dispose of: Farwell on Powers, p. 384; *Bristow* v. *Warde*, 2 Ves. jun. 336; *In re Fowler's Trust*, 27 Beav. 362, 9 W. R. Ch. Dig. 54. Here there is no fund out of which compensation can be made, and where there is no compensation there is no election: *In re Lord Chesham*, 34 W. R. 321, 31 Ch. D. 466. The effect of an irrevocable appointment by deed over a fund the subject of a power is to take out of it that which is appointed: *Wilson* v. *Piggott*, 2 Ves. jun. 351. The doctrine of satisfaction and double portions does not apply here.

Buckley, Q.C., and *Gore Brown*, *contra*.—We submit that Mrs. Papillon has had the third to which she is entitled under the will. A person *in loco parentis* is presumed to intend to benefit all his children equally: *Pym* v. *Lockyer*, 5 My. & Cr. 29. [STIRLING, J.—Does that presumption arise in the case of a power, the object of which is to enable a parent to give more to one of his children than to another?] We submit that it does: *In re Tussaud*, 26 W. R. 874, 9 Ch. D. 363; Jarman on Wills, 4th ed., vol. 1, p. 216; *Powys* v. *Mansfield*, 3 My. & Cr. 359. [STIRLING, J.—*Montague* v. *Montague*, 15 Beav. 565, is apparently

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

a case where the rule against double portions was held to apply to an appointment under a special power in the case of children.] [*Hastings, Q.C.*, referred to Sugden on Powers, 8th ed., p. 641.] We submit that this is a case of election: *England* v. *Lavers*, 15 W. R. 51, L. R. 3 Eq. 63; *Chichester* v. *Coventry*, 15 W. R. 849, L. R. 2 H. L. 71.

R. B. Phillpotts, in reply.—*Montague* v. *Montague* went on the special circumstances of that case: *Walmsley* v. *Vaughan*, 5 W. R. 549, 1 De G. & J. 114; *In re Lacon*, 39 W. R. 514, [1891] 2 Ch. 482. *England* v. *Lavers* and *Chichester* v. *Coventry* do not apply here. *Ravenscroft* v. *Jones*, 12 W. R. 362, 4 De G. J. & S. 224, qualifies the doctrine set up in *Powys* v. *Mansfield*.

Cur. adv. vult.

July 28.—STIRLING, J.—The question is whether Mrs. Papillon is entitled to share in the unappointed portion of the £10,000 equally with her brother and sister, or only after giving credit for the sums of £2,000 and £1,333 6s. 8d. which she has received.

It was conceded in argument, and in my opinion rightly, that the facts raise no case of election on the part of Mrs. Papillon: see *Bristow* v. *Warde*, *Montague* v. *Montague*, *Fowler's Trust*. It was, however, strongly urged that the rule against double portions precluded her from sharing in the unappointed fund, without giving credit for the sums already received, and the question to be decided is whether the benefits conferred on her constitute portions to which the rule applies. These benefits were conferred on her by her mother under a power contained in the will of her grandfather, which enabled the donee to distribute the funds subject to the power amongst her children or other issue in such shares as she thought fit, the children who attained twenty-one or (as regards daughters) married, taking equally in default of appointment.

The rule against double portions is generally stated to apply to provisions made by a parent or person *in loco parentis*; but in all the cases, so far as they have been brought to my attention, the parent referred to is the father. In the well-known case of *Powys* v. *Mansfield*, 3 My. & Cr. 359, Lord Cottenham says: [His lordship read pp. 366-7 and 368, and continued:] *Primâ facie* the duty of making a provision for a child falls on the father, but may fall on or be assumed by some other person. I do not say that in no case and under no circumstances can the duty fall on or be assumed by the mother of the child; but it appears to me that the burden of proving such to be the case lies on those who assert the fact so to be.

In the present case the mother was distributing a fund derived under the will of her own father; and there is no evidence that either she or her father undertook the discharge of any such duty.

In my judgment, under these circumstances, the rule does not apply. But it is right that I should make some remarks as to the argument which was addressed to me as to the intention of the power being to enable unequal shares of the fund to be given to the objects of it. No doubt this is in part the purpose of the power; but it also enables the donee to confer an indefeasible interest which can be dealt with by way of sale or settlement or otherwise. The power of the donee to distribute the fund in unequal shares may for some purposes be a circumstance to be taken into consideration, but does not seem to me to be sufficient to exclude, or even to rebut, the application of the rule. In *Montague* v. *Montague* the rule against double portions was held applicable to appointments made in exercise of a special power. But an examination of this case shows that the appointor was the father of the appointees, and that the appointed funds consisted of sums made chargeable by way of portions for younger children on estates settled by himself on his marriage. The appointed funds were therefore "portions" in the strictest sense.

The result is that Mrs. Papillon is entitled to share in the appointed fund *pari passu* with her brother and sister, and without bringing into account the sums already received by her.

Solicitors, *Mear & Fowler; Ingram, Harrison, & Ingram.*

Chan. Div. Stirling, J. — March 12, 16; April 2, 3, 6; June 26, 1897.

In re FRIEND.
FRIEND *v.* YOUNG. (*a.*)

Partnership—Liability of estate of deceased partner for goods ordered before, but delivered after, his death—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 9 *—Statute of Limitations—Merchant and factor—Fiduciary relation—Acknowledgment by debtor—Appropriation by creditor.*

E. & Co. employed F. & Co. as commission agents. The course of business was for E. & Co. to send goods to F. & Co. to be forwarded to the purchasers. F. & Co. received the purchase-money and accounted for the same to E. & Co. after deducting their commission.

After the death of one of the partners in F. & Co., E. & Co. recovered judgment for sums due to them in respect of several business transactions with the firm of F. & Co. against the surviving partner, who became bankrupt, and nothing was obtained from his estate under the judgment. E. & Co. now claimed to prove for the balance against the estate of the deceased partner.

As to certain items which were for goods delivered to the firm of F. & Co. after, but under an order given before, the death of the partner,

Held, that the contract was really one of agency, and that the death of the partner terminated the partnership before the agency began, and terminated the contract too; and that, accordingly, no obligation was incurred by his estate.

As to certain other items with regard to which the defence of the Statute of Limitations was set up,

Held, that there was no fiduciary relationship between the parties so as to prevent the statute being set up; but that a payment had been made by F. & Co. which constituted an acknowledgment of the debt, and accordingly took the case out of the statute, though the fact that E. & Co. had appropriated the payment to the account of which these items formed part would not in itself have been sufficient to take the case out of the statute.

This was an action for the administration of the estate of Frederick Friend, who died on the 7th of January, 1895. At the time of his death he carried on two businesses, one being that of a merchant and commission agent in partnership with his son, William Beauchamp Friend, under the style of Frederick Friend & Co., at 11, King William-street, in the City of London. At the time of the death, this partnership appears to have been one at will; and William Beauchamp Friend continued it under the same style as surviving partner.

For many years prior to the death of Frederick Friend, his firm of Frederick Friend & Co. were employed as commission agents by Eastwood & Co., cement manufacturers. The business transactions

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

consisted in part of consignments made by Eastwood & Co. to Frederick Friend & Co., and in part of sales effected by Eastwood & Co. to third parties through the agency of Frederick Friend & Co. The course of business in respect of the latter transactions was that Eastwood & Co. sent to Friend & Co. the goods which formed the subject of the sales; and that F. Friend & Co. then forwarded them to the purchasers and received the purchase-money, for which they accounted to Eastwood & Co., deducting their commission.

On the 5th February, 1896, Eastwood & Co. recovered judgment against the firm of Friend & Co. (then consisting of William B. Friend only) for £579 10s. 4d., a balance then due to them in respect of several business transactions with Friend & Co. William B. Friend had become bankrupt, and nothing was recovered from him under the judgment. Eastwood & Co. now claimed to prove in respect of the balance against Frederick Friend's estate. As to an item of £82 10s. sought to be charged under date the 8th of November, 1895, it was admitted that the estate was not liable. As to four other items of £66 13s. 4d. each the facts were as follow:

In 1894 Friend & Co. procured for Eastwood & Co. an order for certain goods to be sent to Alexandria. The testator died before these goods were delivered, but the order was executed by Eastwood & Co., who had not been informed of his death, and according to the usual course of business between the firms the son, the surviving partner, received the purchase-money. He never accounted for this purchase-money to Eastwood & Co.

The facts as to the remaining items are fully stated in the reserved judgment which deals with them, and it is enough to say here that the Statute of Limitations was pleaded as a bar to any claims in respect of those items, while, on the other hand, it was contended that Friend & Co., as agents of Eastwood & Co., were in a fiduciary position towards the latter, and that, in any case, payments had been made which took the case out of the statute.

Grosvenor-Woods, Q.C., and *T. Mathew*, for the claimants.—We have a right to prove against the estate of the deceased partner, though we have recovered judgment against the surviving partner: *In re Hodgson*, 34 W. R. 127, 31 Ch. D. 177; *Kendall* v. *Hamilton*, 27 W. R. 121, 3 C. P. D. 403; *Wegg-Prosser* v. *Evans*, 43 W. R. 66, [1895] 1 Q. B. 108. Next it is said that some items are statute-barred. [STIRLING, J.—If Friend & Co. were your agents they were in a fiduciary position towards you: *Burdick* v. *Garrick*, 18 W. R. 387, 5 Ch. 233.] Yes. In the present instance the surviving partner who has suffered judgment to go against him in default is executor of the testator, and cannot well raise the statute as a defence. Friend & Co. as our agents were trustees for us of the balance of the purchase-money. Agents are trustees for many purposes: Darby and Bosanquet on the Statutes of Limitation, 2nd ed., p. 249; Lindley on Partnership, 6th ed., p. 510. In any case Eastwood & Co. have a right to appropriate the payment made in 1894.

Hastings, Q.C., and *Le Riche*, for the plaintiff.—This case is covered by *Houlton's case*, 1 Mer. 616. The contract of agency was determined by the death of F. Friend. The trust implied from the relation of principal and agent is not enough to defeat the Statute of Limitations, unless the claimants can prove something to take the case out of the statute. *Burdick* v. *Garrick* is no authority here. *Knox* v. *Gye*, L. R. 5 H. L. 656, and *Watson* v. *Woodman*, 24 W. R. 47, 20 Eq. 721, were both cases of agency, but the defence of the statute prevailed. There has been no acknowledgment here to take the case out of the statute: *Nash* v. *Hodgson*, 6 De G. M. & G. 474; *Waugh* v. *Cope*, 6 M. & W. 824. The case is within section 9 of the Partnership Act, 1890, as to the transactions which took place after the death of F. Friend: *Read* v. *Brown*, 37 W. R. 131, 22 Q. B. D. 128; *Northey Stone* v. *Gilling*, 42 W. R. 99, [1894] 1 Q. B. 99; *In re Head*, 42 W. R. 55, [1893] 3 Ch. 426. The Statute of Limitations has no application; it is a case of principal and agent in a fiduciary relation. *Attorney-General* v. *Edmunds*, L. R. 6 Eq. 381; *Moxon* v. *Bright*, L. R. 4 Ch. App. 292, 17 W. R. Ch. Dig. 1; *In re Forest of Dean Coal Co.*, 27 W. R. 594, 10 Ch. D. 450; *Metropolitan Bank* v. *Heiron*, 29 W. R. 370, 5 Ex. D. 319; *Marris* v. *Ingram*, 28 W. R. 434, 13 Ch. D. 338; *In re Lands Allotment Co.*, 42 W. R. 404, [1894] 1 Ch. 616; *Soar* v. *Ashwell*, 42 W. R. 165, [1893] 2 Q. B. 390; *Makepeace* v. *Rogers*, 13 W. R. 450, 566, 4 De G. J. & S. 649; *Knox* v. *Gye*, L. R. 5 H. L. 656; *Tatam* v. *Williams*, 3 Hare 347; *Robinson* v. *Alexander*, 8 Bligh N. S. 352; *Betjemann* v. *Betjemann*, 44 W. R. 182, [1895] 2 Ch. 474; *Foster* v. *Hodgson*, 19 Ves. 180; *Sherman* v. *Sherman*, 2 Vern. 276; *Hunter* v. *Belcher*, 12 W. R. 782, 2 De G. J. & S. 194; *Walker* v. *Butler*, 6 E. & B. 506, 4 W. R. C. L. Dig. 182.

STIRLING, J.—The question is whether the estate of the deceased partner is liable in respect of the sums received by the surviving partner. Before the Partnership Act, 1890, the case would have been unarguable. It was decided in *Houlton's case*, 1 Mer. 616, that where bills had been deposited with a banking firm, and at the death of one partner were in proper custody and were afterwards improperly sold no liability attached to the deceased partner. Of course there was no liability at law in respect of transactions subsequent to the testator's death, and the question was whether there was any remedy at equity. Sir William Grant says at p. 622: "If there be no remedy at law against the executors of Mr. Devaynes, I am at a loss to understand the equity on which this court is to interpose to make good the loss against Mr. Devaynes' estate. It has not been incurred by anything that he did or neglected to do. The bills were safely kept as long as he had anything to do with them. From the act of placing them in the custody of a partnership, it followed that, upon the death of one of the partners, they would fall into the possession of the surviving partners. Mr. Houlton himself, therefore, has virtually placed them there. Mr. Devaynes' executors could not take them away. Mr. Devaynes could not direct his executors to take them away; and though Mr. Devaynes has neither been personally instrumental in the loss, nor personally benefited by it, nor could have prevented it, yet it is contended that it is upon his estate the loss ought to be thrown, and that by a court of equity. I apprehend, however, that it would be the reverse of equity to throw the loss on his estate in such a case as the present. It might be as well contended that if they had thrown the bills into the fire or lost them by negligence Mr. Devaynes would be responsible for such act of negligence. He had no more to do with the sale of the bills than he would have had to do with a loss occasioned by such means as these." That case has never been dissented from; it is cited by Lindley, L.J., in his book on the Law of Partnership, and the law is thus stated in that work, 6th ed., at p. 621: "With respect to the direct liability of the assets of the deceased to creditors, it may be taken as a general proposition, that the estate of a deceased partner is not liable to third parties for what may be done after his decease by the surviving partners; and on that

ground it has been held that they cannot be restrained at the suit of the executors of the deceased from continuing to carry on the business of the late firm in the old name." 3 Swans. 490 note citing *Webster* v. *Webster*, 1791, may here be cited as an authority.

But it is said, and truly, that the present case must be decided by the law as established by the Partnership Act, 1890. The section of that Act relied upon is section 9. [His lordship read the section:] I think there are some other clauses which ought to be read with that section when the matter is fully investigated. I refer to section 12, sub-section (2), section 14, sub-section (2), sections 36, sub-section (3), and 38. In the present case the argument turned on section 9. It is said that at the time of testator's death the partnership had incurred an obligation in respect of which the estate of the deceased partner is liable under the section. It is not said that any portion of the debt was incurred during the partnership. I should have been unwilling to read "obligations" in such a way as to throw on the estate of the deceased partner any obligations which would not have been admissible prior to the Act. It is true that the Act amends the law, and it may well be that the law in this case has been amended to the extent of conferring on the partnership creditors a legal remedy, where before the Act they had only an equitable remedy. But I must first inquire whether the obligation was incurred while the testator was a partner, and, if so, the nature of the obligation. I asked Mr. Grosvenor Woods what obligation was incurred whilst the testator was a partner. He said that there was a contract by Eastwood & Co. to send to Friend & Co. certain goods, and Friend & Co. undertook to send the goods and receive the purchase-money and account for it. Be it so; it was a contract, and when you strip off the details it comes to this, it was a contract that Eastwood & Co., as principals, would employ Friend & Co., as agents, to receive the goods and deal with them in a certain way, and to receive the proceeds of sale. Therefore this was a covenant of agency. Before the agency began the partnership was determined by the death of Frederick Friend. It seems to me when that happened the contract was at an end. I apprehend that if Eastwood & Co. had become aware of the fact they might have refused to send goods to the surviving partner. It was held in the case of *Tasker* v. *Shepherd*, 9 W. R. 476, 6 H. & N. 575, when two partners had entered into a covenant with a third person—to employ him as agent for four and a-half years, and before the period had expired one partner died, the surviving partner was under no obligation to continue him as agent, and that, in the absence of an express stipulation, the claim would only extend to four and a-half years, subject to the condition that all parties so long lived. Under these circumstances it seems to me that no obligation was incurred by the estate of the deceased partner, because the contract of agency had come to an end.

I think on these grounds that the five items which relate to the goods delivered to the surviving partner cannot be allowed in the account. As to the question raised on the Statute of Limitations I will take time to consider my judgment.

Cur. adv. vult.

June 26.—STIRLING, J., stated the facts as above, and continued: It was in the first place contended that the statute could be no bar by reason of the fiduciary relation which existed between the parties. From the operation of the statute, 21 Jac. 1, c. 16, s. 3, were excepted, "such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants."

It was laid down by the Court of Common Pleas in *Cottam* v. *Partridge*, 4 Man. & G. 271, that actions of account between a merchant on the one hand and a factor on the other fall within the exception: see per Tindal, C.J., at pp. 284-5: [His lordship read the judgment: "The exception in the statute . . . dealings creating a trust," and continued:] The exception was repealed by section 9 of the Mercantile Law Amendment Act, which provides: [His lordship read the section, and continued:] Inasmuch as actions of account between merchant and factor fall within the exception in the statute of James, they must equally fall within the provisions of this enactment of the Mercantile Law Amendment Act; and consequently this enactment constitutes a defence to an action at law by a merchant against his factor.

It is next to be observed that this statute applies not only to actions but to suits for account, by which I understand to be meant suits in courts of equity. Independently of this, the effect of this enactment as regards suits in equity was much considered by the House of Lords in *Knox* v. *Gye*, L. R. 5 H. L. 656, where it was held that the lapse of the period of six years was a bar to an action for an account brought by the legal personal representative of a deceased partner against a surviving partner. The general principle is thus stated by Lord Westbury (see p. 674): [His lordship read from "The general principle was laid down" to "analogy to the Statute of Limitations," and later on from "Your lordships will no doubt" to "remedy."]

In this case there is no question that the courts of law and of equity have concurrent jurisdiction with reference to such a claim as this; indeed, as has already been stated, an action at law has been brought and judgment recovered for the very sum in question against the surviving partner in the firm of F. Friend & Co. A court of equity, therefore, ought to give effect to any bar created by statute which would be available at law.

Much reliance was placed on the case of *Burdick* v. *Garrick*, 18 W. R. 387, L. R. 5 Ch. App. 233, at pp. 240-1. That case, however, was commented upon by Hall, V.C., in *Watson* v. *Woodman*, 24 W. R. 47, L. R. 20 Eq. 721, where he expressed his opinion that the case was decided on the special circumstances. The recent case of *Soar* v. *Ashwell* was also relied on; but in that case the plaintiff's claim was of such a nature as could only be asserted in a court of equity. And this is pointed out by the Master of the Rolls in the commencement of his judgment.

In my judgment, therefore, the existence of a fiduciary relation does not prevent the defence of the statute being set up in the present case.

Before dealing with the other points raised it is desirable to state some further facts.

It appears that on the 27th of August, 1894, Eastwood and Co. sent a letter enclosing a statement of account between the two firms showing a balance due to Eastwood & Co. of £494 6s. 4d. This was arrived at by debiting Frederick Friend & Co. first with a series of items, which, on the face of the account, had become due within six years from the date when the account was sent. Then came this entry:

Consignment Account.			
Your balance as shown by you	£504	14	2
+ Cash deducted (see explanation) - - - - -	84	5	9
	£588	19	11

This, with the previous items, made up a total debit of £1,236 6s. 8d. On the other side were credited various sums, including "Commission account, as per statement annexed." At the foot of the annexed

statement were these words, "N.B.—Do you agree our figures?" And on one of the audited items is appended the remark, "You will understand by our letter that we do not agree all these figures." The items under the heading "Consignment Account" constitute the balance claimed in respect of consignments, less £300. All the items making up the consignment account were in August, 1894, statute-barred with the exception of two under date 5th of March, 1889, of £31 5s. and £29 6s. 3d., making together £60 11s. 3d.

On the 12th of September, 1894, Eastwood & Co. wrote to F. Friend & Co.: "Dear Sirs,—Will you kindly make a point of sending a cheque for £400 to-morrow, Thursday, and very greatly oblige.—Yours faithfully, Eastwood & Co."

On the 13th of September, 1894, F. Friend & Co. replied as follows: "Dear Sirs,—Enclosed we beg to hand you a cheque for £300 on account, and we will thoroughly examine statement next week and close up the affair altogether if possible."

The £300 so paid was in the books of Eastwood & Co. placed to the credit of the consignment account and in the account brought in for the purpose of proof in this action it is credited against the amount debited for the assignments. Beyond this nothing was done down to the time of the death of the testator.

The question is, what effect is to be attributed to the payment so made? Upon the law applicable three cases must be referred to.

The first is *Mills* v. *Fowkes*, 5 Bing. N. C. 455. The question arose as to the effect of a payment of £15 made under circumstances stated at pp. 460-1 of the report. [His lordship read from "The law has been correctly laid down" to "from the operation of the statute."]

I may here observe that the Mercantile Law Amendment Act expressly provides that "no claim which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of the action."

In *Nash* v. *Hodgson*, 3 W. R. 590, 6 De G. M. & G. 474, the question was as to the effect of a judgment made to a creditor who held promissory notes of the debtor, two of which were statute-barred. Lord Cranworth, C., goes through the earlier cases, including *Mills* v. *Fowkes*, and sums them up thus: [His lordship read at p. 482, "They show that simple payment . . . may be doubtful," and continued:] With reference to these observations it is to be observed that in both *Mills* v. *Fowkes* and *Nash* v. *Hodgson* there existed debts not barred by statute, excepting the payment. Knight Bruce, L.J., appears to have thought that the appropriation by the debtor took the case out of the statute. With this Turner, L.J., does not agree, but says: [His lordship read pp. 489-90, "It seems to me however . . . the payment had to be made perfectly generally," and continued:] With this view of the law the case of *Walker* v. *Butler*, 6 E. & B. 506, agrees: [His lordship read the judgments at pp. 510-11, and continued:] According to these authorities I am bound to hold that the appropriation by Eastwood & Co. of the £300 to the consignment account did not operate to take the case out of the statutes; but I must have regard to all the circumstances of the case in order to ascertain the intention of Messrs. F. Friend & Co. in making the payment.

Now, from this point of view the letter of the 13th of September, 1894, is most important.

In the first place, the payment is expressly stated to be not in satisfaction but *on account*; it is, therefore, a payment in respect of a larger debt.

Secondly, it appears that the payment was made with reference to the statement prepared by Eastwood & Co., and the balance thereby shown to be due from F. Friend & Co.

Thirdly, this statement cannot be regarded as a settled account. It contained some items at least which Eastwood & Co. did not admit, and it invited as to others discussion on the part of F. Friend & Co., and that firm were ready to avail themselves of the invitation, "in order to close up the affair if possible."

Looking at all these circumstances, I think that the payment amounts to an acknowledgment on the part of F. Friend & Co. that there was pending between them and Eastwood & Co. an account *relating to the several items mentioned in the statement*, including the consignment account on which balance of more than £300 would prove to be payable; and I think that from that there ought to be inferred a promised to pay that balance when ascertained. The view which I take as to the effect of the payment is similar to that taken by Kay, J., with reference to an acknowledgment in *Banner* v. *Berridge*, 29 W. R. 844, 18 Ch. D. 254. [His lordship read: "I suppose there is no doubt about the law . . . the balance shall be paid," and continued:] Then do the cases of *Mills* v. *Fowkes* and *Nash* v. *Hodgson* bind me to hold that the defence of the statute must prevail. In my opinion these two cases are distinguishable for two reasons: first, that the payment was made expressly with reference to a statement of account which included as part of it the statute-barred items; and, secondly, that apart from these statute-barred items there did not exist a balance of £300 payable to Eastwood & Co., either on the face of the statement or in fact.

In my judgment, therefore, the applicants are entitled to prove in respect of the items in the consignment account.

One question stills remains. After the death of Frederick Friend a sum of £100 was paid to Eastwood & Co. by William Beauchamp Friend. For this sum credit is given in arriving at the balance sought to be proved; but the applicants now seek to appropriate it to those items in respect of which the estate of Frederick Friend has been held not to be liable.

The general rule is that where a debtor does not make an appropiation of a payment the creditor may do so; and that he has the option of making such appropriation "until the last moment," as it is sometimes put; certainly until he communicates an appropriation to the debtor (*Simson* v. *Ingham*, 2 B. & C. 65) or brings an action (*Mills* v. *Fowkes*), or until the case comes before a jury (per Taunton, J., *Philpott* v. *Jones*, 2 Ad. & E. 41, see p. 44).

It seems to me, however, that the applicants have in fact exercised this right by carrying in their proof in the form which they did, and that it is too late for them now to appropriate as they seek to do.

Solicitors, *H. P. Davis; Sims & Syms.*

Q. B. Div.
(Collins and Ridley, JJ.) July 31, 1897.

LONDON COUNTY COUNCIL (*Appellants*) *v.* WOOD (*Respondent*). (*a.*)

Local government—Highways—Locomotives—Locomotive passing along highway—Being "used" on highway—Licence—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 32.

Section 32 *of the Highways and Locomotives Act*, 1878, *gave county authorities power to make bye-laws for granting annual licences to locomotives used within their county, and under this section a county council made a bye-law that "No locomotive shall be used on any highway within the county until an annual licence for the use of the same shall have been obtained by the owner thereof."*

Held, that a locomotive which is only passing along a highway for the purpose of proceeding to another district is being "used" on such highway within the meaning of this bye-law, and that the owner thereof required a licence for such user.

Case stated by Mr. Kennedy, metropolitan police magistrate, sitting at Woolwich police-court.

An information was laid on behalf of the appellants against the respondent charging that he, on the 3rd of November, 1896, at High-street, in the parish of Eltham, in the county of London, and within the Metropolitan Police District, did unlawfully use a locomotive on a highway in contravention of a bye-law made by the appellants prohibiting a locomotive being used on any highway within the said county until an annual licence for the use of the same should have been obtained from the appellants by the owner thereof whereby he (the respondent) became liable to the penalty provided by section 32 of the Highways and Locomotives Act, 1878, and the Local Government Act, 1888.

Section 32 of the Highways and Locomotives Act, 1878 (41 & 42 Vict. c. 77), provides: "A county authority may from time to time make, alter, and repeal bye-laws for granting annual licences to locomotives used within their county, and the fee (not exceeding ten pounds) to be paid in respect of each licence; and the owner of any locomotive for which a licence is required under any bye-law so made who uses or permits the same to be used in contravention of any such bye-law, shall be liable to a fine not exceeding forty shillings for every day on which the same is so used. All fees received under this section shall be carried to and applied as part of the county rate. This section shall not apply to any locomotive used solely for agricultural purposes."

Section 38 enacts: "'Locomotive' means a locomotive propelled by steam or by other than animal power."

The London County Council, under section 32, made bye-laws for the "Licensing and use of locomotives in the county of London (exclusive of the city of London," and No. 1 of such bye-laws provided: "No locomotive shall be used on any highway within the county of London until an annual licence for the use of the same shall have been obtained from the council by the owner thereof, nor at any time after the expiration of any such licence unless a further licence shall be obtained in respect of such locomotive."

The bye-laws also provided that the licence fee for a locomotive should be £10 a year, and for a steam-roller £5 a year, and there was also a provision for what was called a "travelling licence" on reduced terms.

The respondent was an engineer carrying on business at Crickenhill, in the county of Kent, and was the owner of the steam-roller in respect of which the information was taken out. He had not obtained a licence to use the steam-roller within the county of London. On the 3rd of November, 1896, the steam-roller was, by the directions of the respondent, being driven along the highway, High-street, Eltham, in the county of London; but it was not being so driven for any purpose of rolling the highway, but was passing along the highway in the course of a journey from Crickenhill to Ealing, in the county of Middlesex, where it was to be temporarily employed in road making. In the course of such journey it would travel over some sixteen miles along highways in the county of London.

It was contended for the respondent that as the steam-roller was only passing along the highway for the purpose of proceeding to another district, such steam-roller was not being "used" within the meaning of the bye-law.

It was contended for the appellants that the steam-roller was being used to go to Ealing and earn money there; that it was being used as a locomotive because it was being propelled by steam from one place to another, and that the intention of section 32 was to make all persons who should use and wear the highways by means of any locomotive contribute by paying a licence fee to the county rate.

The magistrate decided that the mere passage of the steam-roller over the highways within the appellants' district while crossing from one locality to another was not such a "user" on the highway as was contemplated by the bye-law, and he accordingly dismissed the information.

The question for the opinion of the court was whether upon the facts above stated the steam-roller was "used" within the meaning of the bye-law.

Daldy, for the appellants.—The steam-roller was being "used" on the highway while it was passing from the county of Kent to the county of Middlesex just as much as if it were being used on the highway for the purpose of rolling the same. Passage of a locomotive along a highway is a "user" of the highway within the contemplation of the bye-law, and of the 32nd section of the Act. The licence fee was to be paid in aid of the county rate, and the clear intention of the Act was to compel those who damaged the road by the use of locomotives to contribute towards the cost. The damage to the road would be the same whether the steam-roller was merely passing along the highway or was doing work on the highway. [He referred to *Bell* v. *Stockton Tramway Co.*, 51 J. P. 804.]

The respondent did not appear.

COLLINS, J.—Although we have not had the advantage of hearing any argument in favour of the view taken by the learned magistrate, the point appears to me to be reasonably clear, and I feel compelled to differ from the view taken by him. The case arises in this way. The Highways and Locomotives Act, 1878, provides that the county authority may make, alter, and repeal bye-laws for granting annual licences for locomotives used within their county, and that the owner of any locomotive for which a licence is required under any bye-law so made who uses or permits the same to be used in contravention thereof shall be liable to a penalty. In this case the owner of a steam-roller was with the steam-roller proceeding along a road within the jurisdiction of the London County Council for the purpose of fulfilling some contract of employment in the adjoining county

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

of Middlesex. The steam-roller was not actually at work in mending roads, but it was on its way travelling and passing over a highway in order to fulfil its contract at its destination. The point was taken that the owner ought to have had a licence, and that not having had a licence, he was subject to a penalty within section 32, if there were a bye-law applicable to the case. There are bye-laws applicable to this case, and it seems to me that these bye-laws contemplated the passage of a locomotive over the road, and this steam-roller is a locomotive. They clearly contemplated such passage as a user which would oblige the owner to have a licence. It is true that they provide for mitigating the full rigour of the bye-law by allowing a person who will assert that he does not intend to use the locomotive on more than six days within the county, and that he has a licence in force for another county, to have what is called a travelling licence on reduced terms. It is obvious that unless he can bring himself within these provisions he will be, within the view of the bye-law, liable to the whole amount of the licence. It seems to me to be the intention of the bye-laws that a person who uses the locomotive for the purpose of travelling from one place to another in order to do work when he gets there, should be taken to use the highway, and that being the intention of the bye-law, it seems also to be the intention of the Act under which the bye-law is made. An engine only supplies the means of locomotion, and the provision we are now dealing with is a Highway Act, which is obviously an Act for the protection of highways. These locomotives use the highway whether they are merely passing over the highway, or whether they are drawing a load upon it, and generally speaking the locomotive is the more serious factor in the case. Even when you have a traction-engine dragging a load on the road the traction-engine is much more likely to injure the highway than the load that follows. Much more so is that the case in the case of a steam-roller, and the steam-roller's action on the road appears to be just as injurious whether it is engaged in mending the road or passing over it. In either case it is the same weight passing over it, and it does the mischief the Legislature intended to be dealt with. If I borrow a horse for the purpose of drawing a load at a place ten miles distant, and if I ride the horse to that place, could it be said that I was not using the horse when passing over that ten miles? It seems to me as a matter of common sense that I should be using the horse on that journey, and in the same sense the roadway also.

Under these circumstances I think the learned magistrate was wrong in his decision of this case.

RIDLEY, J., concurred.

Appeal allowed. Case remitted.

Solicitor for the appellants, *W. A. Blaxland.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Wright, JJ.) — May 24, 1897.

In re GINGER.

Ex parte THE LONDON AND UNIVERSAL BANK (LIMITED). (*a.*)

Bankruptcy—Bill of sale—Reputed ownership—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44 (*iii.*)—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 15.

Goods in the possession of a bankrupt in his trade or business at the commencement of the bankruptcy under such circumstances that he is the reputed owner thereof, though covered by a bill of sale, pass to the trustee in the bankruptcy, and not to the grantee of the bill of sale.

Appeal from a judgment of his Honour Sir A. G. Marten, Q.C., in the county court at Luton (reported at 41 SOLICITORS' JOURNAL, p. 13), deciding that the goods comprised in two bills of sale, or either of them, on the bankrupt's farm, in his trade or business, at the commencement of the bankruptcy, were in his possession, order, and disposition by the consent and permission of the true owner under such circumstances that he was the reputed owner thereof, and consequently passed to the trustee in the bankruptcy, and not to the grantee of the bills of sale.

The bankrupt, who was a dairy farmer, of Slapton, in Buckinghamshire, granted the first of the two bills of sale to the appellants, the London and Universal Bank (Limited), upon the 28th of February, 1896. This bill of sale was given to secure a loan of £500 and interest at 60 per cent., repayable "£75 for interest on the 28th of May then next, and the principal sum of £500, together with the interest then due, on the 28th of August, 1896." The schedule annexed to this bill of sale comprised, amongst other things, the debtor's household furniture, and also the cattle, poultry, and fixtures used in his business as a dairy farmer. The second bill of sale was dated the 20th of March, 1896, and was given to secure a loan of £200 and interest at 60 per cent., repayable, both principal and interest, "on the 20th of June then next." The schedule to this bill of sale comprised certain cattle on the farm, 300 acres of grass, the crops of 70 acres of arable land, and the tenant-right, goodwill, and valuation of the farm. Both bills of sale contained the usual proviso that the grantee should not be entitled to seize or take possession of the chattels comprised in the schedules for any other cause than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882. None of the causes entitling the grantee to take possession had arisen before the 8th of April, 1896, when the debtor committed an act of bankruptcy by non-compliance with the terms of a bankruptcy notice served upon him upon the 1st of April. A petition was presented against him on the 9th of April, and a receiving order was made upon the 20th of April.

Upon the 22nd of April the official receiver took possession of the debtor's farm and goods, including all the chattels comprised in the two bills of sale.

The goods were sold, and the proceeds, £2,154 4s., paid into court.

The holders of the bills of sale moved before the county court at Luton, on the 13th of August, 1896, to obtain the money representing the value of the goods comprised in their bills of sale. His Honour Sir A. G. Marten, Q.C., in a considered judgment, delivered upon the 22nd of October, 1896, allowed their claim as to the household furniture and all other chattels comprised in the bills of sale except such as were "in the possession, order, or disposition of the bankrupt in his trade or business," which he held to have been in the bankrupt's possession at the date of the bankruptcy by the consent and permission of the true owner under such circumstances that the bankrupt was the reputed owner thereof; therefore, by section 44 of the Bankruptcy Act, 1883, they passed to the trustee.

The bills of sale holders appealed.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Jelf, Q.C., and *Muir Mackenzie*, for the appellants.—In this case there is no consent by the true owner to the goods remaining in the possession of the bankrupt. The true owner is the grantee of a bill of sale, and by the Bills of Sale Act he is forbidden to seize the goods until default is made in payment of the instalments due under the bill of sale. He has no power to grant or refuse consent: *In re Stanley*, 17 L. R. (Ir.) 487. [VAUGHAN WILLIAMS, J.—Cave, J., in *Ex parte Slater, In re Webber*, 64 L. T. Rep. 426, 40 W. R. Dig. 20, refused to accept *In re Stanley* as law as being inconsistent with *Ex parte Harding, In re Fairbrother*, L. R. 15 Eq. 223, 21 W. R. Dig. 29.]

Jelf, Q.C., cited *The Colonial Bank* v. *Whinney*, 34 W. R. 705, 11 App. Cas. 426.

Reed, Q.C., and *Carrington*, for the respondents.—There is no difference between a contract subject to the consent of the parties and a contract subject to a statute.

They cited *Spackman* v. *Miller*, 12 C. B. N. S. 659, 11 W. R. C. L. Dig. 18; *Ex parte Izard, In re Chapple*, 32 W. R. 218, 23 Ch. D. 409; *Ex parte Sully, In re Wallis*, 33 W. R. 733, 14 Q. B. D. 950.

Jelf, Q.C., replied.

VAUGHAN WILLIAMS, J.—The contention of the appellants in this case seems to be that the effect of the Bills of Sale Act, 1882, is such that if a lender takes a security for a loan and complies with the provisions of that Act, thereby allowing the grantor of the bill of sale to retain possession of the security until such default is made as entitles the grantee to seize it, then such possession by the grantor is not by the consent and permission of the true owner, but is accorded to the grantor by the statute.

The proper answer to that contention is that, notwithstanding the Bills of Sale Act, 1882, the possession by the bankrupt of goods assigned to the grantee under such circumstances that the bankrupt continues to be the reputed owner thereof is possession by the consent and permission of the true owner, not statutory possession conferred by the Bills of Sale Act, 1882.

Nobody suggests that we are to read the reputed ownership section as being in any way controlled by the Bills of Sale Act, 1882. Here we have two statutes, both of them in force, and it cannot be argued that one controls the other. This, therefore, is not a question of construction at all, the construction of the Bankruptcy Act, 1883, is absolutely unaffected by the construction of the Bills of Sale Act, 1882, and *vice versâ*.

If the Bills of Sale Act, 1882, had never been passed, and you had a case like the present, no one could doubt but that if the circumstances of possession led to reputation of ownership the goods must pass to the trustee. Of course, if the circumstances were not such as to lead to reputation of ownership, the question would not arise. I am only going to deal with the case where the possession is such as to give rise to reputation of ownership, and I would point out that if you got such circumstances following a bill of sale as in the present case, and the bill of sale were held to be bad in form, no one could contend that reputation of ownership did not arise. It is, however, said that the Bills of Sale Act negatives possession with consent—*i.e.*, such possession as raises reputation of ownership. I do not see why, for the Bills of Sale Act applies to all classes, and the reputed ownership clause only applies to traders, and even as to trade goods there may be a custom which negatives reputation of ownership, so that there are numberless cases where the reputed ownership clause is inapplicable.

It seems to me that although the Bills of Sale Act compels the lender to allow the borrower possession until default, it in no sense compels the lender to consent to possession under such circumstances that the borrower is the reputed owner of the goods—*i.e.*, it in no way compels the lender to consent to the false reputation of ownership. The fact is, that, if the circumstances are not such as to raise reputation of ownership, the enforced consent does no harm; but if the circumstances are such as to raise reputation of ownership, then the grantee must go further than the Bills of Sale Act and take such steps as may be needed to protect himself.

As to *In re Stanley*, I wish to say that it seems to me to have been decided on two grounds, one of which was that the possession was consistent with the terms of the mortgage deed and excluded the reputation of ownership. This view is, however, inconsistent with *Spackman* v. *Miller* and that series of cases.

WRIGHT, J., concurred.

Solicitors for the appellant, *Gibson, Usher, & Co.*

Solicitors for the respondent, *Leslie & Hardy*, for *H. Pettit*, Leighton Buzzard.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov 27.

ATTORNEY-GENERAL v. BROWN. (a.)

Inland revenue—Succession duty—Father and son in partnership—Death of father—Acquisition by son of father's share in business — Succession — Sale and purchase—Construction of partnership deed—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 2.

A father admitted his son into partnership for a term of five years. The son brought no capital into the business, but the value of the business was estimated at £62,445, of which two-thirds was to be deemed the father's share and one-third the son's; and one condition of the partnership deed was that, in the event of the father dying during the partnership, the son was to take the whole of the business and pay to the father's executors or administrators £10,000. By a deed of even date the son agreed to pay to the father and his executors a rent-charge of £139 per annum in respect of the freehold property of the partnership.

On the death of the father during the partnership the Crown claimed succession duty in respect of the father's share of the business which passed to the son, less the sum of £10,000 payable by the son to the estate of the deceased.

Held, that the son's acquisition of his father's share of the business was a succession, on which succession duty was payable.

Judgment of Vaughan Williams *and* Kennedy, JJ. (45 *W. R.* 446), *reversed.*

Appeal from the judgment of a Divisional Court (Vaughan Williams and Kennedy, JJ.) on the hearing of an information by the Attorney-General claiming succession duty, 45 W. R. 446.

On the 31st of March, 1881, the defendant, George Thomas Brown, entered into a contract of partnership for a term of five years with his father, George

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Brown, who was then carrying on the business of a cotton spinner and manufacturer. For some years previously the defendant had been the manager of the business. On becoming a partner the defendant did not bring any capital into the business, but the value of the business was estimated at £62,445, and it was agreed that the sum of £41,630 should be considered as having been brought into the partnership by the father, and the remaining £20,815 by the son. The father was to take two-thirds of the profits, and the son one-third.

The deed of partnership contained the following clause: "If the said George Brown shall die during the partnership, the said George Thomas Brown shall be absolutely entitled, for his own use and benefit, to the whole or entirety of the capital of the partnership . . . and the said George Thomas Brown shall within six calendar months next after such death duly execute and deliver unto the executors or administrators of the said George Brown a bond for the payment to them of the principal sum of £10,000. . . . But if the said George Thomas Brown shall die during the partnership, the said George Brown shall be absolutely entitled, for his own use and benefit, to the whole or entirety of the capital of the partnership, and the said George Brown shall within six calendar months next after such death duly execute and deliver unto the executors or administrators of the said George Thomas Brown a bond for the payment to them of the principal sum of £15,000."

By a deed of even date the son agreed to pay to the father and his executors a rent-charge of £139 per annum in respect of the freehold property of the partnership.

The contract of partnership was carried into effect, and the father and son carried on business together until October, 1884, when the father died.

The Crown claimed succession duty in respect of the father's share of the capital of the partnership which passed to the defendant, less the sum of £10,000 payable by the defendant to the estate of the deceased.

The question was whether the defendant's acquisition of his father's share of the capital of the partnership was a succession, or whether the provisions of the partnership deed constituted a sale and purchase.

The Divisional Court gave judgment against the Crown.

The Crown appealed.

Sir R. B. Finlay, S.G., and *Vaughan Hawkins* (*Sir R. E. Webster, A.G.*, with them), for the Crown.

Haldane, Q.C., and *Danckwerts*, for the defendant.

Cur. adv. vult.

RIGBY, L.J., read the judgment of the court as follows: In this case the Crown claims from the defendant, George Thomas Brown, succession duty in respect of any benefit derived by him from his acquisition, on the death of his father and partner, George Brown, of the share of the latter (being two-thirds of the whole) in a partnership business of George Brown & Co., carried on by the father and son down to the death of the father in 1884; the real question being whether the arrangement (to use a neutral phrase) under which the son acquired the share of his father was or was not in the nature of a sale by the father to the son within the meaning of *Fryer* v. *Morland*, 25 W. R. 21, 3 Ch. D. 675, and so excluded from the operation of the Succession Duty Act.

The facts of the case are not in dispute. George Brown, the father, to the end of the year 1880 carried on the business of cotton spinner and manufacturer, his son, George Thomas Brown, assisting him in the management of the business, but having no share therein. George Brown, the father, being minded to take his son into partnership with him, caused a valuation to be made of his assets employed in the business as on the 1st of January, 1881, and a general statement of account showing his position in the business on the same day. In this statement of account the items on the credit side were the values of the assets at the prices put upon them, a large banker's balance of £10,000 (obviously, we think, made up to an even sum considered sufficient to start the new firm), and the accounts due to the business. The total of these assets on the credit side was £63,824 8s. 11d. On the debit side was placed the amount of the accounts owing in the business, being £1,378 16s. 1d., and there resulted a net balance to the credit of the business of £62,445 12s. 10d. The statement of account was taken as the starting-point of the new firm, and the credit balance attributed as to £41,630 8s. 6d. (two-thirds of the whole) to the father as his capital, the remaining one-third, or £20,815 4s. 4d. being attributed to the son, though the whole amount was in truth brought in by the father. We have thought it desirable, with reference to the arguments pressed upon us, to state plainly the way in which the exact balance was arrived at, but for greater simplicity that balance will hereafter be dealt with as if it were a round sum of £60,000. The articles of partnership, which contained or evidenced the terms of the only contract between the father and the son, were dated the 31st of March, 1881. They carried the partnership back to the 1st of January, 1881, and made the term of the partnership five years, if both partners should so long live, subject to a clause enabling either partner to expel the other in case (among other events) of lunacy, bankruptcy, or breach of the articles. The benefits conferred upon the son by the articles included the following: He got at once one-third of the capital, say £20,000, and one-third of the profits. If the partnership continued for the five years, or determined by any other reason than the death of a partner, his share of capital was to be one-half, say £30,000. If his father died during the term, he was to have the whole capital, say £60,000, subject to his giving his father's executors, within six months after his death, a bond conditional for payment of £10,000 and 4 per cent. interest thereon from the father's death by ten instalments of £1,000 a year, the first payable, with interest as provided, at the end of twelve calendar months from the date of the bond, thus giving eighteen months for the first payment at the son's election. In the event of the son's death during the term, his father was to have back the business (formerly his own), but was to pay the son's executors £15,000, secured by his bond in a similar manner. The consideration given by the son (and it cannot be suggested that it is not in law a good consideration), was his agreeing to be a partner, and thereby taking upon himself liability for the debts of the firm, and his rendering services as a partner, with the addition in the sole case of his succeeding to the whole business of the money consideration involved in his giving the bond for £10,000. The money payment and the obligation to indemnify the father's estate against the debts of the firm constituted the only additional consideration for the acquisition of the father's two-thirds. Can the arrangement above summarized, looking at the case in substance apart from form, be fairly described as a case of sale and purchase within the meaning of the exception established by *Fryer* v. *Morland*? The contract between father and son is one and indivisible, and it is not permissible to isolate one of its terms from the other.

The event which has actually happened does involve a money payment by the son, but for the purpose of arriving at the true meaning of the arrangement it is necessary to consider also what did and what might have happened independently of that event. Now, the son actually got one-third of his father's capital without having to make any money payment to the father at all. If the partnership had lasted throughout the five years, or been determined by the father expelling the son or the son the father, the son would have got half the capital without having to pay anything. If it had been determined by the death of the son, his estate would have had £15,000, but would not have had to pay anything. It would hardly have been possible to say that in any of these cases the contract was one of sale and purchase in the sense in which that phrase is to be used for present purposes or in any ordinary sense. If the true nature of the arrangement was not in the cases referred to a contract for sale and purchase, the argument for its being so construed in the particular case which happened is greatly weakened, if not altogether destroyed. Looking at the contract broadly we do not think that it is one which ever would have been entered into with a stranger (unless the father chose to treat him as a son), but that it was to a great extent at any rate an arrangement for the benefit of the son, and that it is not converted into a contract for sale and purchase simply because the father stipulated for a money payment in a certain event to his estate. The distinction between the present case and that of *Fryer* v. *Morland* seems plain. Sir George Jessel in that case gives two reasons why ordinary contracts for sale and purchase should not be within the Act. The first and the main reason is the absurdity which would be involved if sales and purchases were to be included. In effect he says: If sales and purchases are to be included, then sales by auction must be. But it is altogether absurd to suppose that a stranger purchasing at an auction should pay 10 per cent. duty when a son purchasing in the same manner would pay 1 per cent. only. The same observation would apply to sales by private treaty. To an arrangement like that in the present case the argument would have no application. The other reason, founded on the language of section 2 of the Succession Duty Act, seems to be equally inapplicable. The Master of the Rolls remarks upon the difficulty of holding that a purchaser in an ordinary case of sale and purchase derives title from his vendor. He derives it from his own money paid out of his own pocket. Is that the case here? It would seem that the provision as to giving the bond for £10,000 involves no such conclusion. Immediately on the father's death his two-thirds share (amounting, say, to £40,000) is to pass to his son with, of course, the subsequent produce whether the son carries on the business or not. He has it either to sell or keep, and it is at least as easy to infer that he is to have this property to enable him to pay conveniently the instalments, as that £10,000 is to be fixed as a contractual value for property taken on the face of the contract as worth £40,000. The true conclusion seems to be that the father was actuated by mixed motives of business and bounty, and that in the case of the son becoming entitled to the whole busines £10,000 was fixed as a reasonable sum which could be paid without inconvenience out of the business for the benefit of the father's general estate, and not at all as a measure of the value of the property taken. This conclusion would be in accordance with the usual or, at any rate, a very general practice in the case of a successful trader carrying on an important business and taking into partnership one of several sons. It is highly improbable that in such a case the whole arrrangement should be based upon the ordinary pecuniary basis which would exist between vendor and purchaser. The partnership agreement is founded on mutual confidence between the parties, and it seldom, if ever, happens that the son gives full pecuniary value for the share secured to him, whilst some provisions for the other members of the family are very generally imported so as to make the arrangement analogous to, if it cannot properly be called, a family arrangement. Hitherto no reference has been made to the point very strongly relied on by the Solicitor-General, that, quite apart from the inadequacy of the sum to be paid on the son taking over the father's two-thirds share, the contrast between that sum and the £15,000 to be paid by the father on taking the son's one-third shows that the sums were fixed, not on the basis of sale, but rather with reference to the presumed and reasonable claims of the son in the particular events. This contrast, if not explained, is a strong ground for supposing that the whole arrangement was in the main an arrangement for the son's benefit.

The judgment proceeded to deal with the reasons on which the learned judges in the court below based their decision, pointing out that they had disregarded the estimated value of the partnership assets, and had apparently been impressed by arguments founded on the depressed condition of the cotton-spinning trade and on the reservation of the rent-charge of £139. The judgment then continued:

Having stated our reasons for differing in matters of comparative detail with the learned judges in the court below, we conclude by pointing out what, in our judgment, and with all deference to them, seems to be the main defect in their reasoning. They do not treat the contract as a whole, but, picking out and dealing separately with one clause of it, they seem to add together all the considerations given by the son for any part of the advantage secured to him and concentrate them on the single case of the taking over by the son of the father's two-thirds, not allowing for the circumstance that, with the exception of the £10,000 and the indemnity to be given for the debts due at the father's death, for the whole of which the son was liable to the creditors, the whole consideration moving from the son would have equally moved from him had he never become the taker of his father's share at all.

The result is that the judgment of the court below is to be reversed, and the Crown held to be entitled to succession duty, of course giving credit in the usual way to the son for the sum of £10,000 in estimating the value of the succession. Costs will follow the event.

Appeal allowed.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the defendant, *Rowcliffes, Rawle, & Co.*, for *Richard Jackson & Son*, Chorley.

From Q. B. Div. (Bkcy.)
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — July 30, 1897.

In re FORT.
Ex parte SCHOFIELD. (*a.*)

Bankruptcy—Verbal agreement to lend money—Receipt by lender of a share of profits of business—Bankruptcy

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

of borrower—Postponement of lender's proof—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 2, *sub-section* (3); *s.* 3.

A verbal agreement to lend money on the terms that the lender shall receive a share of the profits of a business to be carried on by the borrower is within the provisions of section 3 *of the Partnership Act*, 1890; *and therefore, in such a case, if the borrower is adjudged a bankrupt the lender is not entitled to recover anything in respect of his loan until the claims of the other creditors of the borrower have been satisfied.*

Appeal of the trustee in bankruptcy from a decision of the Divisional Court reversing an order of the county court judge of Manchester postponing the respondent's proof until all the other creditors of the bankrupt should have been paid in full.

In April, 1894, Schofield, the respondent, lent Fort, the bankrupt, £3,000 with which to start in business.

It was verbally agreed between them that Fort should have £6 a week as manager of the business, that Schofield should be paid 6 per cent. interest, and that the net profits of the business should be divided between the parties. At the same time Schofield took a promissory note as collateral security. Schofield sued Fort on the note, and Fort pleaded that Schofield was his partner.

This issue was tried and decided in Schofield's favour, and Schofield obtained judgment. Fort then filed his petition in bankruptcy. Schofield tendered a proof in the bankruptcy for £3,153, being the principal, interest, and costs. The proof was objected to upon the ground that Schofield's claim must be postponed to the claims of the other creditors by virtue of section 2, sub-section 3 (*d*), and section 3 of the Partnership Act, 1890.

The Divisional Court (Vaughan Williams and Wright, JJ.) held that as the agreement under which Schofield was to take a share of the profits of the business was not in writing, section 3 did not apply, and that Schofield was entitled to prove for his debt equally with the other creditors.

The Partnership Act, 1890, s. 2, in determining whether a partnership does or does not exist, regard shall be had to the following rules:

(3) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share or of a payment contingent on or varying with the profits of a business does not of itself make him a partner in the business; and in particular

(*a*) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such.

(*d*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business, or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto,

Section 3: In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than 20s. in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

J. C. Bankes, for the appellant, the trustee in bankruptcy.—Section 2, sub-section (3), of the Partnership Act, 1890, provides that the receipt by a person of a share of the profits of a business is *primâ facie* evidence that such person is a partner in the business. The only evidence here is that Schofield was to receive a part of the profits, and, therefore, he is a partner. But, secondly, even if he is not a partner, he comes within section 3, and his claim is postponed until all the other creditors of the bankrupt have been satisfied. The Divisional Court held that the contract between Schofield and the bankrupt not being in writing, section 3 did not apply; but it cannot have been the intention of the Legislature that the lender should be in a more favourable position when the contract is verbal than when it is in writing. The words, "such a contract as is mentioned in the last foregoing section" in section 3 do not refer exclusively to the contracts in writing dealt with in section 2, sub-section 3 (*d*). Verbal contracts are also dealt with in section 2, as for example, in sub-section 2 (*a*). If the lender's proof is postponed under section 3, then he has no right to vote at the creditor's meeting: *Ex parte Taylor, In re Grason*, 28 W. R. 205, 12 Ch. D. 366.

H. Reed, Q.C., and *Bradbury*, for the respondent Schofield.—The question is whether section 3 applies to a verbal contract such as this. Section 3 is a disabling section, because apart from it any one who has lent money to a man can prove in the borrower's bankruptcy unless they are partners. Under section 2, sub-section 3 (*d*), a particular kind of contract is referred to, which confers a privilege if the contract is in writing. That privilege, and the disability imposed by section 3 are correlative, and unless the borrower obtains the benefit of section 2, sub-section 3 (*d*), by having a written contract he does not come within the disabling provisions of section 3. The words "such a contract" cannot refer to two different kinds of contract, one verbal and one in writing. Regard must be had to the use of the word "mentioned" in section 3. The only contract for an advance by way of loan which is mentioned in section 2 is that in sub-section 3 (*d*), and in determining whether a contract is within sub-section 3 (*d*) you must not take a part only of what is mentioned in that clause—viz., the substance of the contract, and ignore the proviso as to the form of the contract.

They referred to Bovill's Act, ss. 1 and 5.

Lord ESHER, M.R.—In this case the respondent Schofield lent a sum of money to a man in order to enable him to set up in business. The borrower has now become a bankrupt. The money was lent to him upon certain terms. First of all there was a term that Schofield at some future date was to be repaid the sum advanced; and, secondly, that, until he was repaid, he was to be paid interest. Then there was a further term to the effect that the borrower was to be paid a weekly allowance out of the profits of the business, as if he were the manager of it; and, finally, after these payments of interest and the allowance to the borrower had been made, the surplus profits arising from the business were to be divided equally between the lender and the borrower until the loan had been paid off.

Now, the question we have to determine is whether such a contract as that is a contract which is men-

tioned or, as I should prefer to say, dealt with in section 2 of the Partnership Act, 1890, not merely in sub-section 3 (*d*), but in any part of the section. Sub-section 3 (*a*) says that "the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such." Now, does that clause deal with the case of money being lent upon the terms that the borrower shall be repaid out of the profits of a business? It seems to me perfectly clear that such a transaction does come within the words of the clause. The clause assumes the case of a person being paid a debt out of the profits of a business and, to my mind, that assumes that the lender has lent his money upon the terms that he should be repaid out of the profits of the business. Therefore, you have a transaction such as the one in this case dealt with by clause (*a*) of sub-section 3, and in clause (*d*) it is certainly dealt with again. Then section 3 says: "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section." Now, that case is dealt with both in clauses (*a*) and (*d*) of section 2, sub-section 3, but it is said that such a contract is not "mentioned" in clause (*a*). It is mentioned by absolute inference, for clause (*a*) cannot be read unless it is to be inferred as a matter of course and beyond any doubt that such a contract is included in it. To my mind that which is read in by necessary implication in such an Act of Parliament as this is equivalent to its being mentioned. [His lordship read the rest of section 3, and continued:] If, then, the case of money lent upon the terms that it shall be repaid out of the profits, is included under the word "mentioned," as I think it is, not only in clause (*d*) but also in clause (*a*) and in the earlier part of section 3 itself, then this case is brought within section 3. In that view of the case it is not necessary to decide whether Schofield was a partner with the bankrupt, for, assuming that he is not and that he is only a lender upon the terms which I have stated, the effect of section 3 is to postpone his proof until the other creditors have been paid. I am therefore of opinion that the appeal ought to be allowed.

A. L. SMITH, L.J.—This case turns upon the true construction of section 2, sub-section 3 (*d*), of the Partnership Act, 1890, coupled with section 3 of the same Act. The question is whether, when a lender lends money upon the terms that he shall receive a share of the profits of the business to be carried on by the borrower, he is postponed in the case of the bankruptcy of the borrower to the other creditors of the borrower. I first of all make this remark upon section 3. In certain cases there cannot be a doubt—I say certain cases so as not to infringe upon any vexed point—that where a lender loans money to be employed in trade, the lender to receive a share of the profits, in the event of the bankruptcy of the borrower, the lender cannot recover his money until all the other creditors have been paid. One cannot very well see why it is that if a contract of loan is made in writing the lender shall be postponed, but that he shall not be postponed if the contract is by parol. I cannot see any reason for that. I know the answer which was given by Mr. Reed, which was very ingenious. He says that the benefit and the burden in these two sections are correlative, and must go together; and if the lender wants to take the benefit of sub-section (*d*)—that is, the case of the contract being in writing, he has the burden imposed upon him by section 3 of having repayment postponed; but if he has not got the contract in writing under (*d*) then he is not postponed under section 3. It is not very easy to see the sense of that, and I see, in looking at the judgment of the court below, that this struck Wright, J., in the course of the argument although he has given judgment in the same way as Vaughan Williams, J. Now I come to section 2 and it seems to me that the court below has not arrived at the true construction of it. I will not go through the whole of section 2 and the sub-sections thereof, but I will come at once to sub-section (*d*), "The advance of money by way of loan"—that is what happened here—"to a person engaged or about to engage in any business"—that is an advance of money by way of loan from Schofield to Fort—"on a contract."

Now, I ask what is the ordinary meaning of that? I should say that means a contract either oral or in writing, and I do not think it can be denied that the true meaning of the word "contract" there is oral or in writing—"on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such." Now, there is a loan on a contract whether by parol or in writing to a borrower carrying payment by way of share in profits and the sub-section says that that does not of itself make the lender a partner with the borrower. Then it goes on: "Provided that the contract is in writing and signed by or on behalf of all the parties thereto." In my judgment the true reading of that clause (*d*) is that the contract part-embraces contracts by parol or in writing, but there is a limitation in this respect; that if the benefit of that section is wanted by the lender the contract must be reduced into writing and signed by him. Now, before I go to section 3 I may point out that it is remarkable, if the learned counsel for the respondent are right, that if the Legislature did not mean to alter the phraseology as to the meaning of "contract" they have taken pains in repealing Bovill's Act (which is repealed by the Partnership Act, 1890) to alter the phraseology of Bovill's Act, which is "upon a contract in writing" and have inserted "on a contract," leaving out "in writing," and as I say, the contract may be either by parol or in writing, but if the lender wants the benefit of the Act, then the contract must be in writing. Now I come to section 3, and it is upon section 3 that the whole of this question turns: "In the event of any person to whom money has been advanced by way of loan upon"—what?—"such a contract." That means by parol or in writing, exactly as in sub-section 3 (*d*) of section 2. The proviso is not needed here. If the money is loaned upon such a contract either by parol or in writing, then the lender is to be postponed. That is my construction of this Act, and for the reasons I have given I think the court below was wrong, and this appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. The question is really a very short one, What is "such a contract" as is mentioned in section 3? The particular contract mentioned is, in my opinion, the one mentioned in sub-section 3 (*d*) of section 2—that is, a contract that the lender shall receive a share of profits derived from carrying on the business. Then there are certain provisions as to what shall follow. This is not amplifying or varying or altering the contract in any way. We have already got a description of the contract that has been dealt with. Now I go on with the sub-section, which goes on to say that such, as a contract, "does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the

contract is in writing, and signed by or on behalf of the parties thereto." According to the simplest interpretation of English words the contract is described before, and the whole description is contained in the section before you get to what is to be the result. Such a contract shall have such an effect if it is in writing. I might use the language of A. L. Smith, L.J. I will not repeat it, but I agree entirely with what he said. The proviso is that such a contract as we have described shall have a certain effect if it be in writing. Section 3 says that the contract shall have another effect, and if we had this section alone to deal with I cannot really think that there is much difficulty about the interpretation. It certainly is not rendered more difficult by considering the state of things under Bovill's Act, which has been repealed. There it refers to a contract in writing, and there were certain cases in which you might have had this absurdity: that if a man contracted verbally no result would necessarily follow, but if he entered into the same contract in writing an important result might follow. Really that must have been accidental, and the accidental effect of that was, I should say, carefully avoided by changing, in the way in which the words have been changed, the language of section 1 of Bovill's Act. We have gone upon the assumption here that this contract did not create a partnership. The only question being whether Schofield should vote or not, which depends upon the question of whether he is postponed to the other creditors, we do not need to say anything more than is necessary to decide that question. Therefore anything which we have said has not the slightest bearing upon that verbal contract. We assume it is a loan of money, and a loan of money only; and although it is not in writing we think it comes entirely within the terms of section 3.

Appeal allowed.

Solicitors for the appellent, *Bower, Cotton, & Bower*, for *J. H. Boardman*, Manchester.

Solicitors for the respondent, *Robbins, Billing, & Co.*, for *J. H. Lea*, Manchester.

High Court of Justice.

Chan. Div. North, J. — Dec. 10.

BOORD *v.* AFRICAN CONSOLIDATED LAND CO. (*a.*)

Company—Register—Inspection—Right to take extracts —Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 32.

The right of inspection under section 32 *of the Companies Act*, 1862, *includes the right of taking copies of the register.*

Motion.

The plaintiffs were holders of 1,000 and 50 shares respectively in the defendant company.

On the 7th of September a resolution was passed to forfeit their shares because of non-payment of a call.

By article 41, where any shares shall have been so forfeited, notice of the resolution shall be given to the member whose shares shall have been forfeited, and an entry shall be made in the register. And by article 44, forfeiture was not to affect liability to pay calls.

On the 21st of October the plaintiffs obtained an order for inspection from the Vacation Judge. The company refused to allow the plaintiffs to take notes.

On the 22nd of October the plaintiffs' solicitors wrote asking for inspection, including the right of taking notes, and stating that if this was refused they would commence an action, and upon the company's refusal issued a writ asking that the company might be restrained by injunction from preventing the plaintiffs at reasonable times from inspecting and taking extracts from the register.

In the register the names of shareholders whose shares were alleged to be forfeited had a red line drawn through them, but the names were still legible.

The company contended that these names did not form part of the register, and that the plaintiffs were not entitled to copy a list of the names of the forfeited shareholders.

Swinfen Eady, Q.C., and *Stewart Smith*, for the plaintiffs.—The right to inspection includes the right to take copies. This has been decided under the Company's Clauses Act: *Mutter* v. *Eastern and Midlands Railway Co.*, 36 W. R. 401, 38 Ch. D. 92; *Holland* v. *Dickson*, 36 W. R. 320, 37 Ch. D. 669. The right of inspection of the register of mortgages under section 43 of the Companies Act, 1862, includes a right to take copies of the register: *Nelson* v. *Anglo-American Land Mortgage Agency Co.*, 45 W. R. 171, [1897] 1 Ch. 130. It must be the same under section 32.

Vernon Smith, Q.C., and *W. Higgins*, for the company.—The plaintiffs have cease to be members. The cases cited do not apply, for under section 32 a a copy can be obtained on payment of sixpence for every hundred words copied. Anyone who wants a copy must pay a proper fee and get a copy from the company, and not make a copy himself.

NORTH, J.—This is an application that the company may be restrained by injunction from preventing the plaintiffs at reasonable times from inspecting and taking extracts from the register. The case is covered by authority, for where there is power to inspect the register there is power to take extracts. *Holland* v. *Dickson* and *Mutter* v. *Eastern and Midlands Railway Co.* show this, unless there is a distinction, because the application here is under section 32 of the Companies Act, 1862. As a copy can be obtained upon payment of sixpence for every hundred words copied, it is said that the right to take extracts is excluded. In my opinion the power to call on the company to give a copy of the register is an additional privilege. A man can take notes, and also if he likes obtain a full copy. If the plaintiffs are members, their right to inspection is clear. It is said, however, that the plaintiffs have ceased to be members, and omitted to tender a shilling. But this was not the ground the company took; the company refused to allow the plaintiffs to take extracts, and would have done so whether the shilling was tendered or not. The plaintiffs must have the costs of the motion in any event.

Solicitors, *Wyatt, Digby, & Co.; Burgoyne, Watts, & Co.*

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div. North, J. — Nov. 23.

SOUTH AFRICAN REPUBLIC v. LA COMPAGNIE FRANCO-BELGE DU CHEMIN DU FER DU NORD. (a.)

International law—Foreign state—Cross-action.

Where a foreign state sues in this country, a counter-claim cannot be made against it except for matters arising out of the original action, and claims for damages for breach of agreement by the plaintiff state which would, if a subject were suing, form the subject-matter of a separate action will be struck out.

The plaintiff republic brought an action for the appointment of a new trustee of large sums of money which, in pursuance of an arrangement between the plaintiff and the defendant, had been lodged in a bank in the joint names of two trustees, one of whom was nominated by the plaintiff and the other by the defendant. The trustee nominated by the plaintiff died, and the plaintiff brought this action asking for a declaration that the fund ought to be held by two trustees; a declaration that the plaintiff was entitled now and from time to time hereafter to nominate a trustee; the appointment of a trustee on the plaintiff's nomination in the place of the deceased trustee; and payment of the funds (which had been paid into court) to the trustees when constituted.

The defendant submitted that it would be inequitable that the fund should be placed under the control of the plaintiff except upon the terms of the plaintiff agreeing to perform the contract between the plaintiff and the defendant.

A counter-claim asked for (1) payment by the plaintiff of three sums of £60,000, £1,800, and £147,895 16s. 8d.; (2) £100,000 damages for libel; (3) that the plaintiff might be restrained from taking proceedings in the republic's own courts to have the concessions to the defendant declared void, or in the alternative for £100,000 damages.

The claim for damages for libel had already been struck out (46 W. R. 67, [1897] 2 Ch. 487).

Swinfen Eady, Q.C., and *Waggett*, for the plaintiff.—Where a sovereign state sues in this country, cross-proceedings can only be taken for discovery or in mitigation of the relief claimed. The counter-claim is not connected with the relief asked, and should form the subject-matter of a separate action.

They cited *Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1, 2 H. L. Cas. 1; *Strousberg* v. *Republic of Costa Rica*, 29 W. R. 125; *Prisleau* v. *United States*, 14 W. R. 1012, L. R. 2 Eq. 659; *The Parlement Belge*, 28 W. R. 642, 5 P. D. 197; *The Newbattle*, 33 W. R. 318, 10 P. D. 33; *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149. A counter-claim is equivalent to a cross-action: *Birmingham Estates Co.* v. *Smith*, 28 W. R. 666, 13 Ch. D. 506; *Amon* v. *Bobbett*, 37 W. R. 329, 22 Q. B. D. 543. The defendant is not in a better position because he makes a counter-claim than if he brought a cross-action. There is no jurisdiction to entertain the counter-claim.

Vernon Smith, Q.C., and *Whinney*.—The counter-claim should be dealt with at the trial. The plaintiff has come here and submitted to the jurisdiction: *Griendtoveen* v. *Hamlyn*, 8 Times L. R. 231. The trusts are to apply the fund to making a railway. This would be a proper counter-claim even if both plaintiff and defendant were subjects. The plaintiff is acting wrongly in taking proceedings to set aside the agreement, and if the defendant is not allowed to counter-claim, the plaintiff cannot be sued.

NORTH, J.—The application to strike out the counter-claim must succeed. The plaintiff is a foreign republic in the position of a foreign sovereign. Certain arrangements were made as to funds lodged in a bank in the name of two trustees, one nominated by the plaintiff, the other by the defendant. The plaintiff and the defendant had different views as to the application of those funds. The trustee nominated by the plaintiff died, and the nominee of the defendant survives, and claims to deal with the funds in a way the defendant thinks right, but which the plaintiff thinks wrong. The plaintiff asks for a declaration that the funds ought to be held by two trustees, the appointment on the plaintiff's nomination of a new trustee, and the payment out of the fund to the trustees. The plaintiff says the funds ought to be in the names of two trustees as it was before the death of the trustee nominated by the plaintiff. The fund has been paid into court. The defence is that the plaintiff has acted wrongly in many respects. After forty-two paragraphs of defence there is a counter-claim asking for (1) payment of three sums of £60,000, £1,800, and £147,895 16s. 8d.; (2) for £100,000 damages for libel; and (3) that the plaintiff may be restrained from taking proceedings in its own courts to have the concessions to the defendant declared void, or, in the alternative, £100,000 damages.

The application for damages for libel has been struck out, but no further relief was then asked. The plaintiff denies, and the defendant alleges, that the plaintiff has submitted to the jurisdiction of the court. As to the position of a foreign Government suing here, the cases of *Duke of Brunswick* v. *King of Hanover*, 2 H. L. Cas. 1, and *Strousberg* v. *Republic of Costa Rica*, 29 W. R. 125, have been cited. The defendant says that justice will not be done unless the counter-claim is admitted. With regard to this the question arises, first, Is it a claim that can be made at all? and, secondly, Can it be conveniently tried in this action? Is a sovereign suing in this country liable to have a cross-action brought against him? It is conceded that the part of the counter-claim asking for an injunction against proceedings in the plaintiff's own courts cannot succeed. The claim for damages for libel has been struck out. The claim for the three sums of money is not a claim in respect of the fund in court, and I do not think the claim can be rightly made in this action; it is a pecuniary claim quite outside it. If the plaintiff could be sued in this country this claim would be the subject-matter of a separate action.

The counter-claim must be struck out, but I give no costs, because part of the counter-claim has been already struck out, and the whole might have been struck out on the first application if it had been asked for.

Solicitors, *Clarke, Rawlins, & Co.; Harwood & Stephenson.*

(a.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div. Kekewich, J. — June 24, 1897.

BATEMAN v. FABER. (a.)

Married woman — Restraint on anticipation — Life interest determinable on fulfilment of certain condition —Bonâ fide but untrue admission by married woman

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

that condition had been fulfilled — Admission inoperative—Inability of a married woman by her own act to annul a restraint on anticipation.

A married woman cannot, by any act of her own, annul the effect of a restraint upon anticipation to which her property is subject. Accordingly, where a married woman, who is entitled for her separate use, without power of anticipation, to an interest for her life, determinable in the event of her fulfilling a certain condition, executes a deed whereby she admits in good faith, though contrary to the truth, that she has fulfilled such condition and purports to release her life interest, her interest will not be affected by such admission any more than by such purported release, notwithstanding the fact that such admission and release were made with the object of inducing, and did in fact induce, an interested party so to alter his position as, in the result, to prejudicially affect his own interests.

Action.

By an indenture dated the 26th of June, 1867, and made between the defendant, Lord Bateman, of the one part, and Sir E. C. Kerrison and Russell Ellice, of the other part, Lord Bateman, in consideration of the sum of £11,430 then advanced to him by Kerrison and Ellice, conveyed to them his life interest in certain freehold estates called the Kelmarsh and Shobdon Court estates upon trust to secure the performance by him of the covenants entered into by him relating to the loan, and subject thereto upon trust to pay the net rents and profits thereof to his wife, Lady Bateman, the plaintiff, for her life for her separate use without power of anticipation. The deed then continued with the following proviso: "Provided, nevertheless, that if at any time the said Lady Bateman shall succeed to an income in her own right of £8,000 or more per annum for her separate use, then and in such case the trust lastly hereinbefore declared shall absolutely cease and determine," and thereupon the property was to be held, subject, nevertheless, to the subsisting trusts, upon trust for Lord Bateman.

Lord Bateman subsequently mortgaged his interest in the Kelmarsh and Shobdon Court estates, subject to the above indenture, to Andrew Montagu as a collateral security for £110,000.

Upon the death of Sir E. C. Kerrison in 1886 the plaintiff became entitled to a life interest in the Kerrison estates in Norfolk, Suffolk, and Middlesex, and the question then arose as to whether or not the condition contained in the above-mentioned proviso had been fulfilled. The plaintiff's then solicitor advised her that she had fulfilled the condition, and, acting upon this advice, and in order to help her husband to obtain better terms with Montagu, the plaintiff executed a deed-poll dated the 4th of March, 1890, whereby, after reciting the above-mentioned facts, she admitted that the trust as to her life interest in the rents and profits of the said Kelmarsh and Shobdon Court estates under the indenture of the 26th of June, 1867, had determined under the proviso in that behalf therein contained, and did thereby release and quit claim to such rents and profits to the intent that the same might be held upon the thenceforward subsisting trusts of the said indenture freed and discharged from all claims and demands of her, the said Lady Bateman, in respect of such rents and profits.

As a result of the execution of the deed-poll Lord Bateman procured more advantageous terms from Montagu for payment of the principal and interest in respect of the said loan of £110,000. Montagu died in October, 1895, and the defendant, George Denison Faber, was his sole executor and residuary legatee.

After the execution of the deed-poll, the plaintiff discovered, as she alleged, that her income from the Kerrison estates did not amount to £8,000 a year, on account of numerous prior incumbrances, so that the deed-poll was executed by her under a misapprehension as to the true state of the facts. The plaintiff accordingly brought the present action against Faber, her husband, and his mortgagees, as defendants, claiming a declaration (1) that she had not at any time since the execution of the deed of 1867 succeeded to an income in her own right of £8,000 or more for her separate use within the meaning of the proviso; and (2) that her admission in the deed-poll of the 14th of March, 1890, was not binding upon her in respect of the income to which, under the deed of 1867, she became entitled for her separate use without power of anticipation, and that, notwithstanding the deed-poll, she had always been, and still was, entitled to such income and consequential relief. At the trial of the action the argument was confined to the question whether or not the deed-poll was binding upon the plaintiff having regard to the fact that she was under the deed of 1867 restrained from anticipation.

Warrington, Q.C., and *Beaumont*, for the plaintiff.—Lady Bateman, being restrained from anticipation under the deed of 1867, could not in the circumstances assign, release, or dispose of her interest under that deed. This would be so even if there had been fraud on her part: see *Jackson* v. *Hobhouse*, 2 Mer. 483, where Lord Eldon favours such a view, although in that case he did not so decide, as he held that no fraud had been made out. The same question arose for decision in *Stanley* v. *Stanley*, 26 W. R. 310, 7 Ch. D. 589, and according to that case, even if Lady Bateman had fraudulently recited the indenture and then executed the deed, that act of hers would have no effect. *Stanley* v. *Stanley* has been twice referred to in the House of Lords with approval, in *Cahill* v. *Cahill*, 31 W. R. 861, 8 App. Cas. 420, and again in *Hood Barrs* v. *Cathcart*, 42 W. R. 628, [1894] 2 Q. B. 559. The court refused to disregard or interfere with restraint on anticipation in *Arnold* v. *Woodhams*, 21 W. R. 694, L. R. 16 Eq. 29, and in *In re Glanvill*, 34 W. R. 309, 31 Ch. D. 532, where the correctness of the decision in *In Re Andrews*, 34 W. R. 62, 30 Ch. D. 159, was called in question. The defendants also contend that the plaintiff is bound by estoppel, but the cases on which they will doubtless rely, such as *Sharpe* v. *Foy*, 17 W. R. 65, L. R. 4 Ch. App. 35, and *Jones* v. *Frost*, 20 W. R. 1025, L. R. 7 Ch. App. 773, although showing that a married woman can be affected by estoppel as to her separate estate, do not deal with a case like the present, where she is also restrained from anticipation. We submit that on the authorities the decision of the court ought to be in Lady Bateman's favour.

Sir Edward Clarke, Q.C., Renshaw, Q.C., and *Brabant*, for the defendant Faber.—This is simply a question of fact—namely, had Lady Bateman succeeded to an income of £8,000 a year or not? In the recital she stated that she had, and that the provision had operated. We submit that this admission by her would be good and binding on her, because she is the only person who could prove it. It was on the faith of this admission that Montagu changed his position. Married women, even when restrained from anticipation, are subject to the discipline of the court: *Derbishire* v. *Home*, 3 De G. M. & G. 80, and *White* v. *Greenish*, 11 C. B. N. S. 209, 10 W. R. C. L. Dig. 34. We submit that the plaintiff's admission was a final statement made with knowledge of all the facts and with the object of getting Montagu to alter his position, that the plaintiff is bound by it, and that she has ceased to have any interest under the deed.

Quin, for the defendant Lord Bateman.

KEKEWICH, J.—The question for decision is one of law rather than fact. It is suggested by the defendants that it is one of fact, but their argument shows that from their point of view it really is one of law. The plaintiff's point is simple enough. By this deed of the 26th of June, 1867, Lady Bateman was entitled to the rents and profits for her life without power to anticipate them, but there was a cesser of her interest in the event of her succeeding to an income of £8,000 a year; in that event the rents and profits were then to go to Lord Bateman, he deriving his interest by virtue of the cesser. There is a question which will arise on this further point—namely, whether Lady Bateman had in fact succeeded to such an income. That no doubt is a pure question of fact, except that we shall have, first of all, to determine what is intended by the words "succeed" and "income in her own right." If Lady Bateman has, in fact, fulfilled the condition no question could arise, the fact occurring, the cesser follows indisputably.

It is said, however, that the plaintiff has admitted that she has succeeded to such an income, and that the proviso has taken effect. There is no doubt that she did make that statement and did so for the purpose of inducing Mr. Montagu to enter into the arrangement concerning the mortgage, but there is no suspicion of fraud because she did it in good faith and acting under her solicitor's advice. If there is fraud it is in insisting now on a right which she can only hold by defeating the deed-poll. Mr. Montagu has been misled, but he has been misled with his eyes open. To my mind fraud in the ordinary sense of the word does not come into the question at all. The defendants wish me to infer that the fact of her succession to £8,000 a year was incapable of any other proof; they say that Lady Bateman, having once admitted the fact, notwithstanding that it was not true, cannot now set up the truth. But what is the difference between that way of putting the argument and the way in which it was put for the plaintiff. Whether Lady Bateman says, "I admit that the proviso has come into operation," or "I release my life interest," it amounts to the same thing. She was restrained from doing either the one or the other, for in whatever way it is put she purports to get rid of her life interest by her own act. If I were to say in the present case that owing to her admission of a fact which in reality was not true, her restraint on anticipation was gone, I should be going contrary to the principle of *Jackson* v. *Hobhouse*. Then it was said that by the admission she did not derogate from the restraint on anticipation. I do not think so. The restraint on anticipation was annexed to the life estate. What Lady Bateman was entitled to was an estate for life with a restraint on anticipation, and if you once destroy the restraint on anticipation you destroy the estate for life; the two are inseparable. In my opinion Lady Bateman could not, by taking advantage of the proviso, cause a cesser of her estate for life; on this point, therefore, the plaintiff succeeds.

Solicitors, *Hudson, Matthews, & Co.; Greenfield & Cracknall; Hammond & Richards.*

Chan. Div. }
Romer, J. } Nov. 12, 20; Dec. 4.

In re WILCOCK.
KAY *v.* DEWHIRST. (*a.*)

Will—Absolute gift of share of personalty—Share settled by codicil "instead of" gift by will—No revocation.

A father by will gave his personal estate to his two daughters, S. and H., equally. By a codicil he directed that "instead of such bequests in the manner expressed in my said will to such daughter absolutely," his executors were to hold the income of the proceeds of his personal estate, after sale and conversion, on trust to pay one moiety to each daughter for life, and on their respective deaths to pay the respective moieties of the fund to their respective children as they should by deed or will appoint, and, in default, to such children equally. There was no gift over in the event of a daughter dying without issue. H. died without ever having had any issue, leaving a will by which she disposed of all her real and personal property.

Held, that there was no intestacy in the event which had happened as to the share in which H. took a life interest by the codicil, as there had been no revocation of the absolute gift in the will.

Doe d. Murch *v.* Marchant, 6 *Man. & G.* 813, *discussed.*

Adjourned summons.

David Wilcock duly made his will dated the 10th of October, 1840, and after disposing of his real estate in the manner therein directed, but not material for the purposes of the present decision, gave and bequeathed all his personal estate and effects, not thereinbefore bequeathed (subject to the payment of legacies, debts, funeral and testamentary expenses) unto and equally between his said daughters share and share alike. And directed that each of his said daughters should have and be paid £1,000 on their respective days of marriage in part of their respective shares of his personal estate. And he thereby appointed his wife and his said two daughters executrixes of his said will.

There was a first codicil not material for the present decision.

The testator made a second codicil dated the 27th of May, 1847, to his said will, and thereby directed that the provision contained in his said will for payment of £1,000 to each of his daughters upon marriage should be null and void, as if the same had not been therein inserted, and as to all his personal estates and effects which he had given and bequeathed in his said will, subject as therein mentioned unto and between his two daughters share and share alike the testator thereby willed and directed that instead of such bequests in the manner expressed in his said will to such daughters absolutely his executors should stand possessed of all such aforesaid personalty upon the trusts thereinafter contained—that was to say, "Upon trust to convert all saleable parts thereof into money and to invest and keep invested upon the terms of altering any security from time to time all moneys arising or to arise from the whole of such aforesaid personality, estates, and effects bequeathed to him by my said will as aforesaid unto my said daughters upon trust to receive the yearly interest or profits thereof, and as to one-half thereof to pay the same from time to time unto my eldest daughter Sarah Ann during her life for her own sole use and for such purpose into her own hands only, so as not to be liable to the disposition or power of any husband and as to the other half part

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

of such income upon trust to pay the same from time to time unto my daughter Harriet during her life for her own use and for such purpose into her own hands only, so as not to be liable to any disposition or power as last mentioned of any husband. And from and after the decease of either of my said daughters respectively, then as to one equal half part of all such trust moneys or personalty upon trust to pay the same unto and amongst such one or more of the lawful child or children of such first deceased daughter that shall attain the age of twenty-one years (and exclusive of the other or others of them) and in such shares or proportions and at such time or times or to pay the income thereof or of any part thereof to any such child or children as such first deceased daughter shall by any deed or will duly execute in her lifetime direct, appoint, give, or bequeath the same, and in default any such gift or bequest upon trust to pay such equal half part of all such trust moneys unto and amongst all such child or children as aforesaid of such first deceased daughter share and share alike as hereinafter mentioned, and as to the other half part of such income from all such trust moneys and personalty as aforesaid upon trust to pay the same from time unto the surviving daughter during her life in manner aforesaid and after the decease of such surviving daughter upon trust to pay such last described half part of all such trust moneys and personalty as aforesaid unto and amongst such one or more exclusive of the other or others of the lawful child or children of such surviving daughter that shall attain the age of twenty-one years, and in such shares or proportions and at such time or times or to pay the income thereof or of any part thereof to any such last-named child or children as such deceased surviving daughter shall by any deed or will duly executed in her lifetime direct, appoint, give, or bequeath the same, and in default of any such gift or bequest upon trust to pay such last described equal half part of all such trust moneys and personalty unto and amongst all such child or children as aforesaid of such last deceased daughter subject as hereinafter mentioned. And I do will and direct that such powers to dispose of all my said trust moneys and personalty as aforesaid so given to my said daughters shall not prevent either of my said daughters from bequeathing the whole or any part of the income of their respective shares thereof for the benefit of any surviving husband of either of them during his lifetime, and I do accordingly empower my said daughters respectively by any deed or will to give the whole or any part of the income last described to any such husband for his own benefit during his lifetime."

The testator died in 1847, and his will and codicils were duly proved.

He had three children, William Butterfield Wilcock, Sarah Ann Wilcock, and Harriet Wilcock.

Sarah Ann married James Dewhirst, and died in 1858, leaving six children surviving her, two of whom, Hannah Beatrice Dewhirst and Mary Lucilla Dewhirst, were defendants to the action.

Harriet Wilcock, the testator's other daughter, married David Hemsworth, and died a widow on the 20th of October, 1896, without ever having had any issue, and by her will she gave all her real estate and her personal estate not otherwise therein disposed of to the plaintiff and the defendant Mary Lucilla Dewhirst upon trust for sale and conversion, and then upon further trusts under which the said Mary Lucilla Dewhirst was absolutely entitled, subject to the payment of the debts, funeral and testamentary expenses, and an annuity of £12 to an old servant.

The question in the originating summons taken out by the plaintiff, who was one of the trustees of the testator's will, on which the decision is reported, was whether, in the events which had happened, there was an intestacy as to the undivided moiety of the testator's residuary personal estate in which Harriet Hemsworth was entitled to a life interest.

Harry Greenwood, for the summons.

Farwell, Q.C., and *Pattullo*, for Mary Lucilla Dewhirst.—There is no express revocation of the absolute gift in the will to Harriet Hemsworth: *Doe d. Murch* v. *Marchant*, 6 Man. & G. 813.

Neville, Q.C., and *E. E. Spencer*, for the defendant Hannah Dewhirst.

Levett, Q.C., and *Mark Romer*, for the defendants Joseph Hill and Vernon David Wilcock.—There is an express revocation, and so an intestacy: *Re Richards, Williams* v. *Gorvin*, 50 L. T. Rep. 22, 32 W. R. Dig. 227. The word "instead" distinguishes this case from *Lassence* v. *Tierney*, 1 Mac. & G. 551.

ROMER, J.—I have had, and still have, considerable doubt as to what my decision ought to be in this case. But on further consideration I have come to the conclusion, contrary to my first impression, that there is no intestacy as to Mrs. Hemsworth's share of the residuary personal estate. Undoubtedly by the will that share is given to her absolutely. And the question is whether that gift is revoked by the codicil beyond what is necessary to give effect to the special provisions of that codicil. The principles applicable to the question are clear. The first is that referred to by Lord Cairns in *Kellett* v. *Kellett*, L. R. 3 H. L. 160, 167, 17 W. R. H. L. Dig. 3, 18, where he says, "The principle is perfectly clear that where you have a distinct disposition made by a will, that disposition cannot be revoked by a codicil except through the medium and use of words equally clear and distinct." Another principle is that pointed out by Lord Cottenham in *Lassence* v. *Tierney*, 1 Mac. & G. 551, 561, that "If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatees' enjoyment of it to secure certain objects for the benefit of the legatee upon failure of such objects the absolute gift prevails." On the other hand, as pointed out in *Gompertz* v. *Gompertz*, 2 Ph. 107, and also in *Lassence* v. *Tierney*, and again by Pearson, J., in *In re Richards*, 50 L. T. Rep. 22, 32 W. R. Dig. 227, it is clear that if there is an absolute gift by will, and then a clause (whether a subsequent part of the will or by codicil), not merely modifying the enjoyment by the legatee, but diminishing the estate originally given to him, then the absolute gift has in effect been cut down, and the court can only give effect to it as so diminished. Now, applying these principles to the case before me, what effect ought I to give to the codicil? The conclusion I come to is that the testator has not merely entirely revoked the gift by the will, but has only modified it to the extent shown by that codicil. It is noticeable that by the codicil the payment of £1,000 provided for by the will is clearly revoked. But when the testator comes to deal with the residuary personal estate he only says that "instead of the bequest in the manner expressed in the will to his daughters absolutely" he directs his executors to stand possessed of the residuary personal estate upon trusts which are for the benefit of the daughters, their children and appointees.

This is certainly not clearly a total revocation, and I gather that the real object of the codicil was only to modify the gifts to the daughters in the will to the extent and in manner pointed out by that codicil but not beyond.

I quite feel the force of the word "instead" used

in the codicil, but the other words used "in the manner expressed in my said will to such daughters absolutely" seem to me to point, not to a total substitution of the new gift for the old, but a modification of the old gift, and I think to carry out the will and codicil taken together the same meaning should be given to the word "instead" as was given in *Doe d. Murch* v. *Marchant*, where Tindal, J., says: "The argument on the part of the plaintiff has been that inasmuch as the devise in the codicil is expressly given to Betty Jones" instead of "the devise and bequest contained in the will it must be considered as an express revocation of the former devise, and the substitution of that contained in the codicil. But we think the force of that word will be satisfied without giving it so large an operation, and that it may well be interpreted to mean" instead of so much only of "the devise in the will as is incompatible with the disposition contained in the codicil. And this appears to us the sounder construction, as it is the manifest intention of the testatrix both in the will and codicil to make Betty Jones the principal object of her bounty?"

On these grounds there must be a declaration that there is no intestacy as to the moiety of the personal estate given to Mrs. Hemsworth.

Solicitors, *Windybank, Samuell, & Behrend*, for *Simpson & Denham*, Leeds; *R. H. Behrend; Ince, Colt, & Ince*, for *Carter, Atkinson, & Bentley*, Pontefract.

Q. B. Div.
(Wright and Kennedy, JJ.) } Oct. 26, 27.

PHILLIPS v. THE LONDON SCHOOL BOARD.
COCKERTON v. THE SAME. (a.)

Elementary education—School board—Superannuation fund—Deductions from salaries of teachers—Ultra vires—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 35.

A school board established a fund, to be formed by means of deductions from the salaries of the school teachers, for the purpose of providing superannuation allowances for the teachers on their retirement owing to age or ill-health. The expenses of managing the fund were paid by the board out of their general revenues.

A teacher who, by an agreement in writing with the school board, had contracted to come under the superannuation scheme and to permit the deductions from her salary to be made, subsequently brought an action to recover the amount of the deductions so made.

Held, that the contract between the plaintiff and the school board was not illegal as being ultra vires *of the board, and that the plaintiff was not entitled to recover.*

Appeals from decisions of His Honour Judge Lumley Smith, sitting at the Westminster County Court.

The plaintiff Phillips was appointed a teacher by the London School Board in the year 1884. Shortly afterwards the school board prepared a scheme for providing superannuation allowances to their officers and teachers. Under this scheme two per cent. was to be deducted from the salaries to form the *corpus* of a superannuation fund, and out of this fund the officers and teachers were to receive allowances, according to a certain scale, on their retirement from the service of the board through age or ill-health. The board were to guarantee the solvency of the fund.

The board desired to obtain statutory powers enabling them to carry the scheme into effect, no such powers being contained in the Elementary Education Acts; they accordingly prepared Bills for this purpose, but no such Bill was passed. Subsequently the board passed a resolution bringing the scheme into operation, subject to the proviso that should they not obtain Parliamentary authority for the scheme within two years the deductions made from the salaries would be returned to the recipients of the salaries less the expenses of managing the fund. They afterwards passed a resolution extending the period of two years to five years. The plaintiff Phillips agreed in writing to come under the scheme.

In March, 1893, the five years having expired without statutory powers having been obtained, resolutions were passed under which the teachers then in the service of the board were given the option either of receiving back with interest the contributions to the fund which had been made by means of deductions from their salaries or of permitting these contributions to be carried to a new superannuation fund, the solvency of which was not to be guaranteed by the Board, or in any way aided out of money arising from the rates.

The plaintiff Phillips chose the latter alternative, and on the 13th of April, 1893, in writing agreed with the board that the part deductions from her salary should be carried to the new fund, and that the board should be entitled in the future to deduct two per cent. from her salary as a contribution to the new fund. This deduction was accordingly made each year until January, 1897, when she resigned her office of teacher. She then requested the accountant of the fund to repay to her all moneys which had been deducted from her salary since 1888, and on his refusal to do so she brought this action in the Westminster County Court.

The facts in *Cockerton's case* were similar; the only material difference being that she entered the service of the board after the passing of the resolutions of March, 1893. Under those resolutions it was made compulsory upon a teacher thereafter entering the service of the board to sign an agreement to come under the superannuation scheme and permit the deductions from salary to be made; the plaintiff Cockerton so agreed.

It was admitted that the clerical expenses connected with the management of the superannuation fund were paid out of the general funds of the board.

The county court judge found in both cases that the deductions were made with the consent of the plaintiffs, and held that they were not in law entitled to recover them; he therefore gave judgment for the defendants.

The plaintiffs appealed.

Jelf, Q.C. (*Organ* with him), for the appellants.—The appellants are entitled to recover. Although under section 35 of the Elementary Education Act, 1870, a school board is entitled to appoint teachers "and assign them such salaries or remuneration (if any) as they think fit," they have no power to establish a superannuation fund or make agreements with their employés as to their contributions to that fund. They are a corporation established by Parliament for a particular purpose, and if they act outside that purpose they are acting *ultra vires*: Brice on *Ultra Vires*, pp. 37, 40, 640; *Ashbury Railway Carriage and Iron Co.* v. *Riche*, 24 W. R. 794, L. R. 7 H. L. 653; *Hattersley* v. *Earl of Shelburne*, 10 W. R. 881, 31 L. J. Ch. 873. [WRIGHT, J., referred to *Yorkshire Railway Wagon Co.* v. *Maclure*, 30 W. R. 761, 21 Ch. D. 309.] The board are clearly *ultra vires* in applying part of their school fund in defraying the

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

extra clerical expenses rendered necessary by the establishment of this fund. [WRIGHT, J.—Why cannot the board under section 35 fix a teacher's salary by paying so much to the teacher and allotting so much with her consent to a common fund for the benefit of all the teachers? *Hewlett* v. *Allen*, 42 W. R. 670, [1894] A. C. 383, at p. 392.] That is not within the powers of the board under section 35.

A. J. Ram, for the respondents, was not called upon to argue.

WRIGHT, J.—By section 35 of the Elementary Education Act, 1870, a school board has power to appoint officers and teachers and to "assign them such salaries or remuneration (if any) as they think fit." It appears that in the year 1888 the London School Board established a kind of superannuation fund. So far as their scheme is before us the fund out of which the payments or allowances are to be made is derived entirely from the contributions of the teachers themselves, although it appears that the management expenses are, to some extent at all events, paid out of money derived from the rates. The plaintiff Mrs. Phillips, who was a teacher before the scheme was set on foot, agreed to come under the scheme, and deductions were accordingly made out of her salary for the purposes of the superannuation fund. In 1893 the board proposed to alter some of the arrangements as to the fund, and gave an option to the existing teachers either to receive back all their contributions with interest or to come under the amended scheme. Mrs. Phillips exercised her option by electing to come under the scheme. Then on leaving the service of the board she brings this action to recover the amount of her contributions.

Now, these moneys had been carried to the superannuation fund in pursuance of a contract between the plaintiff and the school board. The plaintiff can only recover if she can show that that contract is void or illegal. The only ground upon which it is suggested that it is void or illegal is that it is *ultra vires* of the school board; and the only ground upon which it is suggested that it is *ultra vires* is that some charge is thrown on the money arising from the rates for the expenses of management of the superannuation fund. I will assume for the moment that that is illegal in some sense as being beyond the powers of the board; yet there was no contract between the board and the plaintiff that the rates should be charged, and I cannot see any ground for saying that the contract is vitiated because of this charge on the rates. I do not see why the fact of the charge on the rates being *ultra vires* can entitle the plaintiff to recover money which, with her full consent, has been paid to a particular fund to be applied for the benefit of herself and others.

But I desire to say a word as to the legality of what the school board have done. They may, under section 35, assign such salaries or remuneration as they think fit; I cannot see that it was not competent for them to assign to a teacher who consented a salary or remuneration, part of which was to be paid quarterly (or as it may be) and part to be accumulated until the expiration of the service or other period, and then to be applied for the benefit of all those who agree to join in the scheme. I am not sure that it would be wrong for the board to pay out of rate-provided money the expenses of administering such a fund. That is not for our decision, but it seems to me an open question.

As regards the other plaintiff, I see no substantial difference; she was appointed after the scheme of 1893 had been adopted, and she agreed to enter the service on the terms of these deductions being made. I think both appeals must be dismissed.

KENNEDY, J.—I entirely agree. There is nothing *ultra vires* in the contracts between the plaintiffs and the school board. There was no contract to pay anything out of the rates, and this is of itself sufficient to dispose of the argument of Mr. Jelf. The contract was not illegal, and it is impossible to hold that money ought to be repaid which was paid with the full consent of both parties for a special purpose.

Appeals dismissed.

Solicitors for the appellants, *Baker & Nairne.*

Solicitor for the respondents, *C. E. Mortimer.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) } July 15, 1897.

WATKINS v. BARNARD. (a.)

Bankruptcy—Execution—Administration order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 46, 125—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11 (2).

A judgment creditor levied execution upon the goods of a judgment debtor. The sheriff seized and sold the goods, retaining the proceeds for fourteen days as required by section 11 (2) *of the Bankruptcy Act*, 1890. *Within the fourteen days the sheriff had notice of a petition in bankruptcy against the debtor, and therefore continued to hold the money after the fourteen days had expired. Soon after that date the debtor died, and the petition of which the sheriff had had notice was dismissed; but a petition was presented by a different creditor for administration under section* 125 *of the Bankruptcy Act*, 1883, *upon which an administration order was made.*

The trustee in the administration and the execution creditor both claimed the money in the hands of the sheriff.

Held, that the execution creditor was entitled to the money, because it had become his property prior to the making of the administration order, and at that date no longer formed part of the property of the debtor.

Interpleader issue directed to be tried before Vaughan Williams, J., to decide whether Watkins, the trustee of the property of A. A. Cronmire, deceased, or Barnard, an execution creditor of the said Cronmire, was entitled to certain money in the hands of the sheriff.

Upon the 8th of March, 1897, Barnard recovered judgment in the Queen's Bench Division against A. A. Cronmire for £956 11s. 6d. Upon March 9 he issued execution. The sheriff went in and seized the debtor's goods, which he sold on March 29, retaining the proceeds as required by section 11 of the Bankruptcy Act, 1890.

Within the fourteen days for which that section required him to retain the proceeds the sheriff received notice of the presentation of a petition in bankruptcy against the debtor, returnable on the 26th of April.

Upon the 16th of April the debtor died. Upon the 23rd of April a petition was presented for the administration of the debtor's estate in bankruptcy under section 125 of the Bankruptcy Act, 1883. This petition was heard and an order made thereon upon the 24th of April, and at the same time the previous petition in bankruptcy was dismissed.

The trustee under the administration order and the execution creditor both claimed the fund in the hands

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

of the sheriff, who interpleaded, whereupon the present issue was directed.

H. Reed, Q.C., and *R. J. Willis*, for the trustee.

A. R. Jelf, Q.C., and *Hume Williams*, for the creditor.

VAUGHAN WILLIAMS, J.—The question in this case is as to what effect, if any, section 11 of the Bankruptcy Act, 1890, has on the rights of the execution creditor in this case. The dates in the case are not material, but the consecution of events is. There was a judgment, execution was levied on that judgment by the sheriff who seized and sold the goods of the debtor and received the proceeds. By the terms of section 11, sub-section 2, of the Bankruptcy Act, 1890, the sheriff had to hold those proceeds for fourteen days, and nobody doubts or disputes that section 11 had that amount of application. That is an application which section 11 has, not in bankruptcy, but in anticipation of the contingency of bankruptcy. The Legislature thinks that in cases where there is judgment and execution there is an inherent probability of such a state of insolvency that the judgment debtor's goods should be distributed equally among his creditors, and therefore it enacts that where there is this state of probabilty of insolvency the sheriff is to hold the proceeds of the goods sold for fourteen days before handing them over to the execution creditor.

On the facts of this case it is impossible to say that the execution creditor had acquired an absolute title to the proceeds, it was subject to bankruptcy not supervening within fourteen days. Within those fourteen days the sheriff received notice of a petition in bankruptcy against the debtor, shortly after the debtor died, and an order was made for the administration of his estate in bankruptcy under section 125 of the Bankruptcy Act, 1883.

Then the question arises whether sub-section 6 of section 125 makes section 11 of the Bankruptcy Act, 1890, so apply as to defeat the defeasible title of the execution creditor.

Sub-section 6 of section 125 of the Bankruptcy Act, 1883, enacts that: "With the modifications hereinafter mentioned all the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, shall so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act."

Section 11 of the Bankruptcy Act, 1890, is in substitution of section 46 of the Act of 1883, which was a provision of Part III. of that Act.

In spite of this it has been argued that section 11 of the Act of 1890 does not apply to administrations under section 125 of the Act of 1883 because the words of section 11 are if the sheriff have notice of "a bankruptcy petition" and "a receiving order is made thereon, or on any other petition of which the sheriff has notice." These words, it is urged, are not apt words to apply to "a petition for an order of administration" or to an "administration order." I do not assent to this argument; if I think any provision of Part III. of the Act is applicable to section 125 I shall apply it, even though the words of such provision be words apt for bankruptcy and not for administration. If I were not to do so no provisions of Part III. would be applicable to section 125 because the words of that part of the Act are throughout apt for bankruptcy rather than for administration.

Then, as to the case of *In re Gould, Ex parte The Official Receiver*, 35 W. R. 458, 19 Q. B. D. 92, that is an authority binding on me but it only decides that sub-section 6 of section 125 is not intended to operate so as to enlarge the assets of the deceased by taking in other people's property. That being so I have to enquire in this case whether the money in the hands of the sheriff formed, at the date of the administration order, part of the estate of the deceased, or was the property of the execution creditor, and I have come to the conclusion that it had become the property of the execution creditor, because no receiving order was made on the petition which was presented during the fourteen days for which the sheriff had to hold the money, and he had no notice within those fourteen days of the petition for administration on which an order was made. There will be judgment for the defendant and an order that the amount in the hands of the sheriff be paid to the defendant's solicitor, and that the plaintiff do pay the costs.

Judgment accordingly.

Solicitor for the plaintiff, *H. H. Bourne.*

Solicitors for the defendant, *Blyth, Dutton, & Hartley.*

Prob. Div. & Adm. Div. } July 8, 1897.
Admiralty. }

"THE THEODORA." (*a.*)

Admiralty—Practice—County court having admiralty jurisdiction — Mode of trial — Meaning of term "actions" in consolidating and amending Act—County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 *Vict. c.* 51), *s.* 2—*Maritime cause—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 101.

The proper mode of trial in the case of a maritime cause over which a county court having admiralty jurisdiction has jurisdiction under the 2nd section of the County Courts Admiralty Jurisdiction Act, 1869, *is either by the judge alone or by the judge assisted by mercantile assessors.*

The parties in such a suit are not entitled to a jury: section 101 *of the County Courts Act*, 1888, *by which it is provided that, in all "actions" where the amount claimed shall exceed five pounds, it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action, unless the action is of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice, not being by the context applicable to admiralty or maritime causes tried in a county court having admiralty jurisdiction.*

This was an appeal from the Admiralty side of the county court of Hampshire, holden at Portsmouth.

By the order appealed from, the judge of the county court of Hampshire had refused an application by the defendants, the Thames Moss Litter Co., to allow a jury to be sworn to try an admiralty action for balance of freight exceeding £5. The proceeding was taken under the County Courts Admiralty Jurisdiction Act, 1869,*

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* The section so far as material is as follows: "Any county court appointed or to be appointed to have admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes: As to any claim arising out of any agreement made in relation to the use or hire of any ship or in relation to the carriage of goods in any ship, and also as to any claim in tort in relation to the carriage of goods in any ship, provided the amount claimed does not exceed three hundred pounds."

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

An objection having been taken on behalf of the plaintiff, and sustained by the judge, that the action being a maritime action instituted in a county court having admiralty jurisdiction under the 2nd section of the County Courts Admiralty Jurisdiction Act, 1869, the suit could not legally be tried by a jury.

March 23.—The appeal was heard by a Divisional Court of the Probate, Divorce, and Admiralty (Jeune, P., and Barnes, J.).

Boyd, Q.C., and *Newbolt*, for the appellants.

Kilburn, for the respondent, plaintiff in the court below.

The arguments and authorities referred to on the question decided by the court appear from the judgment.

Cur. adv. vult.

April 8.—JEUNE, P.—I have had the advantage of reading the judgment prepared by my learned brother, and I agree in its conclusion; but as the matter is one of practical importance I think it well shortly to state the reasons which determine my decision. The question is whether under section 101 of the County Courts Act, 1888, the plaintiff or defendant can claim to have the action tried by a jury where the proceeding is one in which jurisdiction is given by the County Courts Admiralty Jurisdiction Acts, 1868 and 1869, and the subject-matter is not salvage towage or collision. To my mind the question resolves itself into this, Whether the Act of 1888 gave that right for the first time? I entertain no doubt that under the County Courts Admiralty Jurisdiction Act, 1868, no right to a jury was conferred. In *The Tynwald*, 43 W. R. 509. [1895] P. 142, my learned brother, Bruce, J., so held, on the ground mainly that the words "ordinary civil causes" in section 10 of the County Courts Admiralty Jurisdiction Act, 1868, imputed a reference to the mode of trial alone common to such causes—namely, that before a judge. I do not wish to challenge this view, but my opinion is based rather on observation that the Act of 1868 gives an appeal on fact which is inconsistent with jury procedure, and provides for transfer of causes when convenient to the High Court of Admiralty.

Then came the Act of 1869. It may, I think, be assumed that this Act gave to the county courts an admiralty jurisdiction over matters previously within the cognizance of the courts of common law, and I feel the force of the argument that to hold that there is no right to a jury in trials under this Act is to suppose that the Legislature withdrew the right to a jury from causes in which it previously existed. But if the Act of 1868 did not give a right to a jury there is no language in the Act of 1869 which conferred that right. On the contrary, the provision as to assessors, though it does not, as does section (1) of the Act of 1868, give a right to assessors, and therefore does not lead so conclusively to an inference, as that section, still appears to me to point to trial before a judge as the recognized mode of trial. I think it would be a strong confirmation of this view if the decision in *Simpson* v. *Blues*, 20 W. R. 680, L. R. 7 C. P. 290, and *Gunnestad* v. *Price*, 23 W. R. 470, L. R. 10 Ex. 65, to the effect that these Acts do no more than give to the county courts a portion of the jurisdiction of the High Court of Admiralty, could properly be preferred to those of the Privy Council in *The Cargo ex Argos*, 21 W. R. 707, L. R. 5 P. C. 134, and *The Hewsons*, L. R. 5 P. C. 134, and of the Court of Appeal in *The Alina*, 5 Ex. D. 227, and the Admiralty Court in *The Rona*, 30 W. R. 614, 7 P. D. 247, because it would seem impossible to suppose that in merely giving a portion of the jurisdiction of the High Court of Admiralty to the county court it was intended without any express words to that effect to set up a different mode of trial for that portion. This question, however, cannot, I think, now be considered open, and no such argument can be relied on. But it is to be observed that in *The Alina* the late Master of the Rolls, while holding that the county courts had obtained a wider jurisdiction than the High Court of Admiralty, assumed that in the county court trials would be before a judge without a jury. "The only suggestion we have heard," the learned judge said, "is that the plaintiff might not get a jury or the defendant might, but the answer was very simple. It does not follow that that was considered an evil by the Legislature. We know perfectly well that by the comparatively recent Judicature Act that very option is given to a plaintiff of going to a Division where there is no jury instead of to a Division where there is a jury. Did the Act of 1888, s. 101, reproducing the language of the County Court Act of 1846 (section 70), include actions on the admiralty side of the county courts? In *The Tynwald* I expressed my opinion that the Act (section 101) did not include causes of collision, salvage, and towage. It seemed to me impossible to suppose that it was intended by the general words employed to escheat the right to nautical assessors which was the well-established rule of trying such causes. If this view be correct, the absolute universality of the language of section 101 cannot be insisted on. I cannot, however, conceal from myself that the causes of collision, salvage, and towage stand on a different footing from the other causes in which jurisdiction was given by the Acts of 1868 and 1869. There are no words in the Act which seem so distinctly to exclude trial by jury in their case as to render a repeal of such words by general language improbable, and there is nothing in their nature unfitted for trial by jury. But on the whole, though not without some hesitation, I have come to the conclusion that, having regard to the subject-matter and the context, as the interpretation clause directs, the word "actions" in section 101 of the Act of 1888 should be understood not to include actions on the admiralty side of the county court. When it was a question of the local limits of the jurisdiction, as in *The Hero*, 40 W. R. 143, [1891] P. 294, or of appeal, as in *The Eden*, 40 W. R. 415, [1892] P. 67, or *The Delano*, 43 W. R. 65, [1895] P. 40, there was no reason why what applied to common law or Chancery proceedings should not also apply to those in admiralty. But mode of trial appears to me to be in a different position. If I am right in thinking that from 1868 to 1888 it was intended that admiralty actions in the county court should be tried in the same way as admiralty actions in the High Court, it seems to me highly improbable that by the use of general language in the Act of 1888 it was intended to effect a complete change in this respect. This view, I think, receives strong support from the consideration that, as was held by the Court of Appeal in *The Delano*, with regard to all admiralty actions, and as the provisions of the Act of 1885, s. 125, as to assessors in appeals in the High Court show, at any rate with regard to some admiralty actions, the appeal on fact given by the Act of 1868 remains a provision inconsistent with trial by jury. For these reasons I think that the appeal must be dismissed.

BARNES, J.—In this case the defendants, the cargo owners, contend that though the action is brought in *rem* under the Act of 1869, yet that by virtue of section 101 of the County Courts Act, 1888, they are entitled to require a jury to be summoned to try the case. On the other hand the plaintiff contends that

the defendants have no such right and that the case must be tried by the judge sitting with assessors if required. The plaintiff desired to have the judge assisted by mercantile assessors, but was informed by the registrar that there were no such assessors attached to the court, and as no request was made to have assessors appointed, the question for determination resolves itself into this: Are the defendants entitled to have the case tried by a judge and jury, or is the judge to hear it alone? To answer this question it is necessary to review the Acts which bear upon the subject. The County Courts Admiralty Jurisdiction Act, 1868, conferred admiralty jurisdiction on county courts. Section 2 gave power to Her Majesty in Council to appoint county courts to have admiralty jurisdiction. Section 3 provided that "any county court having admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of the Act, certain causes (in the act referred to as admiralty causes)—namely, causes of salvage, towage, necessaries, wages, and damage to cargo or damage by collision within certain limits as to amount, and causes of the same kind as aforesaid where the said limits are exceeded, where the parties agree to the court having jurisdiction." There is now a further limit as to suits for wages, by section 165 of the Merchant Shipping Act, 1894. Sections 6, 7, and 8 of the Act of 1868 contain provisions for transfer of causes to the High Court of Admiralty or to another county court. Sections 10, 11, and 13 are as follow: 10. "In an admiralty cause in a county court, the cause shall be heard and determined in like manner as ordinary civil causes are now heard and determined in county courts, save and except that in any admiralty causes of salvage, towage, or collision the county court judge shall, if he think fit, or on the request of either party to such cause, be assisted by two nautical assessors in the same way as the judge of the High Court of Admiralty is now assisted by nautical accessors." 11. "In any such admiralty cause as last aforesaid it shall be lawful for the judge of the county court, if he think fit, and he shall, upon request of either party, summon to his assistance, in such manner as general orders shall direct, two nautical assessors, and such nautical assessors shall attend and assist accordingly." 13. "The judge of every county court having admiralty jurisdiction shall hear and determine admiralty causes at the usual court held within his jurisdiction or at special courts to be held by him, and which he is hereby required to hold as soon as may be after he shall have had notice of an admiralty cause having arisen within the jurisdiction of the court." Section 26 provides for appeals to the High Court of Admiralty from decrees or orders of county courts in admiralty causes; and section 31 limits the right of appeals to cases where the amount decreed or ordered to be due exceeds £30. Section 34 provides that the Act shall be read as an Act with so much of the County Courts Act, 1846, and the Acts amending or extending the same as was then in force. Sections 35 and 36 contain provisions for the making of general orders for regulating the practice and procedure of the courts, but the rules now in force appear to have been made under these sections, combined with sections 164 and 165 of the County Courts Act, 1888. The present rules contain numerous special provisions relating to Admiralty actions. The County Courts Admiralty Jurisdiction Act Amendment Act, 1869, is by section 1 to be read and interpreted as an Act with the Act of 1868, and by section 2 any county court appointed or to be appointed to have admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes: (1) "As to any claim arising out of any agreement made in relation to the use or hire of any ship or in relation to the carriage of goods on any ship, provided the amount claimed does not exceed three hundred pounds, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed three hundred pounds." (2) "As to any cause in respect of any such claim or claims as aforesaid, but in which the amount exceeds the said limit when the parties agree to the court having jurisdiction." Section 3 provides that the jurisdiction conferred by that Act and by the Act of 1868 may be exercised either by proceedings *in rem* or proceedings *in personam*. Section 4 extends the third section of the Act of 1868 to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds. Sections 5 provides that in any admiralty or maritime cause the judge may, if he think fit, or on the request of either party, be assisted by two mercantile assessors. The County Courts Act of 1846, by section 69, enacted that the judge of the county court should be the sole judge in actions brought in the said court, and should determine all questions of fact as well as of law, unless a jury should be summoned. As thereinafter mentioned and by section 79 it was enacted that in all actions where the amount claimed should exceed five pounds it should be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action; and in all actions where the amount claimed should not exceed five pounds it should be lawful for the judge in his discretion, on the application of either of the parties, to order that such action be tried by a jury. It never seems to have been contended that those sections affected the mode of trial of admiralty actions.

The County Courts Act, 1888, which repealed the Act of 1846, by sections 100 and 101 repealed these provisions as to trial, but excepts actions of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice from the actions in which the parties have a right to a jury. Equity actions appear to be expressly excepted, because they are mentioned in Part III. of the Act, dealing with jurisdiction and law. They were not included in the Act of 1846, and jurisdiction in such actions was not conferred until 1863, and although it would seem that a judge may order a trial by jury, in that case neither party has a right to a jury.

Such being the Acts affecting the trial of admiralty actions in county courts, it was decided by this court in the case of *The Tynwald* that in an admiralty cause of collision in a county court, if one party asks for a jury and the other for assessors, the trial must be by judge and assessors. The President held that the exception in section 10 of the Act of 1868 enabled either party, or the judge, in cases of salvage, towage, or collision, to say that the trial should be by judge and assessors, and that section 101 of the Act of 1888 was not to be construed to repeal section 111 of the Act of 1868 and to establish a new mode for the trial of admiralty causes of salvage, towage, and collision. Bruce, J., arrived at the same conclusion, but by different reasoning from that adopted by the President. He held, for reasons given at length by him, that the provision in the first part of section 10, that an admiralty cause in a county court shall be heard and determined in like manner as ordinary civil causes were then heard and determined in county courts, meant that they were to be heard and determined by the judge alone, and that section 101 of the Act of 1888 had no application to admiralty actions. The President's judgment

would not cover the present case, because the exception in section 10 is confined to salvage, towage, and collision actions, and it was not necessary to go further than he did; but the reasoning of Bruce, J., would apply to the present case.

In the main I agree with the views held by him. The Act of 1868 conferred admiralty jurisdiction on county courts, and admiralty jurisdiction was always exercised in the High Court of Admiralty by the judge alone or the judge assisted by assessors. The two classes of causes left untouched by the exception in the 10th section of the Act of 1868 are causes of necessaries and wages, with regard to which it was argued that the Act had not taken away the parties' common law right to a jury. But it is to be observed that in suits of this kind in the Admiralty Division of the High Court there is no right to a jury, although the Court of Admiralty had power, under section 11 of 3 & 4 Vict. c. 65, if it thought fit, to direct a trial by jury of any issue or issues on any question or questions of fact arising in any contested suit.

When the ancient jurisdiction of the Admiralty Court to enforce the maritime lien of a seaman for his wages was extended by section 10 of the Admiralty Court Act, 1861, to claims by the master for his wages and disbursements, and to cases of special contract which could only be dealt with previously in the courts of common law, no right to a jury in the Admiralty Court in these cases was given. Again, when the 6th section of the 3 & 4 Vict. c. 65 and the 4th and 5th sections of the Admiralty Court Act, 1861, gave the Admiralty Court jurisdiction over claims for necessaries in certain cases, and for the builders equipping or repairing of any ship, where the ship or proceeds thereof are already under arrest, no right to a jury was conferred. There seems, therefore, no reason for saying that in conferring admiralty jurisdiction on the county courts the Legislature did not intend causes of necessaries and wages to be determined without a jury. Further, if any such cause is transferred to the High Court under sections 6, 7, and 8 of the Act of 1868, it would be tried in the High Court without a jury. Moreover, an appeal is given in the 26th section of the Act of 1868 to the High Court of Admiralty from a decree or order of a county court in an admiralty cause. This provision is intelligible if the appeal is from a judge's decision, but not if a jury has tried the case, and there is no provision in the Act dealing with such a subject as new trials. In my opinion, if the whole scope of the Act of 1868 is considered, the intention was to set up inferior Admiralty Courts to deal with certain cases within certain limits, as such cases would be dealt with in the High Court of Admiralty, and the only difficulty in arriving at this conclusion, so far as it affects the mode of trial, is created by the first part of section 16 of the Act of 1888 and the incorporation of the Act of 1846 by section 34 of the Act of 1868, but this difficulty can be eliminated by adopting the opinion expressed by Bruce, J., in the case of *The Tynwald*.

The Act of 1888 is "an Act to consolidate and amend the County Courts Acts." Section 3 of that Act provides that every court held under the Act shall have all the jurisdiction and powers at any time prior to the coming into operation of the Act of 1846 belonging to any county court for the recovery of debts and demands as altered by the Act—*i.e.*, the Act of 1888—throughout the whole district for which it is held. Part III. of the Act, under the title "Jurisdiction and Law," contemplates only common law actions and certain jurisdiction in equity. The only reference to an admiralty action is in section 125, where provision is made for assessors on the hearing of an appeal. The Acts repealed by the Act of 1888 are all Acts which relate only to the common law, equity, and bankruptcy jurisdiction of the county courts. The Acts of 1868 and 1869 are not mentioned. There are strong reasons for holding that the Act of 1888 was not intended to affect proceedings under the Acts of 1868 and 1869, but the judges of this court and of the Court of Appeal have held that some of the sections of the Act of 1888 have by the generality of these terms affected the Acts of 1868 and 1869. In *The Hero*, in this division, it was held that section 74 of the Act of 1888 extended the provisions of the Act of 1868 as to the mode of commencing proceedings. In *The Eden* the same court held that section 120 of the Act of 1888 gave a right of appeal in an admiralty action upon a point of law, although the amount decreed was under fifty pounds. In *The Delano* the Court of Appeal approved of and followed the decision in *The Eden*, and held also that in respect of a question of fact the special provisions of the Act of 1868 are left unaffected.

These decisions are binding on this court, but they do not decide the present question. They show, however, what difficulties have been produced in the admiralty procedure under the Acts of 1868 and 1869 by the Act of 1888, and it seems to me very desirable that these difficulties should be dealt with by fresh legislation. I do not feel that I am bound by these decisions to hold that section 101 of the Act of 1888 entitles the parties to trial by jury in causes of necessaries and wages under the Act of 1868. As soon as the conclusion is reached that according to the Act of 1868 all the causes mentioned in it are to be tried by a judge alone except in the three cases where he must have assessors if required, it seems to me to follow that the actions referred to in section 101 of the Act of 1888 do not include admiralty actions, because if they do then in my opinion they would make a trial by jury compulsory at the request of either party in salvage, towage, and collision causes, as well as in other causes which the case of *The Tynwald* shows cannot have been intended. In my opinion the application of the word "actions" in the 101st section of the Act of 1888 to admiralty causes is repugnant to the subject or context, and according to the usual rules of construction it would be erroneous to hold that the special provisions of the Act of 1868 for the trial of admiralty causes by a judge alone or by a judge assisted by assessors are to be repealed by a general Act with which the Act of 1868 is to be read containing provisions for the trial of actions by a judge and jury. So far I have dealt with the Act of 1868, but the Act of 1869, under section 2, sub-section 1, of which the claim and counter-claim in this case are made, is to be read and interpreted as one with the Act of 1868, and the observations I have made upon the Act of 1868 apply, in my judgment, with equal force to the Act of 1869. The sub-section gives to the county court a somewhat wider jurisdiction in respect of the subject matter than was possessed by the Admiralty Court and the claims mentioned in it are of a common law character, but similar considerations to those pointed out above in dealing with the Act of 1868 apply. In conferring jurisdiction by section 6 of the Admiralty Court Act, 1861, on the High Court of Admiralty over certain claims for damage to imported cargo no right to have a trial by jury was given by the Legislature, and there seems no reason to think that it was intended that such a right should remain in respect of the maritime causes mentioned in section 2, sub-section 1, of the Act of 1869. The county court having admiralty jurisdiction is to have jurisdiction, and all powers and authorities relating thereto, to try and determine these causes. The liability to transfer to and trial in the High Court

without a jury, and the mode of appeal are the same as for cases under the Act of 1868. And section 5 of the Act of 1869, giving power to the judge to have two mercantile assessors, is, in my opinion, inconsistent with the notion of a right existing to trial by jury of cases arising under the Acts of 1868 and 1869. Lastly, some of the County Court Rules specially applicable to admiralty actions are inconsistent with the trial of such actions taking place before a jury. For instance, ord. 39B, r. 65, empowers the judge in all actions to order a reference to the registrar or to the registrar and assessors as to the amount for which judgment should be given, and then appoint that tribunal to discharge one of the functions of a jury—namely, the assessment of damages. This is in accordance with the ordinary practice of the High Court in admiralty actions.

No appeal having been brought against this decision the action was heard by the judge of the court below sitting alone, and a decree pronounced by him in favour of the plaintiff's claim for the balance of freight, £5 14s. 4d. proceeded for, and dismissed a counter-claim by the defendant, claiming damages on the ground that the arrest of the cargo had been unjustifiable on the facts.

July 8.—An appeal brought by the defendants against the above decision of the county court judge on the merits was heard before a Divisional Court of the Probate, Divorce, and Admiralty Division—[The President and Barnes, J.]—and the decision appealed from was affirmed.

Solicitors for the appellants, defendants in the court below, *Stokes & Co.*

Solicitor for the respondent, *Bechervaise.*

[No question appears to have been raised either in this court or in the court below whether, in an action for balance of freight under the County Court Admiralty Jurisdiction Act, 1869, the action could legally be brought against the cargo in respect of which the balance of freight was claimed.]

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Dec. 16.

LOLE AND ANOTHER *v.* BETTERIDGE.
MALLAM (CLAIMANT). (a.)

Bankruptcy—Protected transaction—Execution—Sheriff to hold goods for fourteen days—Notice of bankruptcy petition—Hours for service—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-section* 2—*Bankruptcy Rules,* 1886, *r.* 90.

By section 11, *sub-section* 2, *of the Bankruptcy Act,* 1890, *the sheriff is to retain the proceeds of an execution for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made thereon, he is to pay the money to the official receiver. By rule* 90 *of the Bankruptcy Rules,* 1886, *service of notice is to be effected before six in the afternoon, except on Saturday, when it is to be effected before two in the afternoon; and service effected after those hours shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day, or, in the case of Saturday, on the following Monday.*

Notice of a bankruptcy petition, and a receiving order made thereon against the debtor, was served upon the sheriff, who was holding the proceeds of an execution, after the hour named in rule 90, *on the fourteenth day.*

Held, that the notice was served in time, as rule 90 *did not apply to such a notice, but only to service of notices of procedure in the bankruptcy; and, further, that, even if the rule did apply, it did not invalidate the service upon that day, but merely postponed the date for computing the time within which the next step in the proceedings was to be taken.*

Appeal from an order of Day, J., at chambers.

The sheriff having levied execution upon the goods of the defendant in respect of a judgment for a sum exceeding £20 recovered by the plaintiffs against the defendant, the latter, on the 18th of September, 1897, paid the sheriff the amount of the judgment debt and costs. Upon Saturday, the 2nd of October, the defendant presented his own petition in bankruptcy, and a receiving order was made against him on the same day. On the afternoon of that day the official receiver gave notice to the sheriff by telegram of the bankruptcy petition and receiving order and claimed the moneys in his hands. This telegram was received by the sheriff at 3.40 on the afternoon of that day. The execution creditors contended that the moneys ought to be paid over to them upon the ground that, as the notice of the bankruptcy petition was not served until after two in the afternoon of the 2nd of October, the notice was, by rule 90 of the Bankruptcy Rules, 1886, too late, and the fourteen days during which the sheriff was required by section 11, sub-section 2, of the Bankruptcy Act, 1890, to hold the moneys, had expired.*

Day, J., upon an interpleader summons, held that the notice, having been served after 2 p.m., must be deemed to have been served on the following Monday, and ordered the sheriff to pay over the money to the execution creditors.

The claimant appealed.

H. Reed, Q.C., and *H. J. Turrell,* for the claimant.—It is admitted by both parties that the fourteen days did not begin to run until the 19th of September: section 141 of the Bankruptcy Act, 1883. The fourteen days therefore did not expire until midnight

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

* By section 11, sub-section 2, of the Bankruptcy Act, 1890, "Where, under an execution in respect of a judgment for a sum exceeding £20, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver."

By rule 90 of the Bankruptcy Rules, 1886, "Service of notices, orders, or other proceedings shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any week day, except Saturday, shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday."

of the 2nd of October, and the notice was given in time. Rule 90 of the Bankruptcy Rules, 1886, upon which the execution creditors rely, does not apply. That rule comes under a group of rules headed "Service and Execution of Process," and simply deals with the service of process in bankruptcy proceedings—that is, notices in respect to court matters: *Curtis* v. *Wainbrook Iron Co.*, Cab. & Ell. N. P. Rep. 351. In computing time the days mentioned in the Bankruptcy Act mean whole days: *In re North, Ex parte Hasluck*, [1895] 2 Q. B. 264, 43 W. R. Dig. 10; *In re Maud, Ex parte Townend*, 40 W. R. 47, 8 Morrell Bank. Rep. 144; *In re Cripps, Ex parte Ross*, 36 W. R. 845, 21 Q. B. D. 472. A notice by telegram is sufficient, as in the case of notice of an injunction. If the learned judge's decision is right, the sheriff might have paid away the money at any time after two o'clock on the 2nd of October, as no valid notice of a bankruptcy petition could have been served after that hour.

Muir Mackenzie, for the execution creditors.—Section 11, sub-section 2, of the Bankruptcy Act, 1890, speaks of a notice being "served." This is different from the expression "having notice," an expression which is used in section 49 of the Bankruptcy Act, 1883, and also in the latter of section 11, sub-section 2, of the Act of 1890. The two expressions are distinguished throughout the Bankruptcy Acts: see section 4, sub-section 1 (*g*), of the Act of 1883, where the word "served" is used. This latter expression signifies more than merely having knowledge; they imply a more formal act. Service of notices is dealt with in rule 90, which prescribes the hours within which notices must be served. This notice, having been served after two on Saturday afternoon, must be deemed to have been served on the following Monday, when the fourteen days had expired.

He referred to *Bellyse* v. *M'Ginn*, [1891] 2 Q. B. 227, 39 W. R. Dig. 24.

R. W. Coventry, for the sheriff.

A. L. Smith, L.J.—The question, as it seems to me, in this case is whether the fourteen days during which the sheriff is required by section 11, sub-section 2, of the Bankruptcy Act, 1890, to hold the proceeds of an execution, are cut down by rule 90. In this case the fourteen days did not, in fact, terminate till midnight of the 2nd of October. The official receiver claimed the money in the hands of the sheriff on that day, having served upon him notice of the bankruptcy petition. The execution creditor contended that the service of the notice was too late, as the 2nd of October was a Saturday, and the notice ought to have been served before 2 p.m. on that day. That depends upon whether rule 90 applies to this case. In my opinion it applies to notices of procedure and not to notices such as this. This part of the rule is headed "Service and Execution of Process." Rule 89 obviously applies to notices relating to procedure and to nothing else. So also do rules 90 and 91. They all deal with notices of procedure. Therefore I do not think that rule 90 applies to such notices as this, and I agree with the decision of Grove, J., in *Curtis* v. *Wainbrook Iron Co.*, a case which, no doubt, has been acted upon by sheriffs ever since it was decided. If, however, I am wrong upon this point, there is another ground upon which my judgment can be put—namely, that there is nothing in rule 90 which says that a notice is bad as a notice upon that day if it is not served until after 6 p.m. or 2 p.m., as the case may be. The rule merely says that for the purpose of computing the time within which the other party must take the next step in the proceedings the following day or the following Monday is to be the day from which the time runs. The appeal must therefore be allowed, and the sheriff must be ordered to pay the money to the official receiver.

Rigby, L.J.—I am of the same opinion. Rules 89 to 93 are headed, "Service and Execution of Process." They are concerned only with those notices which are to be acted upon in the bankruptcy itself—that is, they are only applicable to something to be done in the bankruptcy. They have no application to a notice to the sheriff that a bankruptcy petition has been presented against the debtor. It is said that when section 11, sub-section 2, of the Bankruptcy Act, 1890, speaks of a notice being "served" on the sheriff, that brings in rule 90. But the sheriff is bound under that section to hold the proceeds of the execution for fourteen days, and he cannot justify paying away the money until the entire fourteen days have passed. I do not think that the word "served" makes rule 90 applicable. Fourteen days means fourteen times twenty-four hours. We cannot depart from that. The rule, in my opinion, has no application to this case at all, and even if it had any application it does not invalidate a notice served after a certain hour as a notice upon that day merely because it treats the service of the notice as postponed for the sole purpose of computing the time within which the other party is to take some subsequent step in the proceedings.

Collins, L.J., concurred.

Appeal allowed.

Solicitors for the claimant, *Ashwell, Browning, & Tutin.*

Solicitors for the execution creditors, *Warren, Murton, & Miller.*

Solicitors for the sheriff, *Rowcliffes, Rawle, & Co.*, for *Blandy & Blandy*, Reading.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Nov. 4, 5, 22.

Diederichsen v. Farquharson. (*a*.)

Ship—Charter-party—Bill of lading—Incorporation of conditions in charter-party into bill of lading—"Freight and all other conditions as per charter-party."

Goods were shipped under a charter-party and bill of lading. The charter-party provided that the ship was to load and deliver a cargo, including a deck cargo "at merchant's risk." Under the bill of lading the goods were to be delivered in good order and condition, "freight and all other conditions as per charter-party." On the voyage the deck cargo was damaged without negligence on the part of the shipowner.

Held, by A. L. Smith *and* Collins, L.JJ., *affirming the* Divisional Court (Rigby, L.J., *dissenting*), *that the condition in the charter-party as to the carriage of the deck cargo at merchant's risk was not incorporated in the bill of lading, and that the shipowner was liable to the indorsees of the bill of lading for the damage to the deck cargo.*

Appeal of the plaintiff from the judgment of the Divisional Court (Day and Lawrance, JJ.) reversing

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(*a*.) Reported by F. O. Robinson, Esq., Barrister-at-Law.

the judgment of the Common Serjeant, sitting at the Mayor's Court, London.

The plaintiff was the owner of the ship *Thea*, and the defendants were the indorsees of a bill of lading for timber shipped upon the vessel at a port in Sweden for London. The ship was under charter, and by the charter-party the ship was to load a full and complete cargo of battens, including a deck cargo "at merchant's risk," "and . . . proceed to London . . . and deliver the same." That part of the timber which was carried on deck was shipped under bills of lading which stated that the goods were "shipped in good order and well conditioned . . . and to be delivered in like good order and condition. Freight and all other conditions as per charter-party."

The action was brought to recover freight. The claim was admitted subject to the defendant's counter-claim for damage to the goods. The jury found that the goods were damaged while on the voyage to the extent of £10; that the damage was not caused by the negligence of the plaintiff or his servants; that their ship was seaworthy when she sailed; that the damage was not caused by unseaworthiness. The Common Serjeant held that the words in the charter-party, "at merchant's risk," were incorporated in the bill of lading, and gave judgment for the plaintiff upon the claim and counter-claim. The Divisional Court held the words were not incorporated in the bill of lading, and entered judgment for the defendants on the counter-claim.

The plaintiff appealed.

Lawson Walton, Q.C., and *E. Bray*, for the plaintiff.—The effect of the words in the bill of lading "all other conditions as per charter-party" is to incorporate into the bill of lading all those conditions in the charter-party which are not inconsistent with, and are applicable to, the bill of lading. The condition that the deck cargo should be carried "at merchant's risk" is such a condition. It is true that where the words have been "paying freight and all other conditions as per charter-party," it has been held that the conditions to be incorporated must be limited to those which are to be performed by the receiver of the goods. The word "paying" is not used in this bill of lading, and therefore these cases are not in point, and there is no reason why these general words should be cut down in the manner contended for by the defendants.

J. A. Hamilton, for the defendants.—No distinction can be drawn from the fact that the word "freight" is not preceded by the word "paying." The term in the charter-party as to the carriage of the cargo at merchant's risk is not a condition and is inconsistent with the bill of lading. The contract in the bill of lading is an absolute contract to carry, and, in the absence of evidence as to custom, it is an implied term of such a contract that the cargo shall not be carried on deck.

The following cases were referred to in the course of the arguments: *Porteus* v. *Watney*, 27 W. R. 30, 3 Q. B. D. 534; *Gullischen* v. *Stewart Brothers*, 32 W. R. 763, 13 Q. B. D. 317; *Gardner* v. *Trechmann*, 15 Q. B. D. 154, 33 W. R. Dig. 190; *Hamilton* v. *Mackie*, 5 Times L. R. 677; *Russell* v. *Niemann*, 13 W. R. 93, 17 C. B. N. S. 163; *Gray* v. *Carr*, 19 W. R. 1173, L. R. 6 Q. B. 522; *Serraino* v. *Campbell*, 39 W. R. 356, [1891] 1 Q. B. 283; *Manchester Trust* v. *Furness, Withy, & Co.*, 44 W. R. 178, [1895] 2 Q. B. 539; *Royal Exchange Shipping Co.* v. *Dixon*, 35 W. R. 461, 12 App. Cas. 11.

Nov. 22.—A. L. SMITH, L.J.—We are called upon in this case, as it appears to me, to consider the at one time much-debated question as to how much of a charter-party is incorporated into a bill of lading which contains the words, "he or they paying freight and all other conditions as per charter-party." The point arises thus: The plaintiff, the shipowner, sues the defendant, who is the receiver of cargo under a bill of lading, for freight. The defendant counter-claims for damage to cargo during the voyage, the cargo having been carried on deck, whereby it became damaged, and not delivered in like good order and condition as when shipped. The plaintiff, the shipowner, replies to this claim of the bill of lading holder that by the charter-party he was at liberty to carry a deck cargo at merchant's risk, that this term was incorporated into the bill of lading, and thus he is not liable to the defendant for the damage counter-claimed for. The question in this case, therefore, is whether this term of the charter-party as to the "deck cargo being carried at merchant's risk" is incorporated into the bill of lading by the words "freight and all other conditions as per charter-party," for if not, the plaintiff, the shipowner, is liable under the counter-claim to the defendant. The bill of lading in question was given for a portion of timber cargo to be carried from Norway to London, the material parts of which are as follows: "Shipped in good order and condition. Redwood . . . specifying it to be delivered in like good order and condition at the Port of London unto orders. Freight and all other conditions as per charter-party." Now there is a body of authority which has proved conclusively that the words in a bill of lading, "they pay freight for the goods and all other conditions as per charter-party," do not incorporate all the conditions of the charter-party, but only those conditions "which would apply to the person who has taken the bill of lading, and is taking delivery of the cargo, such, for instance, as payment for demurrage the payment of freight," "the manner of paying and so on." These are not my words, but the words of Lord Blackburn in the House of Lords in *Taylor* v. *Perrin*, not reported, but quoted by Lopes, L.J., in *Serraino* v. *Campbell*, [1891] 1 Q. B., at p. 294. It would be mere waste of time to go through all the cases upon this question, especially as this was done by Kay, L.J., in this court in the year 1890 in the case of *Serraino* v. *Campbell*, p. 283, and I will just take three cases to show what has been held to be incorporated in a bill of lading containing the words, "They are paying freight and all other conditions as per charter-party," and what is the rule of construction to be applied thereto.

Thirty-three years ago in the case of *Russell* v. *Niemann*, Willes, J., after consideration, gave the judgment of the Court of Common Pleas upon this point as follows: "We now proceed to dispose of the second point, which is whether the exception contained in the bill of lading is expanded by the exception in the charter-party. That depends upon whether the words 'and other conditions as per charter-party' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions *ejusdem generis* with those previously mentioned—viz., payment of freight, conditions to be performed by the receiver of the goods. It is a mere question of language and construction, and we think it is enough to say that the latter is the construction we put upon these words." This case has never been overruled, but, on the contrary, this court in *Serraino* v. *Campbell* pointed out that it was expressly approved of by the House of Lords. In *Serraino* v. *Campbell* Lord Esher laid down the rule of construction which was to be applied thus: "After full consideration I think that

the words ought to be construed as meaning all those conditions of the charter-party which are to be performed by the consignee of the goods." Lopes, L.J., cited Lord Blackburn's words, which I have above referred to; and Kay, L.J., reviewed all the authorities in order of date, and arrived in the end at the same result as Lord Esher and Lopes, L.J. Again, in the year 1895, in *Manchester Trust* v. *Furness, Withy, & Co.*, [1895] 2 Q. B. 282, 43 W. R. Dig. 167, Mathew, J., treats this rule of construction as then well known and settled, as in truth it was, and in the same case upon appeal, 44 W. R. 178, [1895] 2 Q. B. 545, the present Master of the Rolls (Sir Nathaniel Lindley) said with reference to the words in a bill of lading, "they paying freight, and other conditions as per charter-party." "The effect of the reference has been considered more than once; it has been considered in *Serraino* v. *Campbell* and also in *Fry* v. *Chartered Mercantile Bank*, 14 W. R. 920, and the effect of the reference is to incorporate so much of the charter-party as relates to the payment of freight and other conditions to be performed on the delivery of the cargo. But there is no authority whatever for incorporating more than that."

If ever there was a rule of construction laid down and settled by overwhelming and conclusive authority—I mean from the House of Lords downwards to the court of first instance—it is this, and yet it is now insisted upon by the shipowner that when by his captain he signed the bill of lading in this case upon the 19th of August, 1896, containing the words, "Freight (in print), and all other conditions as per charter-party," the word "paying" being left out, he by so doing incorporated into the bill of lading conditions which otherwise would not have been incorporated, and which were well known would not be. With the contention that the word "freight" does not mean "paying freight" in the mercantile document I cannot agree, for in my judgment the words "freight" and "paying freight" therein mean the same thing, and had it not been for Rigby, L.J.'s, opinion to the contrary I should not have thought the first question open to argument. If we were to accede to the plaintiff's contention we should in my opinion be unsettling that which has long been settled, and upon the faith of which business has been transacted for years, and nothing could well be more mischievous than this. In my judgment the rule of construction above-mentioned applies to all bills of lading which seek to incorporate parts of a charter-party by the words "he or they paying freight" and all other conditions as per charter-party, "or freight and all other conditions as per charter-party," unless there is something therein clearly showing that the well-known rule is to be excluded. To point out that the contract of carriage contained in the bill of lading in the present case is absolute and without exception does not in my opinion avail the shipowners, for this does not, in my opinion, show that the rule is to be excluded, for it is a rule as applicable to a bill of lading containing no exception as to one containing exceptions. I rest my judgment in this case upon the grounds above stated, and I do not propose to discuss the question whether the term in the charter-party including a "deck cargo at merchant's risk" is or is not consistent with the bill of lading, which is silent as to a deck cargo, and only covers a cargo which is to be carried at shipowner's risk. I think that Day and Lawrance, JJ., were right in holding that the clause in the charter-party now sought to be incorporated by the shipowner was not incorporated into the bill of lading, and that this appeal must be dismissed with costs.

RIGBY, L.J.—After the best consideration which I have been able to give to this case I am unable to concur in the conclusion that the counter-claim of the defendants should succeed. The amount claimed is very small, but the principles of interpretation involved are of great importance. The evidence showed that the terms of the charter-party were usual in the trade in the sense of being frequently adopted, but did not show such an established usage as could be presumed to be the basis of every contract of the kind. The question, therefore, is one of construction only, and the issues appear to be reducible substantially to two. First, whether the words "freight and all other conditions as per charter-party" contained in the bill of lading are to be so construed as to extend only to conditions to be performed by the holder of the bill of lading, in which case none of the terms of the charter-party relieving the shipowner from responsibility would be introduced. Secondly, whether the clause relied upon as a defence to the counter-claim ought not to be treated as incorporated by the general words of reference on the grounds of its being repugnant to the other terms of the bill of lading. As to the first issue, I would observe that the argument depends, in my judgment, mainly, if not entirely, upon the decisions of which *Serraino* v. *Campbell* is a conspicuous and, I think, the latest direct example. I guard myself from the first by saying that I have not the slightest intention of laying down anything inconsistent with that class of cases. The decisions are binding upon the court, but I may be allowed to say that if they did not exist I should have had little difficulty in arriving at a similar conclusion in a similar case arising for the first time. The real question is what these cases in fact decided, and it is as important not to extend them so as to cover a case not really included as to preserve their authority with reference to cases really covered by them. I have gone through all those cases, and, without referring to them in detail, I will say at once that no one of them appears to me to go beyond what was laid down by Willes, J., in *Russell* v. *Niemann*. The reference to the charter-party in that case was contained in these words of the bill of lading, "paying freight for the said goods and all other conditions as per charter-party." In the whole line of cases down to and including *Serraino* v. *Campbell* the words to be construed did not differ substantially from these. In each case there was the exact equivalent of the words "paying freight for the said goods," and the words "all other conditions" followed immediately afterwards. At p. 177 of the report of *Russell* v. *Niemann* Willes, J., says: "We disposed of the first question in this case yesterday, and we now proceed to dispose of the second, which is whether the exception contained in the bill of lading is expanded by the exception in the charter-party. That depends upon whether the words 'and other conditions as per charter-party' include all the stipulations and conditions contained in that or whether they are not limited to conditions *ejusdem generis* with that previously mentioned—viz., payment of freight conditions to be performed by the receiver of the goods. It is a mere question of language and construction, and we think it enough to say that the latter is the construction which we put upon these words." It is to be observed that the learned judge by construction puts in the words "to be performed," and I gather that if he had not felt himself entitled to do that he would have held that all the stipulations of the charter-party ought to be incorporated (see his statement, p. 172, of the point to be decided). In *Serraino* v. *Campbell* each of the learned judges, Lord Esher, M.R., and Lopes and Kay, L.JJ., refer to the passage above quoted and

treat it as the foundation of the decision in the later case. It is plain, to my mind, that following *Russell* v. *Niemann* the Court of Appeal, in *Serraino* v. *Campbell*, treated the matter as purely one of construction of the very words used and had no intention of laying down any general rule as to the meaning of the words "all other conditions as per charter" independently of the introductory words "they paying freight." I have looked through all the cases cited and I have not found one in which, independently of words of introduction equivalent to the words "paying freight," the words "all other conditions as per charter-party" have been cut down by construction to conditions to be performed by the bill of lading. In the absence of such words the Court of Appeal (*Gardner* v. *Trechmann*, 15 Q. B. D. 154) seem to me to have held that the words of reference "other conditions as per charter-party" when not controlled by the context are sufficient to introduce all the terms of the charter-party not repugnant to the contract contained in the bill of lading. What amounts to such repugnancy as to lead to the rejection of any term, and in what cases such a result follows will be dealt with in discussing the second question. Meantime the effect of the word "freight" preceding the words "and all other conditions" has to be considered. If the word conveys a meaning equivalent to "paying freight" the case is brought within the principle of *Russell* v. *Niemann*, because then it expressly refers to one condition to be performed by the bill of lading holder. But, in the first place, the forced character of the construction suggested seems to me to result from a comparison of the reasoning in the class of cases so often referred to and the present. The insertion in the former of the word "performing" so as to make the whole phrase run "paying the freight and performing all other conditions" is natural and perhaps even inevitable (see *per* Lord Bramwell in *Gray* v. *Carr*, 19 W. R. 1173, L. R. 6 Q. B. 522). Its insertion in the present case making the phrase run "freight and performing all the other conditions" is at once seen to be putting a strain upon the original words which, in my judgment, they will not bear. You cannot, in fact, bring in "performing" without first getting in "paying" or something of the sort.

Now, "freight as per charter-party" means in its obvious and *primâ facie* sense freight as fixed and ascertained by the charter-party and nothing else. The phrase no more carries as part of the meaning of the language the idea of payment than it would do if the rate followed the word in the bill of lading itself, without having to be imported from the charter-party. In each case the fixing of the rate would indeed involve as a consequence, arising by implication of law, the obligation to pay at that rate; but on the question of construction it is necessary to distinguish clearly between the interpretation of the language used and the consequences arising in law from using it; and the language used ought not, in my judgment, to be altered so as to put in an express condition when it is only implied. On the whole I am of opinion that the authorities relied upon are not applicable, that the reference cannot be cut down to mean only conditions to be performed by the holder of the bill of lading.

The second question remains whether the term a deck cargo to be taken at merchant's risk is to be rejected as repugnant to the bill of lading, and this must be decided in accordance with the general principles of interpretation applicable, not to bills of lading only, but to all contracts, and, indeed, to all written instruments.

It is plain that a clause incorporating by general words only terms of another contract will not incorporate any terms of the latter which are outside the scope and nature of the first.

The bill of lading is a contract for carriage, and in so far as the charter-party may contain terms not applicable to such a contract they will not be treated as incorporated. But no such question arises here. The special term proposed to be introduced has direct reference to the carriage of the goods. The first and most general rule of construction is that the document under consideration is to be construed according to the plain meaning of the words used. This is subject to certain ancillary rules not having the force of law, but intended to serve in proper cases as guides to the true interpretation. The only one of these applicable to the present case, if it is applicable, may, I think, be thus formulated: If the literal construction leads to an absurdity, repugnancy, or inconsistency which reasonable people cannot be supposed to have contemplated under the circumstances, it ought if possible to be modified so as to avoid such a result.

On the question of inconsistency I doubt whether the rule ought ever to be applied except where the inconsistency arises between a term of the contract appearing on the face of it to be the result of a special bargain between the part and the inconsistent term proposed to be introduced is imported by general words—such a case as that of *Gardner* v. *Trechmann* already referred to. It was impossible there to explain why the parties specified a particular rate of freight in the bill of lading if they really meant the higher rate mentioned in the charter-party to rule. The bill of lading freight was therefore treated as governing. If this be the correct view the rule referred to would be only a way of asserting the maxim, *Generalia specialibus non derogant*, and would have no application to the present case. The words of the bill of lading "to be delivered in like good order and condition" bear no sign of a special agreement. They are, in fact, in such a document the most ordinary and general words, and in almost every case their effect is cut down and controlled by the subsequent language of the document. True it is if they were uncontrolled they would involve an absolute contract on the part of the shipowner to deliver which would be broken even if the goods were lost by ordinary sea risks without negligence of any kind. Such a contract is not an impossible one, though it taxed the ingenuity of counsel to indicate cases in which it would practically arise independently of a special bargain at a rate of freight higher than the ruling rate. Here the rate of freight, when originally fixed, was fixed with reference not to an absolute contract on the part of the shipowner, but to a limited one; and it would be a remarkable result if the bargain in the bill of lading were held to entitle the shipowner only to the same freight as if consideration for a much more onerous obligation. But I do not think it legitimate to treat the words quoted from the bill of lading as standing alone and unexplained. They are subject to the words which follow, and ought to be construed as so subject, and not as containing the whole contract. Whether I am right or not in giving to the ancillary rule of construction the limitation which I have suggested, it seems to me that this case can be decided on a much broader ground before we have recourse to the ancillary rule at all. We should be satisfied that the literal interpretation involves something unreasonable, and the question arises whether it is not reason- to suppose that the parties to the contract intended to cut down the earlier words.

The case stands thus: In nearly every bill of lading and in nearly every charter-party there are provisions cutting down and limiting the absolute

obligation of the shipowner to deliver. Is it more reasonable to suppose that the parties intended the contract to be interpreted literally, and so to incorporate the terms of the charter-party or not? In the first alternative they would be entering into a common and ordinary contract, and the shipowner would be getting in freight a consideration commensurate with a limited obligation. In the second they would be entering into a contract of so exceptional a nature that it is difficult to understand how any shipowner should submit to it or any shipper of goods insist upon it.

In my judgment the literal interpretation of the contract in this case is the most reasonable and therefore the correct one, and no occasion arises for resort to the ancillary rule of construction founded on repugnancy or inconsistency.

COLLINS, L.J.—I am of opinion that the judgment in the court below is right, and ought to be affirmed.

It is not necessary to recapitulate the facts which have been already stated in the judgments delivered. The short question is: Is the indorsee of this bill of lading, being for a portion only of a cargo shipped on the plaintiff's vessel, bound by a provision in the charter-party that deck cargo is carried at merchant's risk? The bill of lading, which contains no exceptions, is on its face an acknowledgment that the goods in question are shipped in good order and condition, with an undertaking to deliver them in like good order and condition at the port of London. Then follow the words which give rise to the question in discussion, "freight," which is in point, and written after it, "and all other conditions as per charter-party dated the 1st of August, 1896."

The obligation of the shipowner therefore on this bill of lading is absolute, and certainly does not protect him from liability for damage to deck cargo unless he can find such protection by reason of its incorporation from the charter-party.

I am of opinion that the words which I have cited are not capable of the meaning sought to be put upon them by the shipowner. They are words whose meaning has repeatedly been considered in decided cases, and the view stated by Willes, J., in *Russell* v. *Niemann* as long ago as 1864—viz., "they are limited to conditions *ejusdem generis* with that previously mentioned—namely, payment of freight, conditions to be performed by the receiver of the goods," and again in substantially the same terms by Lord Blackburn, and finally by Lord Esher in 1891 in *Serraino* v. *Campbell*, must be taken as establishing the principle upon which these words are to be interpreted.

The rule is thus stated by Lord Esher in the last case: "After full consideration I think that the words ought to be construed as meaning all those conditions of the charter-party which are to be performed by the consignee. If this be so, then the perils of the sea are not conditions which are to be performed by the consignee. Indeed, they are not conditions which have to be performed by anyone." The ground on which this rule rests is that, inasmuch as freight has to be paid by the consignee as a condition of receiving the cargo, the words "other conditions" are to be read in their natural meaning, and, following upon the word "freight," must be taken to import conditions to be performed by the consignee in relation to the receiving by him of the cargo.

I think it can make no possible difference to this construction that the words "payment of," before "freight," are omitted. "Freight," in my judgment, is obviously equivalent to "payment of freight," or "he or they paying freight," otherwise it could not be described as a condition so as to justify the words "other conditions," which follow it, and the canon of construction above stated is therefore applicable to this bill of lading, and excludes all terms of the charter-party which cannot be brought under the category of conditions to be performed by the consignee.

It has been urged that the absence of exceptions in the bill of lading is a reason for giving a larger interpretation to the words "all other conditions as per charter-party." In my judgment this fact can make no difference, the basis of the rule being what I have stated.

Exceptions, whether they are few or many, or wanting altogether, in the bill of lading, are not thereby turned into conditions to be performed by the consignee; they are merely terms of the bargain between the shipowner and the charterer. To hold otherwise would be to disturb a rule which, having regard to the length of time it has been established, must have been the basis upon which mercantile men have acted in numberless instances in framing their mercantile documents. Further, even if the word "conditions" could be interpreted in this larger sense, another question would arise. The bill of lading might have comprised only that part of the cargo which was in fact carried upon deck, and its absolute words import a contract to carry under deck, for there was no proof here of any custom to control them: *Royal Exchange Shipping Co.* v. *Dixon*, 35 W. R. 461, 12 App. Cas. 11; *Gould* v. *Oliver*, 2 Man. & G. 208. If, therefore, this provision from the charter-party were to be read into it, there would be at one and the same time in the bill of lading an absolute contract to carry under deck and at the risk of the shipowner all the goods comprised therein, and an imported provision that they might nevertheless be carried on deck and at the risk of the consignee.

Whether such an exception might not be so large as to eat up and destroy the express contract, and, therefore, to be incapable of being read into it (see instances of void exceptions, Com. Dig., "fact") it is not necessary to decide. I have not thought it necessary to go through all the cases bearing on its discussion, that process has been gone through several times already, and in *Serraino* v. *Campbell*, after a full review of all that had been decided up to that date the law was laid down by Lord Esher in the terms which I have stated. One reported case only, on the point, has arisen since then—viz., *Manchester Trust* v. *Furness, Withy, & Co.*, and in that case the canon enunciated by Lord Esher in *Serraino* v. *Campbell* is again applied.

Solicitors for the plaintiff, *Harper & Badcock*.

Solicitors for the defendant, *W. A. Crump*.

High Court of Justice.

Chan. Div. } Nov. 16.
Kekewich, J. }

MUDDOCK v. BLACKWOOD. (a.)

Copyright—Infringement—Action on the case—Action of detinue—Action of trover—Injunction—Delivery up and damages—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 15, 23.

In addition to the remedy of a special action on the

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

case under section 15 of the Copyright Act, 1842, the registered proprietor of a copyright can also sue the offender in an action of detinue or an action of trover under section 23 of that Act, and he may join all these remedies in one action, which may be brought in the Chancery Division.

Action.

The plaintiff was the registered proprietor of the copyright in and author of a work called "A Wingless Angel." In 1886 the defendant, James Blackwood, a publisher, bought the stereotyped plates of the plaintiff's work at a public auction, the vendors being the original publishers of the work. The plaintiff had not published any copies of "A Wingless Angel" since 1875. In 1886, and again in 1896, the defendant, James Blackwood, published what were in fact reprints of the plaintiff's work, and it was not until the publication of the latter edition that the plaintiff became aware of the infringement of his copyright. Towards the end of the year 1896, the defendant, James Blackwood, transferred his business to the other defendants, a firm of publishers called J. Blackwood & Co. On the 24th of November, 1896, the plaintiff commenced an action in the Chancery Division for an injunction to restrain the defendants from selling their copies of the work, an account, damages, and delivery up of the copies in their possession. The defendant, James Blackwood, thereupon offered to submit to an injunction and to pay a certain amount for damages and the plaintiff's costs, but this offer was refused by the plaintiff.

On the 18th of December the plaintiff made a demand in writing upon the defendants under section 23 of the Copyright Act, 1842, for all copies of the book unlawfully printed, and on the 23rd of December issued a writ in the Queen's Bench Division claiming damages for wrongful conversion and for unlawfully printing copies of the work without the plaintiff's written consent. This latter action was transferred to the Chancery Division and the two actions were then consolidated. The plaintiff delivered a statement of claim in the consolidated action claiming (1) an injunction restraining the defendants from infringing his copyright in the said work, and delivery up of all the plates and stereotype used by the defendants in and about the printing of the same; (2) delivery up of all copies of the infringing work in the defendant's possession; (3) an account of all profits, or alternatively, damages in respect of the said infringement and an inquiry as to the amount thereof; (4) £250 damages; and (5) costs.

Warrington, Q.C., and *J. G. Joseph*, for the plaintiff.—We rely upon section 23 of the Copyright Act, 1842, which provides remedies in cases of unlawfully printing books without the consent of the registered proprietor of the copyright. We ask for an injunction, damages for the tortious conversion of those sold, and delivery up of the books in the defendant's hands. Section 26 of the Act, which limited a time for the commencement of an action, has been repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2.

Renshaw, Q.C., and *J. W. Baines*, for the defendants.—We submit that section 23 is inconsistent with section 15, under which the remedy is a special action on the case, and that all these remedies cannot be pursued at once in respect of the same copy, they are not cumulative.

They referred to *Pike* v. *Nicholas*, 18 W. R. 321, L. R. 5 Ch. App. 251; *Colburn* v. *Simms*, 2 Hare 543; *Delfe* v. *Delamotte*, 3 K. & J. 581, 6 W. R. Ch. Dig. 19.

KEKEWICH, J.—It is strange that in the year 1897 I should be called upon for the first time to say what is the meaning of section 23 of the Copyright Act, 1842, and whether the remedy given by that section is inconsistent with the remedy given by section 15 of the same Act. There does not appear, however, to be any decision upon the question. Two points have been raised. The first is that as section 15 gives the proprietor a special action on the case, that is the remedy which he is intended to pursue, except so far as his remedies at law are not interfered with, and that, therefore, the 23rd section, which gives certain rights of action, must be construed as meaning something entirely different; that the offender under section 23 is a different person from the offender under section 15—in other words, that section 15 contemplates a person who has "unlawfully printed or imported," while section 23 contemplates a person who is the accidental possessor of an infringing book, so as to give a right of action against that accidental possessor independently of his being otherwise a wrongdoer. This certainly is a possible view, but the language of the two sections is not so clear as to compel me to adopt it.

There are, no doubt, in section 15 words which are not to be found in section 23, but I cannot suggest why those two sections should not have been put into one, or why they should be separated, and I do not say that because under the 15th section the plaintiff has a special action on the case, therefore he cannot sue under section 23. Then the second point is this: Under section 23 the "registered proprietor shall" in respect of pirated books "after demand thereof in writing be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover." That provides an alternative remedy. It was argued on behalf of the defendant that if the plaintiff sued under that section he must sue either in detinue or in trover, he could not sue in both. I do not think that is so; it would be an extremely narrow interpretation of the Act to hold that the proprietor of the copyright in a book, knowing that a man had a certain number of copies in his hands and that he had sold other copies, could not sue that person in detinue for the copies detained, and also in trover for the copies converted to his own use. This seems plain from the Act itself, and I do not see why the plaintiff should not have these two remedies and sue in detinue for those copies detained by the defendant and in trover in respect of the copies sold by him and converted to his own use. In my opinion, therefore, the plaintiff has these two remedies under section 23, in addition to a special action on the case under section 15, and I think he may be said to have been exercising his right to an action on the case in bringing these proceedings in the Chancery Division. The plaintiff is, in my opinion, entitled to an injunction, delivery up of all copies in the defendants' possession as in an action of detinue, and damages for the copies sold as in an action of trover.

Solicitors for the plaintiff, *E. Salaman, Fort, & Co.*

Solicitors for the defendants, *Richardson & Goring Thomas.*

Chan. Div.
Kekewich, J. } July 9, 1897.

URBAN DISTRICT COUNCIL OF HANDSWORTH v. DERRINGTON AND BOTTELEY. (a.)

Local government — Drain — "Sewer" — New street — Street taken over by local authority — "Frontager" — Drains constructed by "frontager" — Liability for expense of sewering street — Omission to serve notice "to sewer" on one frontager — Condition precedent — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 18, 150, 257, 268.

Where a "street" was vested in the local authority, and there were drains — some of which drained more than one house — existing under the street and leading into public sewers in other streets, and the local authority had served the usual notices under section 150 *of the Public Health Act,* 1875, *on the owners of houses, as frontagers to the street, to sewer, &c., the street, but in so doing had omitted to serve one frontager with such notice; and the local authority, on non-compliance with the notice by the frontagers, had proceeded to do the work themselves, and their surveyor had, under the same section of the Act, apportioned the expense among the frontagers, and, the apportionment having been objected to, the parties had gone to arbitration thereon, and an award had duly been made apportioning the payments among the frontagers:*

In an action by the local authority to recover the apportioned amounts from the frontagers,

Held, (1) *that the words "respective owners and occupiers" in section* 150 *mean "all and every one of" the owners and occupiers; that service of notice to sewer on all such owners or occupiers is a condition precedent to enforcing the Act, and consequently failure to serve notice on a single occupier is a failure to comply with the requirements of the section; but held, also (on the facts), that the frontagers should have raised the objection previously* — e.g., *before the arbitrators — and it was too late to take it now;* (2) *on the facts, that the road was not sewered to the satisfaction of the local authority, and that the authority, therefore, were not liable under section* 15 *for maintenance, alteration, &c., of the sewers; and, further, that a street could not be considered to be sewered when all that had been done was to lay a series of drains draining some of the houses on one side in one direction and the houses on the other side in another direction, these drains not forming parts of one system of sewering.*

This was an action brought by the plaintiffs against the defendants Josiah Derrington and James Botteley, the leaseholder and mortgagee respectively of premises in Putney-road, Handsworth, for a declaration, under section 257 of the Public Health Act, 1875, that the proper proportion of expenses incurred by the plaintiffs in executing works of street improvement in Putney-road, Handsworth, payable by the defendants as frontagers to the street, was a charge upon the premises in the street of which the defendants were respectively leaseholder and mortgagee, and that such proportion of the expenses might be raised by the sale of the premises and paid to the plaintiffs.

It appeared that Putney-road was originally laid out in 1875, and that the premises in question consisted of nine houses, of which the first defendant was leaseholder under a lease for ninety-nine years from the 31st of August, 1893.

On the 16th of February, 1894, the plaintiffs served him, along with the other frontagers, with the usual notice, under section 150 of the Public Health Act, 1875, to sewer, &c., the street. This notice was not complied with, and thereupon the plaintiffs did the work themselves, and their surveyor apportioned, under the same section, the defendants' share of the expense at £162 7s. 2d., and served notice for payment. This being objected to the parties went to arbitration, under the Act, on the apportionment.

And on the 9th of October, 1896, an award was made fixing the defendants' share at £158 11s. 8d. Notice to pay that sum was served by the plaintiffs on the 26th of October, 1896, and the sum not being paid the plaintiffs issued the writ in this action on the 3rd of February, 1897.

It appeared, and was admitted by the plaintiffs, that at the time the notices to "sewer, &c.," were served the various houses or groups of houses were served by drains draining more than one house and running in different directions into the public sewers laid in other streets, and it was also admitted that they had omitted to serve with a notice to sewer, &c., one of the frontagers, who consequently was not charged.

The main points raised by the defence were: First, that at the time the "notices to sewer" were served the street was already sewered; and that on the facts the local authority must be taken to have been "satisfied"; second, that the requirements of section 150 of the statute had not been complied with inasmuch as the local authority had omitted to serve notice to sewer on one of the frontagers; third, that the defendants were not liable for the expenses of sewering the road at the places where it was intersected by cross-roads and where, consequently, there could be no frontagers.

Section 13 of the Public Health Act, 1875, provides, sub-section 1, for the vesting of "sewers made by any person for his own profit," &c., in the local authority.

Section 15 provides that "every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Section 18 provides for the enlargement, alteration, and discontinuance of sewers by the local authority.

Section 150 provides that "where any street within any urban district (not being a highway repairable by the inhabitants at large), or the carriageway, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered," &c., "require them to sewer," &c., "the same within a time to be specified in such notice"; and the section further provides that "if such notice is not complied with, the urban authority may, if they think fit, execute the works," &c.; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses.

Section 257 provides that "Where any local authority have incurred expenses for the repayment whereof the owners of the premises for or in respect of which the same are incurred is made liable under this Act, or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of service of notice of demand."

The section also provides that "Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall, by written notice, dispute the same."

Section 268 provides that "Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said board may seem equitable, and the order so made shall be binding and conclusive on all parties.

Warrington, Q.C., and *Hugo Young*, for the plaintiffs.—The local authority can bring an action under section 150 of the Public Health Act, 1875, notwithstanding the fact that there are already private sewers under the road. Putney-road was not, at the time of the issue of the notices, sewered as a whole, and even assuming that it was then sewered as a whole, it was not sewered to the satisfaction of the local authority: *Handsworth Local Board* v. *Taylor*, 69 L. T. Rep. 798. Our next point is that though it is true we omitted to serve a notice on one of the frontagers, the objection on that ground should have been taken before the arbitrator, and it is too late for the defendants to raise it now. Moreover, the defendants were not in fact injured by our omission inasmuch as they were not required to pay more on that account. And in the third place we say that objection as to expenses being increased by not taking into account the width of the cross-roads, should also have been taken within twenty-one days of notice to pay under section 268 of the Public Health Act, 1875: *Sandgate Local Board* v. *Keene*, [1892] 1 Q. B. 831, 40 W. R. Dig. 131; *Cook* v. *Ipswich Local Board*, 19 W. R. 1079, L. R. 6 Q. B. 451; *Ex parte Wake*, 11 Q. B. D. 291, 31 W. R. Dig. 99; *Wake* v. *Mayor, &c., of Sheffield*, 12 Q. B. D. 142, 32 W. R. Dig. 123; *Walthamstow Local Board* v. *Staines*, [1891] 2 Ch. 606, 40 W. R. Dig. 131.

Renshaw, Q.C., and *C. F. Vachell*, for the defendants.—The sewers drain more than one house, and are not made for profit. Consequently they are vested in the local authority under sections 13, 15, and 18 of the Act of 1875, and the authority are compelled to maintain or alter them at their own expense under sections 15 and 18: *Fulham District Board* v. *Goodwin*, 1 Ex. D. 400, 25 W. R. Dig. 156; *Bonella* v. *Twickenham Local Board*, 35 W. R. 578, 36 *ib.* 50, 18 Q. B. D. 577, 20 *ib.* 63; *Ferrand* v. *Hallas Land and Building Co.*, 41 W. R. 580, [1893] 2 Q. B. 135; and *Travis* v. *Utley*, 42 W. R. 461, [1894] 1 Q. B. 233. As to the non-service of notice on one of the frontagers, service on all the frontagers is made a condition precedent by section 150 of the Act. Service on the "respective owners," &c., means service on each and every one of them. The plaintiffs have therefore failed to comply with the requirements of the Act. Then as to the expenses being increased by the cross-roads of which the plaintiffs themselves must be taken to be the frontagers: *Plumstead Board of Works* v. *British Land Co.*, 23 W. R. 634, L. R. 10 Q. B. 203.

KEKEWICH, J.—The main, and, as it seems to me, the only, question of substance to be decided is whether, when the local authority issued the notices under which the Putney-road was sewered, and that work was done, that road (Putney-road) must be regarded, or must not be regarded, as having been sewered to the satisfaction of the urban authority within the meaning of the 150th section of the Act. That they were not satisfied is perfectly clear. We have a report made to them by those to whom they entrusted the duty of inspecting and reporting, and we have the report adopted by the authority. We have the minute to that effect put in evidence, and there can be no question about it, they were not satisfied as a matter of fact. But the point made against them is that it is of no avail for them to say they were not satisfied as a matter of fact, because, as a matter of law, they were satisfied; that is to say, they must be taken to have been satisfied, notwithstanding that they were not satisfied. There is no question, of course, of fraud or of any impropriety at all. It all depends upon the proper construction of the Act and the application of the authorities which have been decided on the different sections. I will take it that this street was vested in the local board, and that therefore Mr. Renshaw's argument proceeds on a right basis. I will take it that there were sewers under the street for the drainage of particular houses and sets of houses; but it does not seem to follow that the street was sewered. What I apprehend is meant by a street being sewered is that it is sewered as a street—as a certain space devoted to traffic with an interval between the houses, and as comprising, of course, the houses on either side. I think it would be wrong to say that a street is sewered when all that you have is a series of sewers draining some of the houses on one side in one direction and the houses on the other side in another direction not forming parts of one system.

That seems to me necessary when you remember that a street, in the sense in which I have mentioned it (which I apprehend to be the proper meaning of a street), is not a thing which comes into existence all at once. It grows, and though it may be complete as a street, as an entity at one particular time, yet it is altered, modified, and enlarged by the addition of new houses.

Therefore, if it were left to me, if it were a matter for me, to say whether the street was properly sewered or not, on the evidence I should say it was not. Though I have thought it well to say so much, that is not the question. The question is whether it was sewered to the satisfaction of the local authority. According to the authorities, and I have two under my eyes which have been quoted, that of the *Fulham Board* v. *Goodwin*, and *Bonella* v. *Twickenham Board of Health*, the local authority must make up its mind once for all whether a street is sufficiently sewered or not, and it must do that within a reasonable time. Perhaps it is not quite accurate to say that the local board must make up its mind; but when once it has determined that a street is sufficiently sewered, then from that time forward the powers under discussion in this case come to an end. They must then repair those sewers, keep them in order, and maintain them

at their own expense—that is to say, out of their general funds. They can no longer cast the burden on the frontagers, and, more than that, if they have been in possession of the street for a reasonable time, and have done nothing, it must be taken, according to the law as laid down by Lord Esher in *Bonella* v. *Twickenham Board of Health*, that they have determined that it is sufficiently sewered, even though, as a matter of fact, they have never come to any such determination at all. That, if I may venture to say so, seems to be common sense, and to be a fair application of the rules of life to such matters. What was done here? From time to time, no doubt, these gentlemen who had built houses fronting towards Putney-road, or who had purchased houses built by others, were anxious to know what they were to do as regards drainage, and they were told from time to time by the representative of the local authority what was necessary for them to do, how they could get rid of their drainage; and is is quite possible that the representative of the local authority may have assured them, and with perfect honesty and propriety, that if they drained in that way they would never be troubled again.

But of course he had no authority to make such a representation on behalf of the local authority, and they must have accepted that for what it was worth. There was no statement even by him, still less by the local authority, that the road was sufficiently sewered —that they were content with the sewering of the road. Far from it, the very application which they made, the very advice that was given them, the very things which they did, all pointed to there being no sewer. It was to be independent sewering for the particular purposes of particular houses. There was no sewering of the street as a whole. It seems to me therefore that, remembering that this street was in the meantime growing—no doubt it had been in existence for some years—the local authority had not exhausted the time allowed them (for it must be an elastic one), to be judged according to the circumstances, for determination whether the street was sufficiently sewered. As I have already mentioned, they certainly never came to it in fact. On the contrary, when first the matter is brought before them, they are clearly of opinion that it is not sufficiently sewered, and they take proceedings on that footing. It seems to me that they were strictly right, and that they acted within the provisions of statute.

Then there is another point which deserves consideration in itself, because much has been said about it. The 150th section of the Act provides that "when the local authority are satisfied that a road has not been sufficiently sewered, they may by notice addressed to the respective owners or occupiers of the premises adjoining, fronting, or abutting on such part thereof as may be required to be sewered," &c. —that is a condition precedent. I can see no possible answer to that argument—it seems to me plain on the language of the Act. The result is that to begin with I agree with Mr. Vachell's argument that respective owners and occupiers must mean all and every one of them. If they did not do that—*i.e.*, serve the notice on every one of the frontagers—they have no basis to start upon. There is a technical objection to their proceeding from the first, a purely technical objection, though, of course, having substance behind it, because the object is that all should determine whether the work should be done; and more than that, if the work is not done by the owners and occupiers, then the local authority shall do the work and recover the proper proportion from all—that is to say, recover from each his proper proportion, and not throw on any one a part of that which ought to be thrown on the others or any of them. The matter, no doubt, from that point of view is one of some importance. They are bound to do that, and it seems to me that they will equally fail to discharge their duty—that is to say, will equally fail to make a basis for further proceedings, if they omit one owner or half-a-dozen or 50 or 75 per cent. In either case they omit to do that which they are bound to do. It is an objection to their proceedings—if I may go back to olden times—"a plea in bar," which might have been raised, I have no doubt, by the defendant. But is he at liberty to raise it now? He has gone forward. I say nothing about the 268th section because I am not sure that an appeal could have been raised under that, though if it could I think that the possibility of such an appeal would be an objection now. But, apart from that, he has thought fit, or has been advised to challenge the charge made by the local authority. That is to say, he has thought fit to challenge the amount which they seek to charge upon him. Now, the amount to be charged upon him is necessarily an apportioned amount—that is to say, in proportion to his frontage, and singularly enough a serious question was raised before the arbitrators in this case. That is to say, the arbitrators assessed the frontage differently from that which the surveyor of the local authority had assessed it at, and that question, no doubt, has itself arisen in this case, and might arise in others.

The whole question of how much ought to be charged was before the arbitrators, and the whole question of the distribution of the proportion among several frontagers. It was perfectly competent for this gentleman to say before the arbitrators, I am not to pay this proportion which you desire to throw upon me, because you have omitted so many yards belonging to a gentleman who has or has not been served, but who is not included in your apportionment, the result being that you have charged me too much, and I must reduce the amount. That was an argument which he might have put forward at that time. And if they had said, We have not served him, we have not addressed our notice to him, therefore we cannot recover against him, and so we must recover a greater proportion against you and the others to whom we have addressed the notice, he would have been entitled to say, "That is bad in law," and by some means or other, by compelling a statement of a case, he could no doubt have brought that within the ordinary jurisdiction of the court, and the matter could be set right. I take it that it is too late now for him to say that the proportion has not been properly ascertained; it is all a matter of proportion. I think it is too late to raise this question, which, though of substance, is technical, strictly technical; that is to say, it goes to the basis of their operations in the first instance. They were bound to prove this in order to show that they could charge anything. It was for him to challenge that at an earlier period. I think it would be entirely wrong to allow him now to say, "This is all wrong; this local authority have been acting outside their jurisdiction from beginning to end." It is not only that they cannot charge this sum, but they cannot charge anything. I think that disposes of that point.

As regards the other points, I do not propose to deal with them separately. It seems to me that they are all disposed of by one observation, that either by an appeal under the 268th section, or by bringing the matter before the arbitrators, those points were open before and are closed by the award. The award is conclusive—conclusive, of course, only as regards such matters as might properly be within the arbitrators' jurisdiction; but all these matters might have been raised before them.

I have dealt with one question of substance, and the other which, though important, I do not regard at this stage as a question of substance. The other points, I think, do not deserve any more than that general observation.

Declaration, that the plaintiffs have a charge on the property for the sum mentioned, together with interest at 4 per cent.

Judgment for the plaintiffs.

Solicitors, *Preston, Stow, & Preston*, for *Ward & Co.*, Handsworth; *Fallows & Rider*, for *Coleman & Co.*, Birmingham.

Chan. Div.
Wright, J. } Nov. 19.

In re THOMAS EDWARD BRINSMEAD & CO. (LIMITED). TOMLIN'S CASE. (*a.*)

Company—Winding up—Conditional application for shares—Repudiation—Opposing winding up petition—Void contract.

A conditional applicant for shares in a company before allotment, to whom shares are allotted, may repudiate his shares if the conditions specified in his application are not fulfilled, as there is no consensus ad idem, *and therefore there is no contract between the company and the applicant.*

This right of repudiation is not taken away by his appearance on a petition to wind up the company as a contributory opposing such a petition.

This was an application by Tomlin that his name might be struck off the list of contributories of the above-named company.

On the 24th of July, 1896, he had applied for shares in the company in the following form:

"Form of Application for Shares. — Thomas Edward Brinsmead & Sons (Limited).—To the directors of Thomas Edward Brinsmead & Sons (Limited), 94, Cannon-street, London, E.C.—Gentlemen [Having paid to your bankers the sum of £———, being a deposit of 10s. per share payable on application for ———shares of £5 each in] Thomas Edward Brinsmead & Sons (Limited), I request you to allot me *five hundred pounds in* [that number of] one hundred shares, and I agree to accept the same, or any smaller number that may be allotted to me, upon the terms and conditions of the prospectus and memorandum and articles of association of the company. I request you to place my name on the register of members in respect of the shares so allotted to me, and I undertake to pay the further instalments upon such allotted shares as and when the same become due, *provided the total number of shares are applied for, and I undertake to pay in full on allotment.* — Ordinary signature, ————.—Name (in full), *George William Flowers Tomlin.* — Address, *Dudley-street, Leighton Bazard.* — Description, *No occupation.*—Date, *24th July*, 1896.—If you desire to pay in full on allotment sign the following:—I desire to pay in full on allotment. This form is to be filled up, cut out, and forwarded, together with cheque or cash for the amount payable on application to the bankers, &c., or to the secretary at the offices of the company, 94, Cannon-street, London, E.C."

The application was made upon one of the usual printed forms, but Tomlin altered it by striking out the portions which are above enclosed in square brackets, and by adding the words which above are printed in italics. He did not sign at all at the end of the words "I desire," &c, and he never paid any money to the company. The company shortly afterwards went to allotment, but all the shares in it were not applied for, and only about 58,000 (including those applied for by Tomlin) out of a larger number were allotted. Tomlin did not receive notice of allotment. Shortly afterwards, finding that something was wrong with the company, on the 17th of August, 1896, he served the company with notice of motion under section 35 of the Companies Act, 1862, for rectification of the register by removing his name therefrom on the ground of misrepresentation in the prospectus. Before this motion came on for hearing a petition for winding up the company was presented. Tomlin appeared as a contributory and opposed the petition, and on the winding-up order being made appealed against it with others. This appeal was, however, dismissed.

He now applied to have his name struck off the list of contributories in the winding up.

Norman Craig, for Tomlin.—The condition on which we applied for shares—viz., that all should be allotted—was not fulfilled. There was therefore no contract between us. We had also given notice that we repudiated our shares before the winding up commenced. This was notice that we intended to repudiate, and our appearance on the winding up does not qualify this: *Foulkes* v. *Quartz Hill Consolidated Gold Mining Co.*, 1 Cab. & Ell. 156.

Hon. F. Russell, for the official receiver.—Tomlin has waived his right to repudiate his contract to take shares. After bringing an action to do so, he comes to the court and obtains a hearing as a shareholder; he cannot now shift his ground and say that he is not and never has been a shareholder, and rely on his notice to repudiate: *Metropolitan Coal Consumers' Association (Limited), Ex parte Edwards*, 64 L. T. Rep. 561, 39 W. R. Dig. 44; *Reid* v. *London and Staffordshire Fire Insurance Co.*, 32 W. R. 94, 53 L. J. Ch. 351.

Norman Craig, in reply.—*Reid* v. *London and Staffordshire Fire Insurance Co.* is distinguishable, for Tomlin never withdrew his notice. *Ex parte Edwards* is in my favour.

WRIGHT, J.—The case has been concisely and ably argued, and I think that no point has been overlooked. The applicant in July, 1896, applied for shares, altering the printed form of application by inserting a proviso which must, I think, be taken to be general in effect and to affect the whole of the previous words. It was, therefore, a conditional application for shares. Next day, when they went to allotment, the whole of the shares were not allotted. The shares applied for by the applicant were allotted to him, but no notice of allotment was given to him, and he has never paid the company anything in respect of the shares. He discovered that there was something wrong with the company, but whether he knew that the total amount of shares was not allotted or based his objection on another ground is not apparent. In August, 1896, he served notice of motion under section 35 of the Companies Act, 1862, for rectification of the register on the ground that he had applied for the shares on the faith of misrepresentations in the company's prospectus, and not on the ground of non-performance of the condition on which he applied. The motion by consent stood over to abide the result of some test cases, and in due course the test motions would have come on. But the motions

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

were cut short by the presentation of a petition to wind up the company. The applicant cannot, therefore, be said to have been in default prior to the hearing of the winding-up petition. But he gave notice of his intention to appear as a contributory at that hearing and oppose the petition. There was, however, nothing in that amounting to a deliberate election to be a shareholder if he was not already one, or to alter the applicant's position. He also appeared at the hearing and opposed, and was a party to the appeal from the decision, but he never voted at any meeting of shareholders. There was no completed contract at first between the applicant and the company—that is, prior to notice (if any) of the fact of allotment being communicated to him in some way—because the application was subject to a condition which was never complied with, and there is no evidence apart from his appearance in court of any waiver of that condition. On the motion before North, J., he adopted the position of a shareholder with a voidable contract. I must therefore hold that the applicant did not intend to render himself liable for the shares; throughout he was endeavouring to obtain relief from liability. When he gave his notice of motion he probably did not know that he could escape on the ground of non-compliance with the condition. When he found that he had a stronger case he took up the position that he was not a shareholder at all. In my judgment he has done nothing to estop himself from denying that he was a shareholder; indeed, I do not see what else he could have done, and in my judgment he is entitled to have his name taken off the list of contributories. It is unfortunate that the decision of the Court of Appeal in *Foulkes* v. *Quartz Hill Co.* was not fully reported, as it is a very important one; but I doubt whether the court meant to lay down the rule so absolutely as is stated in the note to the report. I do not think that note goes so far as the note in Mr. Palmer's book.

Solicitors for the applicant, *Beall & Co.*

Solicitors for the official receiver, *Russell & Co.*

Q. B. Div.
(Wright and Kennedy, JJ.) } Nov. 1, 11, 23, 26.

In re AN ARBITRATION BETWEEN THE LONDON COUNTY COUNCIL AND THE CITY OF LONDON BREWERY CO. (*a.*)

Local government—London County Council—New street — Improvement charges — "Initial valuation" — Licensed premises—Evidence of takings and payments —Value of the tying covenant—"Trade interest"— London County Council (Tower Bridge Southern Approach) Act, 1895 (58 *&* 59 *Vict. c. cxxx.*).

In estimating the "initial value" of licensed premises under the London County Council (Tower Bridge Southern Approach) Act, 1895, *the arbitrator must not take into consideration the takings and payments, nor any tying covenant, as elements of the value of the site, nor must he take into consideration the takings and payments as evidence of value of the site and buildings, and such evidence should not be admitted even for the purpose of testing the evidence of witnesses.*

In the case of a tying covenant in a lease whereof less than twenty-one years are unexpired, the value of the site and buildings must be treated as the same whether the covenant is considered or not, though the benefit of it may be differently apportioned between the lessor and lessee.

In estimating the value of the owner's estate and interest in the site and building, the tying covenant should be taken into consideration, as it is not a trade interest within section 36.

This was a special case stated by an arbitrator appointed by the Local Government Board on a question arising under the clause dealing with "improvement charges," commonly known as the "betterment" clause, in the London County Council (Tower Bridge Southern Approach) Act, 1895. By that Act the London County Council was authorized to make a new street on the south side of the River Thames as an approach to the Tower Bridge, and for that purpose to take certain lands compulsorily. The arbitrator was appointed to make an "initial valuation" under that Act in respect of two licensed premises, one a tied house known as the "Old Rose," and the other the "Raven and Sun," which was not a tied house. The City of London Brewery Co. were the freeholders of the premises, both of which were situated within the "improvement area." The "Old Rose" was subject to a lease, of which less than twenty-one years was unexpired, granted by the company to one W. Clements, which lease reserved, besides an annual rental, the right to the exclusive supply by the company of the malt liquors consumed in the house. In the case of the "Raven and Sun" the premises were under a lease for an unexpired term exceeding twenty-one years without any tying covenant.

When the arbitrator was making the initial valuation the question was raised whether he was to take into consideration the takings and payments, and also whether, as regards the "Rose" inn, and in view of the words "excluding from each such valuation any trade interest" contained in section 36 of the Act, the value of the covenant tying the premises was to be taken into account. By an order made by Pollock, B., upon an originating summons of the 7th of July, 1896, the arbitrator was ordered to make his valuation in the form of a special case for the opinion of the Queen's Bench Division. On the 1st of November, 1897, the court considered the award and it was ordered that it be remitted for amendment. The questions then left by the arbitrator for the opinion of the court were as follow:

As regards the "Old Rose."

1. Whether, according to the true construction of the said Act, evidence of the takings and payments of the said public-houses was admissible.

2. Whether (the "Old Rose" being let on a lease whereof 19 years are unexpired at a rental of £100 per annum, subject to the ordinary covenant tying the purchase of malt liquors to the lessors), in arriving at the value of the lessors' interest, the value of such covenant is to be excluded.

With respect to the "Raven and Sun."

1. Whether, according to the true construction of the said Act, evidence of the takings and payments of the said public-house was admissible.

2. Whether, in arriving at the value of the lessee's interest, all value due to the capacity to tie must be excluded.

As regards both houses the arbitrator then found certain alternative values.

The court having on the 23rd of November again remitted the award to the arbitrator and directed him to state certain particulars and find certain further alternative values, he further awarded and declared as follows:

As to the "Old Rose."

Question 1.—The value of the land without buildings and without regard to takings or payments, but having regard to the fact that the land has a licence attached to it, is £3,400.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Question 2.—The value of the land and buildings without regard to the takings or payments, and treating the premises as if in the possession of an owner who is free to tie or not to tie, but having regard to the fact that the premises have a licence attached to them, is £8,620.

Question 3.—The value of the owner's estate and interest in the land and buildings without regard to to the takings or payments, but subject to the existing tenancies—viz., a lease whereof nineteen years are unexpired at a rental of £100 per annum, containing the ordinary covenant tying the purchasers of malt liquors to the lessors—*i.e.*, the same as in No. 2, is £6,620.

As to the "Raven and Sun."

These premises belong to James Vipan Vipan, as freeholder, subject to a lease to Reid's Brewery Co. (Limited) for a term of ninety years from the 29th of September, 1895, at an agreed apportioned rental of £90 per annum, without any covenant tying any trade, the value of the freeholder's interest was mutually agreed by the claimant's valuers and the London County Council at £2,500.

Question 1.—The value of the land without buildings and without regard to takings or payments, but having regard to the fact that the land has a licence attached to it, is £2,995.

Of this sum the value of the freeholder's interest is £2,500, and the value of Reid's interest is £495. These sums take into account the fact that Reid's premises are free and the rent which they pay.

Question 2.—The value of the land and buildings without regard to the takings or payments, and treating the premises as if in the possession of an owner who is free to tie or not to tie, but having regard to the fact that the premises have a licence attached to them, is £8,931. Of this sum, the value of the freeholder's interest is £2,500, and the value of Reid's interest is £6,431.

Question 3.—The value of the owner's estate and interest in the land and buildings and without regard to the takings or payments, but subject to the effect of the tenancy of the occupier, who, I now understand, is the brewer's manager and not a yearly tenant, such tenancy being, in my opinion, of no effect—*i.e.*, the same as in No. 2, is £8,931. Of this sum the value of the freeholder's interest is £2,500, and the value of Reid's interest is £6,431.

By the London County Council (Tower Bridge Southern Approach) Act, 1895 (58 & 59 Vict. c. cxxx.), it is provided as follows:

Section 36, sub-section 2: "All lands within the improvement area, but which shall not be purchased and taken by the council under the powers of this Act, shall be liable to have an improvement charge placed on such lands . . . in respect or in consideration of any substantial and permanent increase in value which it is clearly shown has been derived from the improvement by this Act authorized."

By sub-section 1 "lands" is defined as extending to "messuages, lands, tenements, and hereditaments."

Sub-section 3 provides that the council shall make a specification of all the lands upon which they propose to place a charge, and shall give notice to each owner, lessee, or occupier of any such lands within the improvement area, and thereupon any such owner, lessee, or occupier may apply to the Local Government Board to appoint some independent person to make a valuation of such lands, which valuation is to be called the "initial valuation."

The sub-section then goes on to provide as follows: "In making such valuation the valuer shall separately distinguish and assess in each case the value of the land apart from that of any existing buildings thereon, and shall also value the land and buildings as a whole, and shall not take into consideration any increased value accruing or supposed to accrue to such land or buildings from or in consequence of the improvement, but shall only take into consideration the value independently of the improvement and as if the improvement had not been contemplated."

"The valuer shall also separately value the interest of the owner of any such lands and the interest of every lessee of any such lands for a term having not less than twenty-one years unexpired at the date of the valuation (excluding from each such valuation any trade or interest), and shall not take into consideration any increased value accruing or supposed to accrue to such lands from or in consequence of the improvement, but shall only take into consideration the value of the said lands independently of the improvement and as if the improvement had not been contemplated."

Bosanquet, Q.C. (*Cababé* with him), for the brewery company, who appealed.—The value of the covenant tying the house should not be excluded. In the event of the county council purchasing the house under the provisions of the Act it is of importance to the company that the value of that covenant should be included, as it would raise the value of the house. On the other hand, in the event of the company retaining the premises, it was equally desirable that the value of the covenant should be included, as that would raise the amount of the "initial valuation," and in that way the increase in the value on which the improvement charge might be made would be kept down.

Hon. A. Lyttelton appeared for the London County Council.—The covenant ought not to be included. It does not increase the market value of the house. In actions brought for compensation under the Lands Clauses Acts such a covenant is always treated as a trade interest. Further, the valuation ought to be made without regard to the takings and payments. The Legislature never intended that it should be necessary to deal with the question of the trade profits in each individual case. If that were so the expense of the whole inquiry, the total cost of which has to be borne by the London County Council, would be enormous. The basis of assessment in all rating cases is the market value of the income.

Counsel cited the following cases: *Dodds* v. *Assessment Committee of the Poor Law Union of South Shields*, 43 W. R. 532, [1895] 2 Q. B. 133; *Alison* v. *The Churchwardens, &c., of Monkwearmouth*, 23 L. J. M. C. 177; *Sunderland Overseers* v. *Sunderland Union*, 13 W. R. 943, 34 L. J. M. C. 121.

Cur. adv. vult.

Nov. 26.—WRIGHT, J.—The arbitrator here has furnished us with an amendment to his award to which there is only one objection; it is this, he has not expressly stated that he has left out the trade interests. However, we assume that that is so. [Counsel assented to this, and the learned judge then read the following judgment:] The matter stands in this way. By an Act which was passed in 1895, called the London County Council (Tower Bridge Southern Approach) Act (58 & 59 Vict. c. cxxx.), the London County Council were empowered to make certain street improvements. Section 36 of the Act recites this: "And whereas the improvement will be effected out of public funds charged over the whole county, and will or may substantially and permanently increase in value lands in the neighbourhood of the improvement which will not be acquired for the purpose thereof, and it is reasonable that provision should be made under which, in respect or in

consideration of such increased value, a charge should be placed on such lands." Then it proceeds to make a provision for the ascertainment of the area which will receive permanent benefit from the improvement, what is popularly called "betterment" purposes, and for the estimation of the increase of value which will accrue to each separate property in that area, and for the assessment on the several properties of an annual charge representing such increase of value. The provisions for these purposes comprise four distinct operations. The council, by sub-section 3, are to make a specification of the properties which, in their judgment, will be so increased in value. Then, by the same sub-section, a valuer appointed by the Local Government Board is to make what is called an "initial valuation" of each property, after hearing interested parties. Then, by sub-section 4, the council are to make an assessment showing, in the case of each property, the amount of enhancement of its market value which, in the judgment of the council, will accrue from the improvement and the amount of redeemable annual charge which is to be imposed in respect thereof, being about one and a-half per cent. on the estimated enhancement. Lastly, an arbitrator appointed by the Local Government Board is to determine any objections to any of the above-mentioned matters, and also the incidence of the charge as between the parties having various interests in any property. Among the provisions relating to the assessment of enhancements of value is one, sub-section 9, providing that the owner of any property assessed may alone, or in concurrence with termors for twenty-one years unexpired, if dissatisfied with the assessment, require the council to purchase his estate and interests in the property at the value specified in the "initial valuation," and therefore the council must either purchase as required or abandon the proposed charge on that property.

The questions for decision in the present case arise in relation, not to the specification or to the assessment by the council, or to the final arbitration, but solely to the "initial valuation" of the properties. In making that valuation the valuer is firstly to distinguish the assessment of value of the site apart from that of any existing buildings thereon. He is, secondly, to value the site and buildings as a whole, without reference to the intended improvements. He is, thirdly, to separately "value" the interest of the owner of the site and buildings, and "the interest" of any lessee thereof for twenty-one years unexpired, excluding from each such valuation any trade interest, which expression we understand to refer to goodwill, expectation of profit, and any other similar matters, and to estimates based on takings and payments, and in doing so he "shall only take into consideration the value of the said site and buildings without reference to the intended improvement."

In the present case—that is, the "Old Rose" public-house—the premises are used as a public-house. There is not a lease for twenty-one years, but there is a shorter lease with the common tying covenant. In valuing the site apart from the buildings on it the valuer has, with the assent of the county council, taken into consideration the fact that the premises are licensed as a public-house, and no question arises on that point, though it would seem that this fact, if admitted at all, as an element of value in the first or second parts of the valuation, should be considered as an element of the value of the site and buildings, rather than of the site alone. On that basis he has made alternative valuations of the site dependent on the two questions whether the takings and payments of the public-house, and the fact that it is "tied" are elements of the value of the site or of the site and buildings. It seems to us plain that neither of these can be considered in valuing the site "apart from any existing buildings thereon."

In the next part of the valuation—namely, that of the site and buildings "as a whole," the same two questions arise. As regards the takings and payments we think that these cannot be treated as elements of value of the land and buildings, that is as in themselves evidence of value, and that evidence of them should not be admitted even for the purpose of testing the evidence of witnesses. In the case of *Dodds* v. *The Assessment Committee of South Shields*, 43 W. R. 532, [1895] 2 Q. B. 133, it was so held with reference to questions of rating, and we think that the principle of that decision, although partly based on practice, is applicable to the present case. The admission of such evidence must tend to induce a consideration of trade value instead of the market value of the land and buildings. As regards the "tying" covenant we think that the valuation of the site and buildings must in effect be the same as if that covenant were considered. The real question is, as it seems to us, what is the market value of the premises fit for a public-house considered apart from any particular distribution of the interest in it—that is to say, considered as an unqualified freehold. If, indeed, the owner held subject to a covenant not to use the premises as a public-house a different question would arise. But as things are, the property must be valued as that of a person who is in all respects a beneficial owner. The fact that the house is "tied" has not increased its value, but only amounts to this, that the owner has not parted with that part of its value which consists of the power to tie. The value of the premises is presumably the same either way.

If the owner chooses to tie, he may get less rent, but more benefit in other ways. If he does not tie, he may get more rent, but less of other benefits. The enhancement of the value of the premises which will result from the improvement will be the same, whether the premises are tied or not, though the benefit of it may be differently apportioned between lessor and lessee, and the charge is intended to be proportioned to the total enhancement of value.

The third part of the valuation appears to be introduced for the purpose of sub-section 9, and although it seems, *primâ facie*, to be required only where there is a lessee for at least twenty-one years, yet, in order to give full effect to sub-section 9, it seems necessary to construe the provision for this third part of the valuation as requiring in every case a valuation of the owner's interests. The only alternative would be to treat the owner as interested to the extent of the whole valuation. This would not work any injustice apart from sub-section 9, because the incidence of the charge will be apportioned by the arbitrator under sub-section 17; but it would work grave injustice under sub-section 9, because the council would be compelled either to pay for much more than what the owner's real interest might be, or to abandon the charge altogether.

Then it only remains to determine whether, in the present case, the fact that the house is tied ought to be considered in this third part of the valuation. We think that it ought, in the same manner as in the valuation of the site and buildings, though not for the same reasons. This part of the valuation is a valuation, not of the site and buildings, but of the owner's interest in them, and anything not being "a trade interest" ought to be considered which affects the *quantum* of that interest. It is not so much that the covenant is to be valued as that the owner's interest has not been diminished by the alienation of the power to tie. If he had leased the house without

tying it his interest would have been less unless he got a compensating rent.

The effect of the whole, as we understand the matter, will be that if the owner requires the council, under sub-section 9, to take his interest, and they do not abandon the charge upon his property, they will have to pay him the value of his actual interests in the premises, and the charge will continue and be apportioned between the council and the lessees, just as if the council had always been the owner, and as if the existing leases had been held from them.

We have so far dealt with the case of the premises described as the "Old Rose." In the case of the the "Raven and Sun" similar questions arise, with this exception, that the premises are under a lease for an unexpired term exceeding twenty-one years without any tying covenant. This circumstance will not, in our opinion, of itself affect the first or second parts of the valuation, though it may or may not be material to be considered as tending to show that the rent is or is not a fair criterion of value. But it may be material in the third part of the valuation. If the owner gets a rent different from the rent which he could get if the house were tied, and if that difference fairly represents the value to the lessee of his freedom from such a covenant, then the existence or non-existence of such a covenant would seem to be immaterial. Otherwise the value of the interest of one or the other party would be increased or diminished, as the case may be.

The valuation will therefore stand as a valuation according to the last tables in each case.

Solicitors for the brewery company, *Western & Sons.*

Solicitor for the London County Council, *W. A. Blazland.*

Prob. Div. & Adm. Div. Admiralty. } Aug. 3.

"THE THRUNSCOE." (a.)

Appeal from county court having admiralty jurisdiction —Breach of contract—Bill of lading—Damage to cargo by heat—Exemption—"Any other accidents of the seas"—Closing of ventilators during bad weather.

The owners of a steamship on board of which cargo is shipped under a bill of lading containing the following exemption: "Fire at sea, accidents from machinery, boilers, steam, or any other accidents of the seas," are not, if the steamship be seaworthy and the cargo properly stowed, liable for damage to the cargo caused during the voyage by heat proceeding from the bulkheads surrounding the engine and boiler space at a time when the ventilators provided for sufficiently ventilating such space had necessarily to be closed for the safety of the steamship.

This was an appeal from the Admiralty side of the county court of Gloucestershire, holden at Bristol.

By the decree appealed from the judge of the court below (His Honour Judge Austin) had pronounced judgment for the defendants with costs in an action of damage to cargo or breach of agreement under the County Courts Admiralty Jurisdiction Act, 1869. The action was instituted on behalf of Messrs. Spillers & Bakers (Limited), the owners of a cargo of grain laden on board the steamship *Thrunscoe*, against Messrs. Bennett & Co., the owners of *The Thrunscoe*, to recover the sum of £61 9s. 6d. in respect of damage caused to a cargo of oats and maize shipped on board *The Thrunscoe* on a voyage from Baltimore to Avonmouth Dock, and consigned to the plaintiffs.

The judgment of the court below, as transmitted to the registrar of this court, was as follows:

His Honour Judge Austin.—In this case the short point which I have to consider is whether or not the damage to the maize and oats which is sought to be recovered in this action is damage referable to what are commonly called perils of the sea, or whether or not it is referable to either unseaworthiness of the ship or defect in stowage.

Now, the story is a very short one; and, indeed, with regard to most of the facts there is hardly any controversy at all. *The Thrunscoe* sailed from Baltimore, being a new ship, and encountered an exceptionally heavy storm, which lasted for about seven days, during which time the ventilators had all to be closed. She had on board a cargo of maize and oats, and when she arrived at Avonmouth it was found that the cargo in No. 2 lower hold had been very seriously damaged in the way I will describe presently. The cargo in No. 3 hold had been slightly damaged; the cargo in No. 2 'tween decks slightly damaged; and, again, there was a certain amount of damage in the 'thwartships bunker. I have no doubt that the damage which the plaintiffs seek to recover here is damage which is the result of what has been called roasting or baking, as distinguished from ordinary heating of a cargo where that cargo has either got wetted by salt water, or has been shipped in a damp state and has fermented. It is damage by roasting and baking which has proceeded from heat generated in the engine space. Mr. Bailhache says, conceding that, he is entitled to a verdict. In my opinion he is not. He says he is entitled to a verdict for two reasons. He says he has Mr. Kilburn in this dilemma; either the ship was not reasonably fit for the voyage across the Atlantic, or, if she was reasonably fit, there was negligence in the stowage. If he had brought substantive evidence to show that this method of construction, which existed in the case of *The Thrunscoe*, which is admittedly the most modern, was improper in any way or lacking in anything which a careful shipbuilder would put into a ship, or if he had shown that precious cargoes could not be carried in *The Thrunscoe* under ordinary circumstances without injury in the way of baking, I should be inclined to be with him on the ground of seaworthiness. I entirely agree that the shipowner must provide a ship reasonably fit for the carriage of the goods for the particular voyage. In my opinion the evidence goes to show that the shipowner did perform that obligation in this particular case. In my opinion there was no default in stowage—no negligence by way of improper stowage. Mr. Bailhache hardly pressed that when he was cross-examining or examining the witnesses, and he put it upon me in argument as being one of the horns of the dilemma which one has to face in this case. In my opinion there was no evidence which I could seriously consider of improper stowage here. In my opinion that which happened was the result of the heat generated in the engine space being detained, so to speak, and kept down below by the closing of the ventilators for a period, which no reasonable man could be expected to contemplate even in January crossing the Atlantic.

It appears from the evidence that the ventilators were closed for a period of seven days, during which time heat generated in the engine space which ordinarily would have got through the many ventilators which were present. Mr. Bailhache hardly cross-examined as to the number of ventilators. It was asserted, and scarcely denied, that there were many ventilators and efficient ones if they were able to be

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

opened. For seven days they were all stopped up. The heat went on increasing and getting worse and worse in No. 2 lower hold, where the main damage took place, and never had a chance, so to speak, of getting away from the grain. In my opinion, that was the direct cause of the injury—the direct cause of this again being the closing of the ventilators, which was the direct result of perils of the sea through which the ship was going. Those on board the ship were bound to do something to prevent the ventilators being a source of danger to the ship. They were bound to close them and keep them closed for an inordinate time in consequence of the inordinate and extraordinary perils of the seas. For this reason I have come to the conclusion that, so far as No. 2 lower hold is concerned, the shipowner is not liable. I feel a certain amount of difficulty in deciding as to his liability or non-liability with regard to the other damaged portions of the cargo. It is true that in the upper portions of the cargo there which were contained in the 'tween decks and thwartship bunker there was a certain amount of baking which extended for a very short space from the bulkhead. Below in No. 2 hold the baking went a very long way; there was more difficulty of ventilation down below than there was up above according to the evidence. It seems to me that it is more reasonable to attribute the baking in the upper portions of the cargo—that is to say, in the 'tween decks and the 'thwartship bunker—to the want of ventilation, which was, as I have said, the result of a peril of the sea, than to attribute it to unseaworthiness or bad stowage. In the result, though there has been a payment into court, I find the defendants are not liable for any portion of the damages at all, and there must be a verdict for the defendants with costs, and an order will be made for the payment out to the defendants of the moneys paid into court. I give leave to appeal if leave is necessary.

The appeal was heard by a Divisional Court of the Admiralty.

T. G. Carver and *Bailhache*, for the appellant.

Sir Walter Phillimore and *Kilburn*, for the respondents.

The Freedom, L. R. 3 P. C. 594; *The Xantho*, 36 W. R. 353, 12 App. Cas. 503; and *Hamilton, Fraser, & Co.* v. *Pandorf*, 36 W. R. 369, 12 App. Cas. 518, were referred to.

JEUNE, P.—The findings of fact of the learned county court judge are conclusive in this case. He found that the damage in question was caused by heat surrounding the engine and boiler space, that the ship was fit to carry the cargo on this voyage, and that the damage was not the result of improper stowage, but was the result of the closing of the ventilators during the period of seven days in a storm of exceptional severity and duration; that the ship was provided with sufficient ventilators to carry off the heat from the bulkheads, but all the ventilators were necessarily closed during the storm for the safety of the step. It appears, therefore, that the learned judge has found, and I see no reason to doubt the correctness of the finding, that the ship was seaworthy, that the stowage was proper; and, thirdly, that it was the exceptional character of the storm which caused the ventilators to be closed. With regard to the principal damage—that is, to the cargo in No. 2 hold, it was quite clear that the air which should circulate between the wooden sheathing and the bulkhead and so prevent the heat of the engines reaching the cargo was stopped by reason of the ventilators being closed, and that that was due to the necessity imposed by the severity of the storm. Under these circumstances, dealing with that part of the cargo alone, it appears to me the severity of the weather was a proximate cause of that damage because the close of the ventilators was due to that cause. Then it is said, and that is the only part of the case which does not appear to me to be quite clear upon the finding of the learned judge of the court below—that, in two other parts of the ship—namely, in the 'thwartship bunker and No. 3 hold, there was direct contact of the grain with the bulkhead, and the bulkhead being heated produced the damage; but the true effect of this finding appears to be that these two causes of the damage in these two cases was the same as the cause in the case of the cargo in No. 2 hold, and that the comparative little damage that was done in those two case would not have occurred if the ventilation of the ship could have been kept in its normal condition. In that finding I concur. For these reasons I think the judgment of the learned county court judge is right.

BARNES, J.—It has not been clear to me during the arguments whether this was an appeal upon fact or upon law, but assuming it to be an appeal upon both grounds, the first question is whether the findings of the learned county court judge upon the facts are wrong.

Now, these findings are set out in the record and the learned President has read them. After looking into the evidence it appears to me that there is no ground for holding that the decision of the learned county court judge upon the facts is erroneous. I think that that finding is in accordance with the weight of the evidence, and it results from the finding that the ship was a ship fit to carry the cargo in question and that there was no improper stowage. Counsel for the appellants have, however, contended that, assuming the findings of fact to be correct, the damage which occurred in the case is not, as a matter of law, within the exceptions in the bill of lading. The exceptions in the bill of lading include "fire at sea or on shore, accidents from machinery, boilers, steam, or any other accidents of the seas." It is to be borne in mind that the contract is for the carriage of goods in a steamship and that the exceptions relate to a contract of carriage of goods on a steamship.

The judge of the court below has found, after stating that the ship was fit to carry the cargo and that the cargo was properly stowed, that the damage was caused by heat proceeding from the bulkheads surrounding the engine and boiler space, and that this damage was the result of closing the ventilators during a period of seven days in a storm of exceptional severity and duration. He has found that the ship was provided with sufficient ventilators to carry off the heat but that they were necessarily closed for the safety of the ship. The ship being a fit ship to carry the cargo and the cargo being properly stowed, it is difficult to see what more the shipowner could do. The findings of the county court judge mean that in the circumstances the vessel met with such extraordinary weather that the servants of the shipowner were compelled to close the ventilators for a period which nobody could reasonably contemplate, and that that practically prevented the heat which is generated in the usual course of the voyage of a steamship from getting away, and that therefore the severity of the weather was the direct cause of the damage which occurred. In my judgment when once the meaning of this finding is realized it becomes clear that this damage was the direct result of the accidents of the seas. I therefore agree that this appeal must be dismissed.

Solicitors for the appellants, *Ince, Colt, & Ince.*

Solicitors for respondents, *Holman, Bindwood, & Co.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 9, 10, 11; Dec. 9.

In re STEVENS.
COOKE *v.* STEVENS. (*a.*)

Executor—Acting before probate—Delay in proving will—Recovering outstanding assets—Wilful default.

A testator died in 1882, *and his will was proved in* 1889. *A policy of insurance on the testator's life could not be got in until probate was obtained, and meanwhile interest at the rate of five per cent. per annum was paid upon a debt of the testator.*

Held (*affirming* North, J., 45 *W. R.* 284, [1897] 1 *Ch.* 422), *that the delay in proving the will and getting in the money due upon the policy did not amount to wilful default, and that, consequently, the ordinary accounts against the executors ought only to be taken.*

Appeal of the plaintiff from the decision of North, J. (reported 45 W. R. 284, [1897] 1 Ch. 422).

Gardner Christopher Stevens made his will on the 12th of February, 1880, and appointed Charles Frederick Stevens, Matthew Sallitt Emerson, and John Sewell executors.

The testator died on the 23rd of December, 1882, and the will was proved by C. F. Stevens alone on the 15th of October, 1889. The testator was entitled to a policy of £676 in the Scottish Widows' Assurance Office, which became payable on the 21st of March, 1883. This sum was paid on the 18th of November, 1889, with £45 1s. 4d. interest at the rate of 1 per cent. from the 21st of March, 1883, to the 21st of November, 1889.

The policy was mortgaged to the testator's bankers, Messrs. Gurney, as security, and was in their possession at the time of his death. Meanwhile interest at the rate of 5 per cent. was paid upon the mortgage debt due by the testator, and the difference in interest thus paid and received was £157 14s. 8d.

Emerson was a solicitor, and denied that he had acted as an executor; but he had acted as solicitor for Stevens, who subsequently proved the will, with regard to certain actions against the estate of the testator. There was no appeal on this point, North, J., having found that Emerson had acted as an executor.

All the three executors named in the will wrote a letter to the Scottish Widows' Assurance Society on the 28th of July, 1883, requesting that the policy-moneys might be paid to Messrs. Gurney, being creditors of the testator, but the society declined to make the payment until probate was taken out.

The action was brought by one of the residuary legatees, asking for an administration decree against Stevens and Emerson upon the footing of wilful default.

North, J., directed the ordinary accounts to be taken against both the defendant executors, but declined to make any order upon the footing of wilful default.

The residuary legatee appealed.

Butcher, Q.C., and *Methold*, for the appellant.—The delay on the part of the executors to take out probate for seven years and get in outstanding assets of the testator's estate clearly amounted to wilful default: *Re Brogden, Billing* v. *Brogden*, 37 W. R. 84, 38 Ch. D. 546. The same principle applies to executors as to trustees, in getting in the trust estate. See also *Seaman* v. *Everad*, 2 Lev. 39; *Hall* v. *Hallett*, 1 Cox 134. Even though no capital is lost, they are liable for the loss of interest resulting to the estate through their default.

Swinfen, Eady, Q.C., and *Christopher James*, for the respondents, used the same arguments as in the court below.

Butcher, Q.C., in reply, referred to *Freake* v. *Cranefeldt*, 3 My. & Cr. 499; *Burdick* v. *Garrick*, 18 W. R. 387, L. R. 5 Ch. App. 233; *Rowsell* v. *Morris*, 22 W. R. 67, L. R. 17 Eq. 20.

Cur. adv. vult.

Dec. 9.—LINDLEY, M.R.—In this case a residuary legatee has brought an action against his testator's executors seeking not only the ordinary accounts of their receipts and payments, but also an account against them on the footing of wilful default. So far as the plaintiff seeks to charge them with wilful default the action has been dismissed with costs, and from this decision the plaintiff has appealed. The testator's assets got in by the executors are said not to be sufficient to pay his debts. Hence the importance of the case to the plaintiff. Two acts of wilful default are relied upon and have to be considered. The first is that the executors omitted to get in a debt alleged to have been due to the testator at his death from a person named Clarke. The facts as to this are complicated, and the pleadings are somewhat embarrassing. But having regard to the mode in which this part of the case was dealt with in the court below, it would be unjust to the defendants to treat the pleadings as admitting that there was such a debt, and so far as evidence goes, no such debt was proved either before North, J., or before us.

The next act of wilful default charged, was the omission on the part of the executors to enable a secured creditor of the testator to realize his security sooner than he did. The consequence of this omission was that the testator's estate had been diminished by the amount of interest which would have been saved if the security had been realized sooner. The security was a policy for £676 on the testator's life; he had deposited it with other documents of value with his bankers, and at his death there was due to them on those securities £1,700 odd. The policy was pledged for much more than it was worth. If the executors had in their hands assets sufficient to pay the debts of the deceased, including the debt due to the bankers, the executors ought to have paid the bankers off; and if, instead of doing this, they kept assets in their hands and allowed interest to run up against the estate, and ultimately had to pay more than they would have had to pay if they had not delayed paying the bankers the amount due to them, the executors would have been guilty of a *devastavit*, and would be disallowed the interest thus unnecessarily paid by them. The policy was not assigned to the bankers, and they could not give a valid receipt for the policy moneys without the concurrence of the executors. Moreover, the insurance office which had to pay the policy would not pay the bankers, even with the concurrence of the executors, until the testator's will had been proved. For some reason or other the executors did not wish to prove it, and although eventually one of them did prove the will, the other has not proved it yet. As soon as the will was proved the bankers, or, rather, a person to whom they had assigned their debt and their policy, obtained the policy-moneys, with the assistance of the executor who had proved, and the debt was reduced by the amount received from the insurance office. It must not be overlooked that, although the executors' accounts have not yet been certified, they have been fully investigated, and

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

there is no proof even now that the executors did wrong in not paying off the bankers and so reducing the policy and getting in the asset which it represented. In the absence, however, of such evidence I am unable to see how a case of wilful default can be established. If debts are paid in the wrong order to the detriment of the creditor the executor is of course answerable. The payment would be disallowed in taking the account of the receipts and payments. But the payment of debts even in a wrong order is not a wrong entitling a legatee to relief, nor does such payment amount to wilful default; and it is wilful default which we have to consider here.

It is urged that it is the duty of an executor to prevent any loss to his testator's estate which it is in his power to prevent. But this proposition is far too wide, as is shown *inter alia* by *Turner* v. *Turner*, 1 Jac. & W. 39, in which it was held that an executor's right of paying one creditor before another justified him as against a legatee in paying even a simple contract debt not bearing interest in preference to a specialty debt bearing interest, although the estate was diminished by the additional interest which had ultimately to be borne. A wrongful payment is one thing, and can be set right by disallowing it when the executor brings in his account. But if it is sought to charge him with loss attributable to some other breach of duty, call it wilful default or by any other name, such breach of duty must be proved, and if no sufficient proof or even *primâ facie* evidence of it is given, it is not right to insert in the judgment any declaration of liability, or even an inquiry as to liability based upon such supposed breach of duty. In the present case no evidence of any such breach of duty has been given, and the attempt to charge the executors with more than they have received has failed. Whether any payment, by which the executors seek to discharge themselves, ought or ought not to be disallowed must be decided hereafter. That question is not before us now. This appeal fails, and must be dismissed with costs.

I have preferred to base my judgment on the above ground rather than to investigate the question whether executors who delay proving their testator's will can be rendered liable for losses which they could have avoided if they had proved it earlier. In the present case the will has been proved by one of the defendants, and the court, therefore, has the probate before it. The probate shows that both defendants are appointed executors by the will, and it is proved that both of them have accepted the office of executor by acting in the administration of the testator's estate. Under these circumstances I fail to see upon what principle they can derive any benefit from delaying to obtain probate. It appears to me that, having accepted office, they ought to be treated as executors as from that time, and not simply as executors *de son tort*, as their counsel contended. It is unnecessary, however, to pursue this inquiry.

CHITTY, L.J.—North, J., has dismissed the action so far as it claims relief on the footing of wilful default, and has made against both the defendants Stevens and Emerson as executors, the common decree under which they have to account for assets received. The will was not proved until 1889, nearly seven years after the testator's death, when probate was obtained by Stevens alone. The probate shows that Emerson also was appointed executor. North, J., has held that Emerson accepted the office by intermeddling with the assets in 1883. There is no appeal from this part of the judgment.

The statement of claim raised several cases of *devastavit* or of wilful default against the executors; but the appeal is confined to two.

The first is the case of Clarke, an alleged debtor, which may be disposed of in a few words. The plaintiff, who is one of several residuary legatees, failed to prove that there was any debt owing by Clarke. Proof of the debt is the foundation of a wilful default decree. When the debt is proved the burden is thrown on the executor to show why he did not get it in (*Styles* v. *Guy*, 1 Mac. & G. 422, and *In re Brogden, Billing* v. *Brogden*). I am satisfied by the judge's notes and the statements of counsel that, although the £4,000 promissory notes given by Clarke to the testator were mentioned, the only substantial contest before North, J., was confined to the £395. The evidence put in consisting of the agreement and the valuation coupled with the admission that notes for £4,000 only were taken and the fact that Clarke was in court, and could have been called by the plaintiff, all went to show that the £395 was not owing at the testator's death. The inference was that that sum had been paid or satisfied in the testator's lifetime.

The other case relates to the policy for £676 which became payable in March, 1883. This policy was mortgaged by the testator with other securities for an amount far exceeding the sum recoverable under the policy. The mortgage, which was held by the testator's bankers, was effected by a deposit of the policy and a memorandum. As there was no assignment of the policy within the Policies of Insurance Act, 1867, the bankers could not sue the insurance office. The right of action at law remained vested in the executors. But inasmuch as the policy was equitably mortgaged for an amount in excess of its value, the executors, assuming they had proved the will, could not have sued for or recovered the policy moneys or any part of them; they were not entitled to receive the moneys without the consent of the mortgagees, and there is no evidence or even suggestion that the mortgagees would have consented to the receipt of the moneys by the executors. The only proceedings which they could have taken against the bankers or their assignee Mann was an action to redeem, in which they might have joined the insurance office as defendants. The result appears to be this: the executors could not be charged under what is termed a wilful default decree, Under such a decree the executors are charged with what they have received or might have received but for their wilful default or neglect.

But the case does not rest here. If on the facts proved a case of *devastavit* by negligence is established other than what is technically termed wilful default, the court ought to make the proper declaration against the executors. The loss alleged is the difference between the interest allowed by the insurance office and the interest which the mortgage debt carried, a difference of 4 per cent. The charge made by the plaintiff's pleading is not merely for wilful default, it is also for a *devastavit*. I pause for a moment to say that on taking the common form account of their receipts, executors can properly be, and are often, charged with a *devastavit* arising on the accounts themselves. On taking the account they stand charged with their receipts; and if they seek to discharge themselves by unlawful payments their discharge is disallowed. Further, if on taking the accounts it appears that the executors have improperly retained balances in their own hands, they are liable to be charged interest on the balances, although no such charge is raised on the pleadings. For this purpose an additional inquiry is generally directed. The charge of interest, when it is made by the court, rests upon the foundation of a *devastavit*.

Where a charge of the nature now under consideration is made by the pleadings, the general rule is that it ought to be disposed of at the trial (see *Smith* v. *Armitage*, 32 W. R. 88, 24 Ch. D. 727). But the rule is not universal, and there may be, and are, cases where it would be proper to direct an inquiry. The plaintiff's counsel on this appeal ask for a declaration of liability, or, in the alternative, for an inquiry. Now, in this case there is the fact that an order for administration against Stevens alone had been made at the instance of another residuary legatee. The accounts had been taken, and were ready for the chief clerk's certificate; but no certificate had been made. North, J., stayed all further proceedings under that order, with liberty to adopt the proceedings under it in this action. It is plain that the numerous charges in the plaintiff's pleadings in this action are in great measure founded upon a knowledge of the accounts in the former action.

The charge against the executors resolves itself into a charge that they were answerable to the plaintiff and the other residuary legatees for loss arising from their negligence in not paying off sooner than they did the interest-bearing debt secured by the mortgage. This charge does not appear to me to rest upon the question whether it was their duty to have proved the will sooner than they did. I will assume that they cannot set up their delay in proving the will as a defence, and that they stand in the same position as if they had both proved the will in 1883, when by intermeddling they accepted the office. But to make good the proposition that the executors are liable for not paying off the mortgage, or in other words for not redeeming it, it is incumbent on the plaintiff to show that the executors had assets which they were bound to apply in redemption of the mortgage. I say "bound to apply" advisedly, because here there comes in the right of an executor to prefer one creditor to another of the same degree at any time before a decree for administration is made by a court of equity. Some few years ago an attempt was made to interfere with this right by appointing a receiver, but it is now established that a receiver ought not to be appointed merely for the purpose of depriving the executor of his right of preference. It suffices to refer on this point to Stirling, J.'s, decision *In re Wells*, *Moloney* v. *Brooke*, 39 W. R. 139, 45 Ch. D. 569, where the authorities are cited and dealt with. Where an executor has assets in his hands which he ought to apply in payment of an interest-bearing debt he is liable for the loss to the estate occasioned by his unjustifiable neglect and delay in paying the debt (see *Seaman* v. *Dee*, *Administrator of Everad*, 2 Lev. 30). But he is not liable for loss accruing to the estate by reason of his paying, in exercise of his right to prefer, a non-interest-bearing debt before an interest-bearing debt. This is established by *Turner* v. *Turner*, and by *Robinson* v. *Cumming*, 2 Atk. 409, where the executor's claim for fifteen years' interest on his own interest-bearing debt was allowed. The plaintiff has not proved or attempted to prove that the executors had at any time before the actual payment of the mortgage debt assets in hand sufficient for its payment, much less that they had assets which they were bound so to apply. There is not even an allegation to any such effect in the plaintiff's statement of claim.

For these reasons I think that no declaration of the executor's liability ought to be made, and on the facts that no sufficient ground has been shown for granting an inquiry.

It will be observed that I have not rested my judgment on any supposed duty of the executors to obtain probate. It may be that their delay in obtaining probate would not afford any defence to a charge of wilful default or of negligence, for which otherwise they were accountable. My opinion is that it would not. It is plain that the mortgagees being creditors, and any of the residuary legatees, could have cited them to take or refuse probate. It would seem that this is the only remedy against executors for not taking out probate.

VAUGHAN WILLIAMS, L.J.—The first question to be decided in this case is whether Stevens, the executor who has proved, can be made responsible to the estate for the interest which has been retained by the equitable mortgagee of a policy of assurance on the life of the testator, in respect of that period during which the mortgagee was unable to get the policy moneys from the office by reason of the neglect of the executor to obtain probate, and thus put himself in a position to give a proper receipt for the policy moneys. If the executor is responsible it must be either in respect of loss of assets received, or which, but for his wilful default, he might have received, or because he has been guilty of such mismanagement in the administration as to make him liable to make good the loss occasioned thereby. Now as to wilful default, accounts are not taken on this footing unless there has been a loss of assets received or assets which might have been received, and there is some difficulty in saying that the executor either received or might have received these policy moneys. He clearly could, under no circumstances, have ever received the policy moneys except subject to the rights of the mortgagee, and never could have claimed as against the mortgagee to have paid over to him one shilling of the policy moneys until the whole mortgage debt and interest had been paid; and inasmuch as the receipt by the mortgagee of the whole policy moneys would have left a large portion of the mortgage debt unpaid (that is to say, the portion which was only paid many years later, when certain promissory notes payable seven years after date, which formed part of the security moneys, were realized), it follows that there were in respect of these policy moneys no assets which the executor received or might have received but for his wilful default. It is true that he gave a receipt to the office for the policy moneys, but the policy, although legal assets, was subject to the lien of the equitable mortgagee, and he was as much entitled to receive the amount secured to him from the insurance company as if he had had an assignment; and if the executor had refused to concur in the receipt to the office, a court of equity would have ordered payment to the creditor (*Glaholm* v. *Rowntree*, 6 A. & E. 710). This disposes of the case so far as it claims to have the accounts taken on the footing of wilful default.

The next question is whether the executor could be charged on the taking of a common account with the interest which became payable on the unreduced debt during the period of delay in obtaining probate. Now, the only mode in which this could be worked out is by charging the executor with the full amount of the policy moneys as a legal asset received, and allowing him against this, only the principal and interest on so much of the debt as would have remained if the policy moneys had been received at the time when they might have been received if the executor had not delayed to obtain probate, and by disallowing him the interest on that part of the debt which might have been paid off, but was not paid off by reason of the executor's delay in obtaining probate. This is rather like the case of disallowing the executor sums paid for interest accruing in a case where, having assets sufficient to pay a debt carrying onerous interest, he neglects to pay off the debts and subjects the estate to interest for which it would not

have been liable if he had made proper use of the assets. But it is obvious that there is this material difference, that in the one case the executor has the assets in hand and fails to apply them, while in the other he has no assets in hand; and, according to my understanding of the taking of a common account, such an account only relates to assets actually received. It seems, therefore, that in the present case the executor cannot be charged with this interest either on the taking of an account on the footing of wilful default or on the taking of a common account. If this reasoning is correct the only mode in which the executor can be charged is by an action in the nature of an action for damages for negligence in administration.

I shall deal next with that question, but before doing so I wish to observe that if he would be liable in such an action I am not sure that his liability might not be enforced by directing an enquiry in the course of taking the common account without any substantial action for negligence. As to the liability of the executor to an action, it is stated generally in Williams on Executors that an executor is liable as on a *devastavit* not only for loss arising by a direct abuse of the assets by spending or consuming them, but also for waste by such acts of negligence and wrong administration as will disappoint the claimants on the assets; and it would seem from the case of *Hall* v. *Hallett* that this liability may include a loss arising to the estate by reason of the estate having to bear charges which it would not have had to bear but for the culpable negligence of the executor. I may observe here that none of the forms employed at law for charging an executor as on a *devastavit* seem to be so framed as to include a claim for damages for negligent administration, all the forms being framed in terms applicable only to the loss of assets received or which might have been received; but assuming that there is no liability which could be enforced at law he might still be made liable by an action or bill as it used to be called in equity to make good the loss to the estate arising from his negligent administration—as seems to have been done in *Hall* v. *Hallett*. On the whole I think that such an action would lie; but the plaintiff would have to establish both the negligence and the damage resulting to the estate thereby; and I am not satisfied that either the negligence or the damage has been established in the present case. First, as to the negligence, I think no action would lie for neglect to take out probate. No such action appears ever to have been brought, and I think that the plaintiff's only remedy is by citing the executor in the Probate Division. The negligence, whether you regard it as negligence to take out probate, or as negligence in not tendering the office an official receipt, was not negligence of any duty arising from the trust accepted by him by intermeddling; and the negligence to take probate was mere negligence to obtain legal proof of the office, the acceptance of which he was by intermeddling estopped from denying. He was always willing to give such receipt as he could, independently of probate. Secondly, as to the damage I am not satisfied that there could have been any surplus on the realization by the mortgagee of his securities, and I doubt whether such damage would not have been too remote even if proved. The damage resulted not only from the executors not taking probate and tendering an official receipt, but also from the fact that no one else interested chose to take out administration, as any person interested might have done, by taking the proper steps in the Probate Division. Taking the view which I do, it is unnecessary to consider whether the fact that Stevens has now proved increases his liability; but there is a great deal of authority to show that the liability of a named executor who has not proved, but has intermeddled, is limited to those assets which he has received: *Read* v. *Truelove*, Ambl. 417; *Lowry* v. *Fulton*, 9 Sim. 104; Williams on Executors. Such an executor is not an executor *de son tort*, but in this respect his liability seems to be limited in the same way: *Rogers* v. *Frank*, 1 Y. & J. 409.

Appeal dismissed.

Solicitors, *S. S. Seal*, for *Steavenson*, Darlington; *White & Co.*, for *Emerson*, Norwich.

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 17, 18.

In re SAUNDERS.
SAUNDERS *v.* GORE. (*a.*)

Settlement—Construction—Appointment of stock sufficient to raise net sum—Succession duty.

The donee of a power of appointment under a settlement appointed so much of the stock, &c., as should be sufficient to raise "the net sum of £2,000" to an object of the power.

Held, that the appointee was entitled to receive the full sum of £2,000 free from succession duty.

Decison of Stirling, J. (45 *W. R.* 456, [1897] 1 *Ch.* 888), *reversed.*

Banks *v.* Braithwaite, 32 *L. J. Ch.* 35, *doubted.*

Appeal of the plaintiff from Stirling, J. (reported 45 W. R. 456, [1897] 1 Ch. 888).

By marriage settlement certain funds were settled, in the events which happened, upon trust for the wife (Ellen Anne Saunders) for life, and after her decease upon the children of the marriage as she should by deed or will appoint. In exercise of the power of appointment she appointed (*inter alia*) "that so much of the stock, funds, shares, and securities now held by the present trustees of the said indenture of settlement upon and subject to the trusts thereof as shall be sufficient to raise the net sum of £2,000 shall, subject to the life interest therein of the said Ellen Anne Saunders henceforth belong and be vested in Edward George Saunders, and be held in trust for him, the said Edward George Saunders, his executors, administrators, and assigns."

The question raised on summons before Stirling, J., was whether the appointee was entitled to receive the sum appointed to him free from succession duty.

Stirling, J., following *Banks* v. *Braithwaite*, 32 L. J. Ch. 35, held that the appointee took subject to the payment of succession duty by him.

The plaintiff appealed.

Cozens-Hardy, Q.C., and *Medd*, for the appellant—The true reading of the appointment is "clear of expenses and of the duty. Stirling, J., was misled by *Banks* v. *Braithwaite*, which is inconsistent with Lord Langdale's decision in *Harper* v. *Morley*, 2 Jur. 653. There is no distinction between the words "clear" and "net": *In re Currie*, 36 W. R. 752.

They also referred to *Wilks* v. *Groom*, 4 W. R. 691, 2 Jur. (N. S.) 798; and *Peareth* v. *Marriott*, 31 W. R. 68, 22 Ch. D. 182.

Godefroi, for another subsequent appointee, added as a defendant, in the same interest.

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Swinfen Eady, Q.C., and *Peterson*, for the respondents.

Cozens-Hardy, Q.C., replied.

LINDLEY, M.R.—The question in this case turns upon the construction of a deed appointing a certain fund, which was the subject of the trusts of a marriage settlement. In the events which have happened those funds were vested in trustees upon trust for Mrs. Saunders for her life, and, subject to her life interest, upon such trusts for the children of the marriage as she should by deed or will appoint; she made various appointments, three of which were in the same form, and I will deal with one of them. The appointment runs thus: [His lordship read the appointment as above set out, and continued:] Now, the question is what is the effect of the expression "the net sum of £2,000" in that particular document. The controversy relates to duties which are somewhat heavy, and the learned judge in the court below has construed this appointment in this way. He says ([1897] 1 Ch., p. 892): "Applying that reasoning," the reasoning of Kindersley, V.C., in *Banks* v. *Braithwaite*, "to the present case, what is given here is not the net sum of £2,000, but so much of the stock as will be sufficient to raise the net sum of £2,000, and when that is ascertained by the proper calculation, as the Vice-Chancellor says, that particular sum of stock is to belong to the appointee. In my opinion the present case falls within the decision of *Banks* v. *Braithwaite* (which I will refer to presently), and the appointment does not carry with it the succession duty, but the appointee takes subject thereto." With reference to that, I confess it appears to me that what is given to Mr. Edward Saunders in this case is the net sum of £2,000 in stock. Though, of course, I can see it in words, I cannot follow in this will the distinction between the measure of the sum and the sum itself. We are discussing simply a question of amount, and, bearing that in mind, it appears to me that the true meaning and true intent of this is that this is an appointment of a net sum of £2,000 in a particular form. If that is the true construction, how can it be held that any expenses are to come out of this net sum of £2,000, whether you call it one kind of expense or another kind of expense? The net sum which is here given is not to be subject to deduction. That is as I understand it. There were other appointments in the same form, and then the last appointment (which I will call the residuary appointment) appears to have been subject to certain preceding appointments. That is how I read it apart from all authority, and I confess I cannot regard it as a gift of so much stock as would be sufficient to raise the sum of £2,000 to be given to Edward without seeing that the intention is to give him that net amount. If I could arrive at any other conclusion—that it was a gift of so much of what is called the measure of the £2,000 and that the net sum was not to be given to him—the case might be different.

But I may say at once this is not the least like instructions to a broker. You have to look at the document and the object of the document; it has nothing to do with what you are to do with the net sum when you have got it. Here is a gift by appointment by a mother to her son, and the question is, What has she given? I am not going through the authorities, but with reference to the case which was so much pressed upon Stirling, J. (*Banks* v. *Braithwaite*), and in deference to which he gave this decision, I confess I should not there have construed that document as Kindersley, V.C., did. The document was: A testator gave the residue of his personal estate to trustees upon trust to set apart £10,000 Consols and pay the dividends to his sister for life, and after her decease to retain so much of the said sum as should be sufficient to realize the clear yearly income of £150, and he directed the trustees to pay the dividends and other income of the stock so directed to be retained by them, to his nephew. I should have read that as a gift of a clear yearly income of £150 to the nephew. However, I see the difference between that case and this, because there there was a difficulty in working out the principle which I should have endeavoured to apply to it with regard to certain rates and duties and so on. Here we are not embarrassed by that at all. This is a simple appointment to Edward George Saunders of this sum. It appears to me, on the true construction of this document, that the case of *Banks* v. *Braithwaite* and others like it, does not apply. Of course I see a difference between a legacy and an appointed fund. There is a rule about legacies that the costs come out of residue unless the contrary is expressed. As to a legacy, it is a little easier, because when you get the word "clear" or "net," there is nothing it can be applied to except the duties, and the expenses come out of the residue. That reasoning does not apply to an appointed fund. When you ask me what the meaning of "clear" or "net" is when applied to an appointed fund, I think, *primâ facie*, it means what it says—clear of everything. There may be reasons for not giving effect to it; there may be contests, there may be difficulties about various rates and duties, and all sorts of things. Here there is no difficulty at all. I cannot see any justification for saying that the net sum here means clear of the expense of raising it, but subject to something else. I think that is clear.

I think, therefore, the appeal must be allowed. The costs must come out of the last-appointed fund.

CHITTY, L.J.—I agree. It is a question of the construction of a deed of appointment under a special power. With regard to legacies the authorities have settled that where a legacy is given to one person so that only one rate of duty is payable, if the legacy given is of a clear sum of money the legatee takes free of duty. It is sufficient to refer to *Haynes* v. *Haynes*, 1 W. R. 204, 3 De G. M. & G. 590, for that proposition. There is undoubtedly some distinction between a legacy and a portion of a fund subject to a power of appointment. A legatee bears none of the expense of raising his legacy; that all falls on the general estate; and the legatee is entitled, where it is a legacy of £1,000, to his £1,000. In order to free him from the legacy duty, however, there must be words which show the intention, and the word which has been relied on here is "clear." I can make no distinction between "net sum" and "clear sum." In the case of an appointment where there are no words of expression to the contrary, all the appointees have to bear rateably, according to the general rule, the expenses of the trustees in regard to their administration of the fund, including the distribution. It might be said that the word "clear" or the word "net" in this instrument refers to those expenses only. I think it would be a very narrow construction. That is not the construction that was adopted by Kay, J., in *In re Currie*, 36 W. R. 752. There was there an appointment under a general power of appointment of so much of the trust funds as should be of the clear value of £1,000, and he held, and I agree with his reasoning, that that was an appointment of a sum of £1,000 clear of all the trustees' expenses, and clear also of the legacy or succession duty. I should say there is no distinction between legacy and succession duty in a case such as the present. That being so I refer to the words which the appointor has used. The appointment is not of a sum of money to be

raised by the trustees by sale, it is an appointment of a portion of the trust funds. The trust funds, according to the statements agreed at the bar, were invested in ordinary trust investments and were liable to be changed from time to time under a power to vary securities. It is a portion of the trust fund thus invested that the appointor disposes of by one operation only. You are to ascertain (by reading the words) what the portion is, and that portion is itself given to the appointee.

Now, it appears to me on the true reading of this will that in ascertaining what portion is appointed you must, in accordance with the language used by the appointor, clear the portion from all charges, including succession duty—"so much of the stocks, &c., as shall be sufficient to raise the net sum of £2,000." That net sum of £2,000 is to be arrived at by excluding from the £2,000 the trustee's expenses and I think also succession duty. The case is not the same as that by which Stirling, J., considered himself bound—namely, *Banks* v. *Braithwaite*. Observations have already been made by the Master of the Rolls on that case, and I must confess that I myself should have arrived on the construction of that will at a different conclusion. The fund there of consols was set apart for one purpose only—namely, for the benefit of the annuitant, and subject to that the fund that was to be retained in consols was to go to the residuary legatee. The direction was to retain a sum of consols sufficient to realize the clear yearly income of £150, and then the trustees were directed to pay the dividends on that sum to the annuitant in the manner mentioned in the will. I think the whole object of the testator there was to provide a clear yearly income of £150 for the benefit of the annuitant. I understand the reasoning of the Vice-Chancellor; but I think it is too fine, if I may say so, to make it applicable to that case. Of course, the consols may have been converted and the rate of interest payable on the consols might by Act of Parliament have been subsequently reduced. It is, as I have said, a question of construction, and I think that the case is not governed by *Banks* v. *Braithwaite*, whatever may be said of that case, and that the true construction is that this appointed portion of the trust funds was clear of all charges and that we could not confine the word "net" merely to the expenses of the trustees.

VAUGHAN WILLIAMS, L.J.—The question arises on the construction of words appearing in a particular appointment. The Master of the Rolls and Chitty, L.J., have already expressed very clear views as to what ought to be the construction of these words in this particular appointment. I cannot say that I myself am by any means as clear as they are as to what is the proper construction, but having regard to the fact that this is merely a question of the construction of the particular words in a particular document, I am not prepared to differ from that construction, merely because I hesitate about that which to them seems clear. However, I do wish to say a few words as to the difficulty that occurs to my mind in the construction of this document. The words are these. [His lordship read the appointment, and continued:] Now, the question to my mind to be answered is this: Ought the word "net" there to be annexed to the gift, or to what I agree is precisely the same thing, the measure of the gift; or ought it to be annexed to the raising of the sum? Is the word "net" to be treated as qualifying the quantity of stock with which the trustees were to deal, or is it to be read here as annexed to the gift to Edward George Saunders? Various authorities have been cited, but it seems to me that in this case, as indeed in every case, it is a dangerous thing to lay down any general rule as to the meaning of words of this sort. You must look always at the whole document, and ascertain what the meaning of the words is when you have taken the whole document into consideration. It is not safe to say there are authorities which decide that a "clear gift" means, in the case of a legacy, a gift clear of legacy duty.

No doubt very often, perhaps generally, in wills where there is a legacy given by such words, such would be the meaning of the word "clear," because there is nothing else which the gift in the nature of things can be clear of, and unless you give that meaning to the word "clear" you give no meaning to it at all. But even in the case of a legacy it is not quite true to say that it is universally so; for I take it that if you have got a legacy and the word "clear" used, it might very well be that you might find in the nature of the gift something to indicate that the word was not meant there to import clear of legacy duty, as, for instance, if the gift in question was an annuity given to a series of annuitants in succession. But in the present case the question arises at an earlier stage. The question, to my mind, is precisely the question which Kindersley, V.C., propounded to himself in the case of *Banks* v. *Braithwaite*, and which Stirling, J., propounded to himself in the present case—that is, is the word "net" here to be annexed to the gift, or is it to be annexed simply to the duty which the trustees had to perform? Is it here to be construed merely as qualifying the subject-matter with which the trustees were to deal as distinguished from the quantum of the gift? One can quite understand that very often you may get a collocation of words which would make it plain that the word "net" or "clear" is meant to qualify the gift—is meant to be annexed to the gift—as in a case where you have the two words "raise" and "pay" placed in immediate collocation. If the will or appointment says you are to raise and pay the clear sum of so much, I think it would be plain in such a case that this quality of "clear of deduction" is to apply not only to the sum to be raised, but also to the sum to be handed over or given to the donee. In the present case you have not got any words as clear as that, because so far as the English grammar is concerned the word "net" seems to me to be limited in its application to the sum to be raised, or rather to the amount of consols to be handed over, and not, as far as grammatical collocation is concerned, to apply to the amount which is to be transferred. Having said this because I have a very strong feeling as to the danger of deciding the meaning of particular words in a particular document by laying down any rule of universal application, I prefer to say that so far as my judgment is concerned I concur in the decision of the court, because I am not prepared to say that, having regard to the words of this particular document, the construction which the Master of the Rolls and Chitty, L.J., think is the right construction is not the right construction. These documents are very generally drawn by professional men, but, of course, occasionally they are drawn by laymen, and I do think that it is always a dangerous thing to conclude the construction of words in a particular document which may be under consideration by decisions that have been arrived at on similar words in other cases.

Appeal allowed.

Solicitors, *Valpy, Chaplin, & Peckham; Withers, Roskell, Munster, & Weld; Hasties.*

High Court of Justice.

Chan. Div. } Stirling, J. } July 28, 29; Aug. 3; Nov. 17.

STOKES v. PRANCE. (a.)

Solicitor and client—Mortgage—Breach of trust—Fiduciary relationship—Guarantee.

A sum of £6,000 was advanced jointly on the security of a mortgage by the trustees of a will and a firm of solicitors. The investment was a breach of trust on the part of the trustees, and the solicitors, who were their legal advisers, failed to advise them that this was the case. The mortgage was taken in the names of one of the firm of solicitors and one of the trustees, and a memorandum was executed by the mortgagees to the effect that £3,000 belonged to the trustees and £3,000, the residue of the £6,000, to the solicitors. The solicitors also gave the trustees a guarantee of the sufficiency of the security. The solicitors subsequently went bankrupt, and an action was brought by the trustees claiming to be paid their £3,000 out of the mortgage security in priority to the solicitors or to any persons claiming under them.

Held, that the trustees were not entitled to any priority upon the construction of either the memorandum or the guarantee; that the investment by the trustees was a breach of trust on the part of the trustees; and that the solicitors, by failing to advise their clients that this was so, were guilty of a breach of trust towards them. Though the law imposes considerable disabilities on solicitors in dealing with their clients, yet, in the present instance, the solicitors were not seeking any benefit which was not in contemplation at the time of the transaction, and their only breach of duty was that they permitted their clients to invest trust money on insufficient security. Under these circumstances, though the solicitors might be answerable in damages, the clients were not entitled to any priority of payment out of the solicitors' security.

The object of this action was to obtain a declaration that the trustees of the will of Hester Stokes, deceased (of whom the plaintiffs were two, the third being one of the defendants, Frederick Pace Webb), were entitled to be paid a sum of £3,000 and interest thereon out of a mortgage debt of £6,000 and the securities for the same, in priority to all other persons claiming to be interested in the mortgage debt and securities; and to have the security realized and the proceeds applied in accordance with the declaration sought.

The mortgage in question bore date the 25th of March, 1864, and was made between John Ball, the mortgagor, of the one part, and John Bailey, the mortgagee, of the other part; and thereby two freehold farms in the parish of Uffculme, in the county of Devon, were conveyed by the mortgagor to the mortgagee in fee to secure the repayment of a sum of £6,000 with interest thereon at the rate of four-and-one-eighth per cent.

Both the mortgagor and the mortgagee died before December, 1876; and by a deed dated the 30th of December, 1876, the mortgage debt and security was transferred to the defendants Courtenay Connell Prance and Frederick Pace Webb as joint tenants in consideration of the payment by them of the sum of £6,000, stated to belong to the defendants Prance and Webb on a joint account. In reality the £6,000 was advanced as to £3,000 by the then trustees of the will of Hester Stokes—viz., Josiah Yeomans Robins, Frederick Charles Jewsbury, and Frederick Pace Webb, out of funds belonging to them as such trustees; and as to the remaining £3,000 by the firm of New, Prance, & Garrard (consisting of Herbert New, Courtenay Connell Prance, and George Henry Garrard), then carrying on business as solicitors and money scriveners at Evesham, out of their partnership assets.

Messrs. New, Prance, & Garrard acted on the occasion of this transfer as the solicitors of the Stokes trustees. Upon this occasion the following two documents, dated respectively the 1st and the 2nd of January, 1877, were executed:

"Memorandum. And we the undersigned, Courtenay Connell Prance, of Hatherley Court, Cheltenham, in the county of Gloucester, esquire; and Frederick Pace Webb, of Evesham, in the county of Worcester, civil engineer, do hereby ask and declare that the principal sum of £6,000, intended to be secured to us upon two estates situate in the parish of Uffculme, in the county of Devon, by virtue of an indenture of transfer of mortgage dated the 30th day of December, 1876, and expressed to be made between John Frederick Bailey and Benjamin Tyler Bailey of the first part, John Anstey Ball of the second part, and us, the said undersigned Courtenay Connell Prance and Frederick Pace Webb, of the third part, although expressed to be lent and advanced out of moneys belonging to us on a joint account, yet in truth and in fact the same belongs to the following persons and in the following proportions—that is to say, the sum of £3,000, part of the principal sum of £6,000, belongs to and is the proper money of Josiah Yeomans Robins, of Myrton House, near Warwick, esquire, Frederick Charles Jewsbury, of the county of Gloucester, banker, and myself, the said Frederick Pace Webb, as trustees of the will of the late Mrs. Hester Stokes, deceased. And the remaining sum of £3,000, the residue of the said principal sum of £6,000, belongs to and is the proper moneys of Herbert New, of Evesham, aforesaid, gentleman, myself, the said Courtenay Connell Prance, and George Henry Garrard, of Evesham, as aforesaid, gentleman. And we, the said Courtenay Connell Prance and Frederick Pace Webb do hereby severally declare that our names shall stand in the said indenture of mortgage as to the sum of £3,000, part of the said sum of £6,000, and the interest henceforth to become due for the same to the extent and after the rate of £4 per centum per annum, in trust for the said Josiah Yeomans Robins, Frederick Charles Jewsbury, and Frederick Pace Webb. And as to the further sum of £3,000 (residue of the said sum of £6,000) and the residue of the interest to become due and payable under the same indenture, in trust for the said Herbert New, Courtenay Connell Prance, and George Henry Garrard, and it is hereby agreed that the said indenture of mortgage and the deeds and documents connected with the said security shall remain in the custody and possession of the Gloucestershire Banking Co. at their branch at Evesham for the respective benefit and advantage of the trustees or trustee for the time being of the estate of the said Hester Stokes, deceased, and of the said Herbert New, Courtenay Connell Prance, and George Henry Garrard, or any person or persons claiming through, under, or in trust for them to the extent or in accordance with the terms of the present memorandum.

"Dated the 1st day of January, 1877.

"Courtenay Co. Prance,
"Fred. P. Webb."

"Memorandum. Whereas by an indenture dated the 30th day of December, 1876, and made between John Frederick Bailey, gentleman, and Benjamin Tyler Bailey, wine and spirit merchant, of the first part; John Anstey Ball, yeoman, of the second part; and Courtenay Connell Prance, of Hatherley

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Court, Cheltenham, esquire, and Frederick Pace Webb, of Evesham, civil engineer, of the third part. In consideration of the sum of £6,000 therein expressed to be lent and advanced to the said Courtenay Connell Prance and Frederick Pace Webb, out of moneys belonging to them on a joint account to or for the use or at the request of the said John Anstey Ball, certain farms, lands, and hereditaments situate at Uffculme, in the county of Devon, therein particularly described, were granted and conveyed unto and to the use of the said Courtenay Connell Prance and Frederick Pace Webb, their heirs and assigns, for ever. But, nevertheless, by way of mortgage only and for securing the payment by the said John Anstey Ball unto the said Courtenay Connell Prance and Frederick Pace Webb, their executors, administrators, or assigns, of the said sum of £6,000 and interest for the same after the rate of £4 2s. 6d. per centum per annum. And whereas the said sum of £6,000, although expressed to be advanced by the said Courtenay Connell Prance and Frederick Pace Webb out of moneys belonging to them on a joint account, yet in truth and in fact the same belongs as to the sum of £3,000 part thereof, to Josiah Yeomans Robins, of Myrton House, near Warwick, esquire, Frederick Charles Jewsbury, of the city of Gloucester, banker, and the said Frederick Pace Webb as trustees of the will of the late Mrs. Hester Stokes, deceased; and as to the further sum of £3,000, the residue of the said sum of £6,000, to Herbert New, of Evesham, aforesaid, gentleman, the said Courtenay Connell Prance, and George Henry Garrard, of Evesham, aforesaid, gentleman. And whereas the said Josiah Yeomans Robins, Frederick Charles Jewsbury, and Frederick Pace Webb advanced the said sum of £3,000 so belonging to them as aforesaid upon the recommendation of the said Herbert New, Courtenay Connell Prance, and George Henry Garrard, and upon the understanding that they would guarantee the sufficiency of the same security and the punctual payment of the interest thereof in manner hereafter appearing. And whereas the said Josiah Yeomans Robins, Frederick Charles Jewsbury, and Frederick Pace Webb have agreed to allow the said Herbert New, Courtenay Connell Prance, and George Henry Garrard to receive the interest from time to time to become due upon the said entire sum of £6,000 after the reserved rate of £4 2s. 6d. per cent. per annum, and to accept interest upon the said sum of £3,000 so due to them as aforesaid after the rate of £4 per cent. per annum, in consideration of the guarantee hereinafter contained. Now, these presents witness that in consideration of the premises they the said Herbert New, Courtenay Connell Prance, and George Henry Garrard do hereby guarantee unto the said Josiah Yeomans Robins, Frederick Charles Jewsbury, and Frederick Pace Webb the goodness and sufficiency of the aforesaid security for the said sum of £3,000, and the due and regular payment to them by even and general half-yearly payments of the interest to become due thereon after the reduced rate of £4 per cent. per annum. And, further, they do hereby also guarantee unto them, the said Josiah Yeomans Robins, Frederick Charles Jewsbury, and Frederick Pace Webb, the repayment of the said principal sum of £3,000, with all interest due thereon at any time upon receiving two calendar months' previous notice requiring payment thereof. And the said Josiah Yeomans Robins, Frederick Charles Jewsbury, and Frederick Pace Webb do hereby agree to the terms and conditions of the aforesaid guarantee, and to accept interest upon the said sum of £3,000 so due to them as aforesaid after the rate of £4 per cent. per annum; in consideration of the said Herbert New, Courtenay Connell Prance, and George Henry Garrard guaranteeing the principal and the punctual payment of the interest.

"Dated the 2nd day of January, 1877.

"(Signed) New, Prance, & Garrard.

"Frederick Pace Webb."

The subsequent history of the case was this:

In 1880 Messrs. New, Prance, & Garrard transferred their £3,000 and interest at 4 per cent. to Messrs. Jewsbury and New and Mrs. E. Smith, the executors and trustees of the will of Henry Smith, and a declaration was executed by Prance and Webb and a guarantee given by New, Prance, & Garrard in favour of Smith's trustees similar to the documents of the 1st and 2nd of January, 1877, in favour of the Stokes trustees. In both cases the consideration for the guaranty was the difference between four and four-and-one-eighth per cent. in the interest paid.

In October, 1886, the former Stokes trustees retired, and the plaintiff, A. A. Stokes, and Garrard were appointed trustees in their place, and the property was vested in the plaintiff and the defendant Webb. Jewsbury also retired from the Smiths' trust, and Prance was appointed in his place. Mr. Smith died about this time. A memorandum was drawn up in this month declaring that the £6,000 belonged as to £3,000 to Webb, Stokes, and Garrard, and as to the other £3,000 to New and Prance, the trustees of Smith, in almost identical terms with that of the 1st of January, 1877, except that the deeds were to remain in the custody of the trustees instead of being deposited with the Gloucester Banking Co. On this occasion the firm of New, Prance, & Garrard again acted as solicitors for the trustees.

On the 22nd of December, 1891, part of the sum of £3,000 was paid off by the Smith trustees. The said £3,000 was then made up as to £1,630 advanced by the defendant Mrs. Valentine (then Smith), and as to £1,370 advanced by New, Prance, & Garrard. By the indenture of that date made between Prance and Webb of the first part, New, Prance, & Garrard of the second part, and Mrs. Smith and Mr. Kilvert of the third part, this sum of £3,000 was treated as if New, Prance, & Garrard were the owners thereof, and then followed the declaration, "It is hereby agreed and declared that the said C. C. Prance and F. P. Webb shall continue and stand seized of and interested in the said messuages, farms, lands, and hereditaments comprised in and appointed, granted, released, and conveyed by the hereinbefore-recited indenture of mortgage and transfer, and possessed of the powers of the sale and other powers in the same indenture contained, for the protection, benefit, and advantage of the parties who now are or hereafter shall be interested in the said two moieties of £3,000 and £3,000 *pari passu* without any priority or preference other than the priority guaranteed by the said New, Prance, & Garrard to the transferees by these presents in respect of the said sum of £1,630 and the interest thereon over the said balance of £1,370 and the interest thereon." On the 28th of November, 1893, New, the senior partner in the firm, died. And on the 22nd of January, 1894, New, Prance, & Garrard were adjudicated bankrupts and the defendant West was appointed trustee in the bankruptcy. On the 24th of July, 1894, the plaintiff Whitfield was appointed a trustee of the will of Hester Stokes in the place of Garrard. The persons now interested therefore in the £6,000 which was still due and owing were Prance and Webb, the plaintiffs, the trustees of Hester Stokes, to the extent of £3,000; the defendants Valentine and Kilvert to the extent of £1,630; and the defendant West, as trustee in bankruptcy of the firm of New, Prance, & Garrard, to the extent of the residue of the £3,000. The mortgage had not

been realized, but it was admitted by all parties to be insufficient for the security of £6,000.

M. S. Grosvenor Woods, Q.C., and *Eastwick*, for the plaintiffs.—The plaintiffs are entitled to the relief claimed: *In re Moore, Moore* v. *Johnson*, 33 W. R. 447; *In re Foster, Lloyd* v. *Carr*, 39 W. R. 31, 45 Ch. D. 629. These cases show that there must be apportionment between principal and interest. *Webb* v. *Jonas*, 36 W. R. 666, 39 Ch. D. 660, and *In re Massingberd's Settlement*, 63 L. T. Rep. 296. 39 W. R. Dig. 242, show that to invest on a contributory mortgage in such a case as this is a breach of trust. As against New, Prance, & Garrard and all persons claiming under them we are entitled to pay ourselves first out of this fund, which must be taken as a mortgage security. A solicitor will not be allowed by the court to take any benefit to himself to the prejudice of the trust estate for a transaction which was a breach of trust and which he himself advised: *Segrave* v. *Kirwan*, Beatt. 157. That was a case of a counsel in a fiduciary relation. See also, *Bulkley* v. *Wilford*, 8 Bli. N. S. 111, 2 Cl. & F. 102; *Horan* v. *McMahon*, 17 L. R. Ir. 641, 35 W. R. Dig. 71; *In re Birt, Birt* v. *Burt*, 31 W. R. 334, 22 Ch. D. 604. Assuming that the position of a solicitor precludes one from receiving any benefit—*In re Snell*, 25 W. R. 823, 6 Ch. D. 105—so that they cannot set up a claim against their own clients, it may be said that they did not know what was being done. It must be taken, however, that they did not inform the trustees: *Donaldson* v. *Haldane*, 7 Cl. & F. 762. But apart from the fiduciary relation they cannot, having given a guarantee, say that the funds are insufficient: Burton Real Property, 7th ed., p. 190. It is a breach of the obligation: *Lumley* v. *Wagner*, 1 De G. M. & G. 604; *Wolverhampton, &c., Railway* v. *London and North-Western Railway Co.*, L. R. 16 Eq. 433, 22 W. R. Dig. 118. It is a primary principle of specific performance: *Piggott* v. *Stratton*, 8 W. R. 13, 1 De G. F. & J. 33. It will be suggested that the document of the 22nd of December, 1891, contained a declaration that the property was held in equal shares by the persons entitled to the £6,000. If that is sought to be relied on it would be attempting to obtain a title from a trustee through a breach of trust: *Priddy* v. *Rose*, 3 Mer. 86; *Roxburghe* v. *Cox*, 30 W. R. 74, 17 Ch. D. 520; *Harpman* v. *Shacklock*, 30 W. R. 49, 19 Ch. D. 207.

W. C. Dauney, for the defendant Webb.

W. C. Prance, for the defendant Prance.

Graham Hastings, Q.C., and *Badcock*, for defendants Valentine and Kilvert, submitted there was no case for priority. As to a solicitor not being allowed to get any benefit, the cases are confined to those of fiduciary relations: *Segrave* v. *Kirwan*. Here the solicitors never got anything out of it. In *Bulkley* v. *Wilford* the solicitor got the testator's property by reason of his neglect of duty. *Horan* v. *McMahon* is to the same effect. *In re Snell, In re Birt*, and *Donaldson* v. *Haldane* are also distinguished. As to the guaranty we rely on *Whitwood Chemical Co.* v. *Hardman*, 39 W. R. 433, [1891] 2 Ch. 416, which was a case of affirmative covenant, and the claim was absolutely unsustainable.

J. R. Brooke, for the defendant West, substantially adopted this argument. He cited *Baker* v. *Palmer*, 2 Ch. 540; *Mara* v. *Browne*, 44 W. R. 330, [1896] 1 Ch. 199.

Grosvenor Woods, Q.C., in reply.—*Mara* v. *Browne* is not like the present case.

Cur. adv. vult.

Nov. 17.—STIRLING, J., stated the facts as above, and continued: The plaintiffs' claim to priority in respect of the £3,000 to which they and the defendant Webb are entitled is based on three grounds—first, the memoranda of the 1st of January, 1877, and the 8th of October, 1886; second, the guarantee of the 2nd of January, 1877; and thirdly, on considerations arising out of the fiduciary relationship which existed between New, Prance, & Garrard and the Stokes trustees.

First, as to the memoranda of the 1st of January, 1877, and the 8th of October, 1886. It is said that these documents, when properly construed, create a priority in respect of the plaintiffs' £3,000 over the other portion of the total mortgage debt of £6,000, by reason of the use of the word "residue." It may be admitted that these documents do not contain all the clauses introduced into such instruments by the most cautious of conveyancers, and are not so explicit as the document of the 22nd of December, 1891, executed in favour of Mrs. Smith and Mr. Kilvert; but still I cannot bring myself to think that the meaning of them is open to serious doubt. It is thereby declared that the £6,000 "belongs to the following persons and *in the following proportions*," that is to say, the sum of £3,000, part of the said principal sum of £6,000, belongs to and is the property of the Stokes trustees, "and the remaining sum of £3,000, the residue of the said principal sum of £6,000, belongs to and is the property of" New, Prance, & Garrard. "Residue" there means the arithmetical remainder after deducting £3,000 from £6,000, and it would be entirely inconsistent with the use of the word "proportion" to read the clause as declaring that the first-mentioned £3,000 belonged to the Stokes trustees, and that subject thereto the balance of the £6,000 belonged to New, Prance, & Garrard. The like meaning is plainly attributable to the word "residue" in the declaration of trust as regards the principal. There may be a little more difficulty as to the meaning of the word "residue" when used with reference to the interest, but it seems to me to be used in the same sense as that already mentioned—viz., the arithmetical remainder after deducting from the amount of interest on £6,000 at 4⅛ per cent., the amount of interest on £3,000 at 4 per cent. This mode of expression appears to me to have been adopted from the desire to preserve to the firm of New, Prance, & Garrard the one-eighth per cent. which constituted the consideration for the guarantee. It cannot fairly be read as giving any priority.

Secondly, as to the guarantee of the 2nd of January, 1877. That document contains a guarantee by New, Prance, & Garrard of the goodness and sufficiency of the security; and it is said that, having given such a guarantee, neither they nor anyone claiming under them can put forward any demand which would result in rendering the security bad and insufficient, or any arrangement whereby they themselves would profit. The answer is that no such claim is made. The plaintiffs' security is one-half of the mortgage debt of £6,000 and the securities for it. To that half the defendants who claim under New, Prance, & Garrard assert no title, they merely seek the benefit of the other half of the mortgage debt and securities which is not comprised in the plaintiffs' security at all. The guarantee does not purport to charge the plaintiffs' £3,000 on any property of New, Prance, & Garrard; it is simply a personal contract by the firm, on which the plaintiffs will no doubt be entitled to prove in the bankruptcy, but which does not give the plaintiffs any rights against from the specific property now in question.

Thirdly, on this point the argument is that the investment of £3,000 on the security of the 30th of

December, 1876, was a breach of trust, that Messrs. New, Prance, & Garrard advised this breach of trust, and that they and all persons claiming under them are precluded from taking any benefit to themselves from the transaction to the prejudice of the trust estate.

Unquestionably Messrs. New, Prance, & Garrard advised the investment; according to the recital in the memorandum of the 2nd of January, 1877, the Stokes trustees advanced the £3,000 upon their recommendation. They were the legal advisers of the trustees in the matter; and as such it was their duty to see that the security was adequate in point of value and in point of form. That duty, in my judgment, they failed to discharge.

As regards the value, according to the rule of the court then and now in force, there ought to have been a margin of one-third over and above the sum advanced; that is to say, as the total advance was £6,000 the value of the mortgaged property ought to have been £9,000. Mr. Prance, indeed, in his evidence, appeared to be of opinion that such a rule did not exist in 1876; if at that time his view of the law was such as he seemed desirous of having it supposed to be, one can only say that casts some reflection on his qualification to advise trustees on such a matter. It is not suggested that any valuation was made previously to the advance. Mr. Prance said: "I must have told Jewsbury and Robins that it was a satisfactory security, and they accepted the security on my recommendation." The property was purchased by the original mortgagor in 1864 for £6,900. Mr. Prance says it was a bargain at that price and was really worth more; he says that if Ball had had t, it would have been worth £9,000 in spite of the times. But that was mere speculation. It was put up for sale in 1878; it was expected to realize £7,500, but a small part only was sold at the price of £530. In 1885 it was valued by the defendant Webb at £6,370. In 1890 it was again put up for sale, the reserve being £7,000, but was not sold. There is no evidence to satisfy me that the mortgaged property was in 1876 or at any other time of a value at all approaching £9,000. In arriving at that conclusion I lay no stress on the guarantee given by Messrs. New, Prance, & Garrard which might seem to suggest the existence of doubt on the part of someone as to the value of the security. I am willing to accept Mr. Prance's explanation that the giving of it was in accordance with the common practice of the office.

The form of the security is not more satisfactory. The trust security ought to have been taken in the names of the trustees: *In re Massingberd's Settlement.* Here the legal title was vested in two persons, one of whom was an entire stranger to the Stokes trust.

In my opinion the investment was on both grounds a breach of trust. I also think that in omitting to advise the trustees this was so, Messrs. New, Prance, & Garrard were guilty of a breach of duty to the Stokes trustees, their clients. For this, but for their bankruptcy, they might be answerable in damages to their clients, and proof may possibly be admissible in the bankruptcy; but under ordinary circumstances they would not have been responsible to the *cestui que trust* as for a breach of trust: see *Barnes* v. *Addy*, 22 W. R. 505, L. R. 9 Ch. App. 244.

It is said, however, that the law prevents them from taking any benefit from their own security to the disadvantage of their own clients, the Stokes trustees. Undoubtedly the law imposes considerable disabilities on solicitors in their dealings with clients. Thus, if a solicitor employed to prepare a legal instrument so frames it that he obtains (even indirectly) a benefit under it, a court of equity will not permit him to retain it unless he can show that he clearly and distinctly pointed out to the client that the advantage actually gained might result from the transaction; and this holds good whether the instrument was or was not designed to produce such a consequence, or whether the solicitor was or was not aware of the true legal effect of the instrument: see *Segrave* v. *Kirwan*, Beatt. 157; *Bulkley* v. *Wilford*, 8 Bli. N. S. 111, 2 Cl. & Fin. 102; *Horan* v. *Macmahon*, 17 L. R. Ir. 641. In such cases the solicitor is treated as trustee of any interest he may acquire under the instrument for the persons on whom it would have devolved if the instrument had not been executed. Again, a solicitor taking for value a security from his own client cannot take advantage of any unusual provisions introduced into it unless he can establish that he gave the client such advice as would have come from an independent solicitor: see *Cockburn* v. *Edwards*, 30 W. R. 446, 18 Ch. D. 449. There are also cases which show that a solicitor will not be allowed to assert independent rights of his own in a way inconsistent with a duty undertaken to the client. Thus, in *Re Birt* the defendant in an administration action and legal personal representative of the testator, was one of the firm of solicitors who acted for the plaintiff. After the plaintiff had obtained an order for a receiver, but before the receiver had perfected his security, the defendant received assets. It was held that he could not, as against the plaintiff, assert the right of retainer which he otherwise would have had. Against these decisions there is not a word to be said; but in each of them the solicitor was claiming in some shape or form a benefit or advantage as against the client which that client never intended to confer.

The argument on behalf of the plaintiffs in the present case invites me to go much further than any previous decision. The transaction contemplated in 1876 was the advance of £6,000 in two sums of £3,000 each—one by the Stokes trustees, the other by their solicitors—on a security in respect of which, as it seems to me, they were to stand on a footing of equality. The instruments by which the transaction was carried into effect are apt for the purpose, and contain no unusual provisions, certainly none to the disadvantage of the trustees. The benefit acquired by the solicitors is one which was within the contemplation of all parties at the time; and nothing could be urged against the solicitors if, unfortunately, the clients had not been trustees, and had not been involved in a breach of trust. Still that is not, in my opinion, a sufficient ground for declaring the solicitors to be trustees, either in whole or in part, of the £3,000 advanced by themselves or of the security they bargained for on the occasion. There is no breach of duty on their part in acquiring or setting up such a security; their default lies in permitting the clients to advance money on the security which the clients actually got. For that the solicitors, as I have said, may be answerable to their clients in damages, but it does not, in my judgment, authorize me to declare the clients entitled to be paid out of the security in priority to those who now represent the solicitors.

Solicitors, *Black & Moss*, for *Nevinson & Barlow*, Malvern; *Burton, Yeates, & Hart*, for *Johnsons, Barclay, & Roger*, Birmingham; *Crowders & Vizard*; *M. H. Prance.*

Chan. Div.
Wright, J. } Nov. 18; Dec. 3.

In re INTERNATIONAL SOCIETY OF AUCTIONEERS AND VALUERS.
BAILLIE'S CASE. (*a.*)

Company—Winding up—Contributory—Removal of name—Fraud—Mistake as to identity of company—Contract in writing.

Where a person is fraudulently induced to take shares in a company by reason of the misrepresentation that it is another company of very similar name, there is no contract at all, and he is entitled to have his name removed from the list of contributories in the winding up, though he has taken no steps to repudiate his shares before the company was wound up.

Cundy *v.* Lindsay, 26 *W. R.* 406, 3 *App. Cas.* 459, *followed.*

This was a summons by Baillie that his name might be removed from the list of contributories of the above-named company. The company was unlimited, and was originally incorporated under the name of the Institute of Auctioneers and Valuers, but that name was changed in consequence of proceedings taken by the Auctioneers' Institute of the United Kingdom, both societies having their addresses in Chancery-lane. Previous to November, 1895, Baillie had applied to the Auctioneers' Institute with a view of becoming a fellow of that society. In November, 1895, one of the officers of the liquidating society called on him and asked him if he still cared to join the Institute and showed him the prospectus of the International Society. Baillie enquired if this was "the Auctioneers' Institute," and being told that it was he consented to join and took shares in the International society. He had before this enquired if the liability was limited and had been informed that it was. When the share certificates were sent to him he saw that the word "limited" was not added to the name of the society (it being, in fact, a company with unlimited liability), he returned the certificates pointing this out, and stating that if it was an unlimited company he would resign, but the certificates were returned to him with the word "limited" written in in manuscript with a letter stating that the word had been left out by a printer's error, and also stating that the Institute had been in existence for many years. On the faith of these statements Baillie retained his membership of the society.

A winding-up order was made against the company on the 7th of December, 1896, and Baillie was included in the list of contributories. He thereupon took out this summons.

Heber Hart, for the applicant.—Here there never was a contract; the whole transaction is void: Buckley, 7th ed., p. 136. If a man is induced by misrepresentations, it does not matter if the name is correct if he is deceived: *Cundy* v. *Lindsay*. If A. contracts with B. under the impression that he is C. there is no contract: *Boulton* v. *Jones*, 2 H. & N. 564.

Clauson, for the official receiver and liquidator.—The contract was in writing, and therefore *Cundy* v. *Lindsay* does not apply. The company's name was on the top of the forms it is now too late for Baillie to say that he was deceived. The law as to repudiation is summed up in *In re Scottish Petroleum Co.*, 31 W. R. 846, 23 Ch. D. 413.

Hart, in reply.—The principal in *In re Scottish Petroleum Co.* is not applicable to a case like this: *McNiell's case*, 18 W. R. 1102, L. R. 10 10 Eq. 503.

Dec. 3.—WRIGHT, J.—[His lordship first stated the facts of the case, and continued:] The question is whether Baillie is to be allowed to repudiate these shares. This case seems to be similar to *Cundy* v. *Lindsay*, 26 W. R. 406, 3 App. Cas. 459; the circumstances show that this contract was void *ab initio*, not one which was voidable on account of the misrepresentations made to him—in other words, that there was no contract at all. When Baillie applied he thought that he was applying for and getting shares in the old Auctioneers' Institute, and those who were acting for the liquidating company knew that he thought so, and deliberately deceived him. That being so, he is entitled to the relief he claims. But it has been argued that the observations in *Cundy* v. *Lindsay* do not apply here, as there it was a verbal contract, and here, the contract being in writing, it is not possible for Baillie to deny it. But in *Cundy* v. *Lindsay* there appeared to have been a so-called contract in writing, but whether that was so or not, the principle of the case applies, and here there was no contract in writing because there was no contract at all. The applicant is therefore entitled to the relief which he claims.

Solicitors, *Timbrell & Deighton; Riddell, Vaizey, & Smith.*

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

Chan. Div.
Byrne, J. } Dec. 18.

In re PIXTON AND TONG'S CONTRACT. (*a.*)

Vendor and purchaser—Devise of real estate upon trust to trustees, their heirs and assigns—Power of sale to the "trustees for the time being" under a will—Executors of surviving trustee—Conveyancing Act, 1881, *s.* 30.

A testator devised his real estate to certain trustees, their heirs and assigns, upon certain trusts, and the will contained a power of sale of real estate exercisable "by the trustees for the time being" under the will.

Held, that the power of sale was exercisable by the executors of the last surviving trustee.

This was a summons in the Manchester District Registry by certain purchasers under the Vendor and Purchaser Act, 1874, for a declaration that the respondents, the vendors, were not entitled to convey in fee the hereditaments comprised in the contract of sale.

Two objections were taken by the purchasers, but only one of them calls for a report.

The facts of the case were as follows:

William Hampson, of Breightmet Hall, Breightmet, in the county of Lancaster, by his will dated 19th of June, 1850, subject to the payment of his debts and funeral and testamentary expenses, devised all his real estate unto and to the use of his wife and his daughter Mary and his sons William Richard Hamer, John, and Daniel, their heirs and assigns, upon trust to permit his wife during her life to have the use and enjoyment of his freehold messuage, wherein he resided at Breightmet aforesaid, with the garden and appurtenances, and subject thereto in trust for all his children in equal shares. And after certain other provisions the will continued: "I declare that the trustees for the time being under this my will shall have power to sell all or any part

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

or parts of my said real estate and any share and shares therein."

The testator appointed his said trustees to be executrixes and executors of his will.

The testator died the 12th of October, 1851, and his will was duly proved by his widow and his son William.

The testator left ten children, all of whom attained the age of twenty-one years.

The widow died the 5th of May, 1869; the daughter Mary died the 6th of March, 1878; William died the 12th of July, 1884; John died the 15th of April, 1880; and Daniel on the 3rd of September, 1889.

Richard Hamer Hampson, who died the 13th of May, 1892, by his will appointed the respondents John Sutcliffe Pixton and Edward Boutflower his executors, who, after his decease, duly proved his will and acted as trustees of the will of William Hampson.

On the 26th of February, 1897, the respondents entered into a contract with the applicants for the sale of certain hereditaments forming part of the real estate of William Hampson.

The applicants objected that as the respondents were not trustees of the William Hampson, they could not exercise the power of sale.

A. E. Milne, for the applicants.—The will contains a power, not a trust, for sale exercisable only by the trustees for the time being thereof. A power for sale differs from a trust for sale, and section 30 of the Conveyancing Act, 1881, will not enable the executors of the last surviving trustee to convey. That section applies only in cases where formerly the heir could have conveyed: *In re Ingleby*, 13 L. R. Ir. 326; *Cunningham* v. *Frayling*, 39 W. R. 469, [1891] 2 Ch. 567.

Stewart Smith, for the respondents.—The will contains a devise of the testator's real estate to the trustees, their heirs and assigns. Before the Conveyancing Act the heir of the surviving trustee would have held the property as a trustee. The executors of the last surviving trustee are in the place of the heir under section 30 of the Conveyancing Act.

He referred to Dart's Vendors and Purchasers of Real Estates, 5th ed., p. 608; *In re Rumney and Smith*, 45 W. R. 678, [1897] 2 Ch. 351. [In the course of the argument Byrne, J., referred to *Morton* v. *Hallett*, 28 W. R. 895, 15 Ch. D. 143; *Osborne to Rowlett*, 28 W. R. 365, 13 Ch. D. 774.]

Byrne, J.—I am of opinion that under section 30 of the Conveyancing Act the power of sale is exercisable by the respondents as personal representatives of the last surviving trustee of the will of William Hampson. Declaration accordingly.

Solicitors, *Thomas Ward*, Manchester, for *Thomas Hughes*, Bolton; *Ashwell, Browning, & Tutin*, for *Ashwell, Tutin, & Co.*, Manchester.

Q. B. Div.
(Hawkins and Channell, JJ.) Dec. 9.

Knowles & Sons (Limited) (*Appellants*) v. Sinclair (*Respondent*). (*a*.)

Weights and measures—Coal—Sale—Ticket—"Correct weight"—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 22, *sub-sections* 1 *and* 2.

Section 22 *of the Weights and Measures Act*, 1889, *provides that, where coal exceeding two-hundredweight is conveyed for delivery on sale in a vehicle not belonging to the purchaser, the "correct weight" of the vehicle and of the coal shall be inserted in the ticket which is to be given by the seller to the purchaser.*

Held, that the "correct weight" means the correct weight as previously ascertained at the place from which the coal is brought, and not the weight at the time of the delivery of the coal.

Case stated by justices for the county of Lancaster.

The appellants are colliery proprietors, and the respondent is an inspector of weights and measures.

An information was laid by the respondent against the appellants under section 22, sub-section 2, of the Weights and Measures Act, 1889, for having inserted in the ticket required by the Act to be given by the seller of coal to the purchaser a false statement of the weight of the vehicle, contrary to the provisions of that sub-section. The information was in the first instance laid under section 22, sub-section 1, for not having caused the tare weight of the vehicle to be marked thereon, but at the hearing the summons was amended into a summons under sub-section 2, and the conviction was under sub-section 2.

A police-constable, an assistant to the inspector, proved that he met the appellant's cart loaded with coal, and that he followed it to a house and there saw the coal delivered, and a ticket at the same time delivered to the purchaser of the coal by the appellants' carter, which ticket showed the appellants' horse and cart to weigh 29 cwts.; that he then took the horse and cart to the weighing machine at the railway station, and there caused them to be weighed, when the weight was shown to be 28 cwts., 3 qrs., or a difference of 28 lbs. (in favour of the purchaser) between the weight shown upon the ticket and that registered by the machine at the station; and that the cart was not weighed apart from the horse.

There was no dispute as to facts, which were taken as above stated.

It was contended for the appellants that they had not committed any offence under sub-section 2 of section 22, as the difference between the weight shown on the ticket and that registered by the machine, was to be accounted for by the weight of the horse varying.

The justices convicted the appellants of an offence under section 22, sub-section 2, and imposed a fine of 20s. and 10s. 6d. costs.

The question for the court was whether the justices were right in so convicting the appellants.

The Weights and Measures Act, 1889 (52 & 53 Vict. c. 21) enacts: Section 21. (1) "Where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver, or cause to be delivered, or to be sent by post or otherwise, to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note according to the form in the third schedule to this Act, or according to a form to the like effect."

Section 22. (1) "Where any quantity of coal exceeding two hundredweight is conveyed for delivery on sale in a vehicle in bulk, the seller of the coal shall, unless the vehicle is provided by the purchaser, cause the weight of the vehicle, as well as of the coal contained therein, to be previously ascertained by a weighing instrument stamped by the inspector of weights and measures, and being on or near to the place from which the coal is brought, and shall from time to time cause the tare weight of the vehicle to be marked thereon in such manner as the local authority approve"; (2) "In any such case the seller of the coal shall insert, or cause to be inserted in the

(*a*.) Reported by Sir Sherston Baker, Bart., Barrister-at-Law.

ticket required by this Act to be given by him a statement of the correct weight of the vehicle, or of the vehicle and the animal drawing it, where both are weighed together with the load, as well as of the correct weight of the coal contained in the vehicle."

Then section 27 provides that the seller or purchaser may require that the coal, or the vehicle used for the carriage of the coal in bulk, may be weighed or re-weighed, with the proviso that where the weighing or re-weighing has been at the instance of the purchaser, the purchaser shall pay the costs of the re-weighing if the results be found correct; and the form of the ticket in the schedule provides that the weight of the coal and vehicle, the tare weight of the vehicle, and the net weight of the coal delivered, shall be given in the ticket.

T. W. Chitty, for the appellants.—In the first place it cannot be said to be an offence within the Act to give too much coal, as the appellants did in this case. The Act was intended to protect the purchaser, and there can be no offence within the Act unless the purchaser is defrauded; it was not intended to make the seller liable to penalties for giving too much coal. In the second place there is no evidence here that an incorrect weight was inserted in the ticket. What has to be inserted in the ticket is the statement of the "correct weight," under sub-section 2 of section 22, and the "correct weight" is the weight which has been ascertained previous to the cart going out with the coal, as required by sub-section 1 of section 22. The "correct weight," therefore, which is to be inserted in the ticket is the weight which is correct at the time the cart is sent out, and not the weight which is correct at the time of delivery to the purchaser. If the purchaser is not satisfied with this statement in the ticket, then he can, by section 27, require a re-weighing. There was no evidence that the weights in the ticket were incorrect at the time the cart was sent out, and therefore this conviction cannot be supported.

Lorhais, for the respondent.—The weight to be a "correct weight" must be a weight which is correct at the time the coal is delivered to the purchaser. It is not enough that the weight should be correct at the time the vehicle is sent out; it must be correct at the time when the ticket is delivered to the purchaser—that is, when the coal is delivered to him.

HAWKINS, J.—I think that this conviction ought to be quashed. [His lordship read section 21, sub-section 1, section 22, sub-section 1, and the form of the ticket given in the third schedule.] Reading these two sections together it is clear to my mind that the ticket is to be delivered containing the particulars which are required by the form of ticket in the third schedule to be prepared and sent out by post, or, at the option of the seller, delivered to the carman to be handed over by him to the purchaser before any part of the coal is delivered. The weighing and the amount of the weighing which is to be included in that ticket, and the particulars of it, are to be ascertained by a weighing-machine stamped by the inspector near to the place from which the coal is brought. That is the obligation cast upon the seller, and I entertain no doubt that the object of the Legislature in those two sections was that the weighing of the coal should take place practically at the place from which the coal came, and that the ticket with these two weights inserted therein should be sent to the purchaser in order that he might have them before him at the time the coal is delivered. I am satisfied it was never contemplated that there should be a ticket of that sort sent in the morning and another ticket delivered in the afternoon. I think the ticket that is to be delivered is that mentioned in section 21 as the result of the weighing in section 22; and there is no proof that the ticket was erroneous in any respect at the time it was made out. I think that all the preliminaries that are required by the statute to be gone through before the coal was delivered were regularly carried out. A ticket was sent; a weight was put upon it, and there is no suggestion that the coal was not actually weighed; and it would be a strong thing for us to say that there is proof that the weights as recorded upon the ticket were false when there is not a particle of evidence to suggest that. I am of opinion that there was no evidence at all to support this conviction, and upon that ground the conviction ought to be quashed.

CHANNELL, J.—I am of the same opinion. I think it is clear, for the reasons stated, that the magistrates were wrong in convicting. The enactment is that the seller shall weigh both the coal and the vehicle and the horse, and that he shall do so beforehand; then that he shall send the particulars of the previous weighing, at which the purchaser is not present, to the purchaser Then the purchaser gets his coal, and then he uses his own judgment whether it is worth while to exercise the right which he has under section 27, of having the coal re-weighed. If he gets the coal re-weighed and if the re-weighing goes against him then he has to pay the costs. If the "correct weight" does not mean the correct weight as ascertained at that previous weighing, then I think it would follow that it would not be an offence if the incorrectness were in favour of the purchaser and against the seller. I think the "correct weight" means the correct weight as ascertained at the place where the weighing has to take place before the delivery is made. I think, therefore, that this conviction is bad, and the simplest course is to quash it instead of incurring further expense about this 28lbs. of coal over-delivered.

Judgment for the appellants. Conviction quashed.

Solicitors for the appellants, *Sharpe, Parker, Pritchards, & Barham*, for *Richardson & Marsh*, Bolton.

Solicitors for the respondent, *Rowcliffes, Rawle, & Co.*, for *John Hall*, Bury.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright and Darling, JJ.) — Nov. 20.

BAGLEY (*Appellant*) *v.* BUTCHER AND ANOTHER (*Respondents*). (*a.*)

Election law—Registration—Occupiers' list of voters—Qualification described as "dwelling-house joint"—Sufficiency of—Representation of the People Act, 1867 (30 & 31 *Vict.* c. 102), *ss.* 3, 6, 27—*Representation of the People Act*, 1884 (48 & 49 *Vict.* c. 3), *ss.* 2, 5.

In Division I. of the occupiers' list of voters in a county, the description of a voter's qualification was entered as "dwelling-house joint." A notice of objection that the voter's qualification was "expressly forbidden by law" had been duly given. The voter had not made either a new claim or a statutory declaration to amend the entry. The qualifying property was in fact a dwelling-house inhabited by the voter jointly with others, the annual value of which was more than sufficient to give £10 a year to each occupant.

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Held (reversing the revising barrister), that the objection should be disallowed, as the description of the qualification was sufficient to describe an occupation qualification.

Townshend *v.* St. Marylebone Overseers, 20 *W. R.* 148, *L. R.* 7 *C. P.* 143, *followed and approved.*

Case stated by the revising barrister for the Eastern Division of the county of Wilts.

The names of the first five persons in the schedule hereto appeared as voters on Division I. of the occupiers' list of voters for the parish of Preshute, and the names of the last two persons in the schedule appeared as voters on Division I. of the occupiers' list for the parish of Pewsey.

In each instance in the third column the nature of the qualification was stated to be "dwelling-house joint."

All the seven persons had been duly objected to, the wording of the objection being "that the nature of your qualification is expressly forbidden by law."

In support of the objection it was contended that "dwelling-house joint" was bad in law under the terms of the 30 & 31 Vict. c. 102, s. 3—extended to counties by 48 & 49 Vict. c. 3, s. 2—at the end of which section it is enacted: "Provided that no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house." Also that in the absence of a new claim, to amend the entry in the overseers' list, or of a statutory declaration under section 24 of 41 & 42 Vict. c. 26, no amendment of the third column could be made.

No amending claim had been made, nor was there any statutory declaration, nor was the revising barrister asked to make any amendment.

Against the objection it was contended that "dwelling-house joint" was a good description in law of the qualification, and the cases of *Townshend* v. *St. Marylebone Overseers*, 20 W. R. 148, L. R. 7 C. P. 143, and *Druitt* v. *Gossling* 58 L. J. Q. B. 109, Fox & Smith Reg. Cas. 123, 37 W. R. Dig. 76, were relied on, and also the Registration Order, 1895, schedule 2, paragraph 8 (ii.) and paragraph 7.

In each instance the dwelling-house was used only as a residence, and was of more than sufficient value to give £10 a year annual value to each joint occupier.

The revising barrister decided that the objection was good in each instance, and he accordingly expunged the names of the seven persons in the schedule from Division I. of the occupiers' list of voters.

The question for the opinion of the court was whether the revising barrister was right or wrong in his decision. If he was right the register was to remain as revised by him; if he was wrong, the names scheduled were to be restored to the register.

The schedule was as follows:

Parish of Preshute—Occupiers' List—Division I.

1. Hussey, Christopher—Clatford—Dwelling-house joint—Clatford House.
2. Hussey, John—Clatford—Dwelling-house joint—Clatford House.
3. Hussey, William—Clatford—Dwelling-house joint—Clatford House.
4. Taylor, Alexander—Manton Down—Dwelling-house joint—Manton House.
5. Taylor, Thomas—Manton Down—Dwelling-house joint—Manton House.

Parish of Pewsey—Occupiers' List—Division I.

6. Dixon, Charles—Pewsey—Dwelling-house joint Southcott.
7. Dixon, Henry—Pewsey—Dwelling-house joint—Southcott.

W. Graham, for the appellant.—The only objection taken here was that the qualification "dwelling-house joint" was forbidden by law. No other objection was taken, and none other can be taken now. In dealing with this objection it is necessary to refer back to the Reform Act, 1832. Section 27 of that Act gave the borough franchise to occupiers, whether as owners or tenants of any house, warehouse, counting-house, shop, or other building of the annual value of £10; and section 29 contained provisions as to joint occupiers of any such premises in a borough, and gave the borough franchise to any such joint occupiers in case the value of the premises was such as to give a sum not less than £10 to every such occupier when divided amongst them. So the law stood until 1867, when the Representation of the People Act, 1867, in section 3, gave the household franchise in boroughs to "every inhabitant occupier, as owner or tenant, of any dwelling-house within the borough"; but subject to the proviso at the end of the section, "that no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house"; and section 6 gave the occupation franchise in counties to occupiers of £12 rateable value, which has been reduced to £10 by section 5 of the Representation of the People Act, 1884. Section 27 of the Act of 1867 dealt with joint occupation in counties, providing that where premises were in the joint occupation of several persons and the aggregate value was such as, if divided amongst them, would, as to value, give each a vote, then each should have a vote, subject to this proviso that not more than two persons, being such joint occupiers, should be registered unless they came within the classes mentioned in the proviso. Then the Act of 1884 provided, in section 2, for a uniform household franchise in boroughs and counties, and established for both counties and boroughs the same household qualification; and section 5 assimilated the occupation qualification in counties and boroughs, providing that "every man occupying any land or tenement in a county or borough of a clear yearly value of not less than £10" should be entitled to be registered. The point raised in this case was raised and decided in the cases of *Townshend* v. *St. Marylebone Overseers*, and *Druitt* v. *Gossling*. In *Townshend's case*, decided in 1871, where the qualification of a person on the list of voters for a borough was described as "dwelling-house," and the voter proved such a joint occupation of a dwelling-house as amounted to a qualification in respect of a "house" under sections 27 and 29 of the Act of 1832, it was held (Brett, J., dissenting) that the qualification was sufficient. [He was stopped.]

Lewis Thomas, for the respondent.—The qualification stated in the schedule is "dwelling-house joint," and it is found as a fact that the house in each case was used as a residence only. By section 20 of the Act of 1832 there was (amongst other qualifications in counties), the qualification of occupation as a tenant of any lands or tenements of a rental of £50 a year; and that remained the qualification for occupiers with value until 1867. By section 6 of the Act of 1867 this qualification was reduced to £12 rateable value, and by section 3 a new qualification as to boroughs was introduced—namely, a household franchise to every "inhabitant occupier, as owner or tenant of any dwelling-house," and that section contains the proviso that "no man shall under the section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house." Under the Act of 1867 there were thus two occupation qualifications, the £12 occupation of "lands or tenements" in a county, and the household qualification in boroughs. The Act of 1884 created a uniform

occupation franchise in counties and boroughs. Section 2 of that Act in addition extended the household franchise to counties, and section 5 extended the £12 occupation franchise to boroughs, reducing the value from £12 to £10. So that from and after 1884 we have the two distinct occupation qualifications in both counties and boroughs—namely, the £10 occupation qualification for occupiers of any land or tenement in either county or borough, and the household qualification for every inhabitant occupier of a dwelling-house in either county or borough. These two qualifications are absolutely distinct from each other; for one a certain value is required, but for the other no value whatever is required. The claim in the present case is in respect of a dwelling-house—that is, it is a claim under section 3 of the Act of 1867 for the dwelling-house or household franchise, and being a claim under that section it comes within the proviso forbidding joint occupiers of a dwelling-house to claim. Therefore the claim "dwelling-house joint" is a claim expressly forbidden by law. *Townshend* v. *St. Marylebone* is a different case from the present, as the claim there was not in respect of a "dwelling-house joint," but was a claim good on the face of it; whereas here the claim is bad on the face of it. I admit that if the claim had been in the form "house and land joint," or "house and garden joint," it would have been good: *Druitt* v. *Gossling*.

He also referred to the Registration Order, 1895, schedule 2, paragraphs 7 (ii), and 8 (ii.); Rogers, vol. 1., p. 642. And Lord Russell, C.J., referred to paragraph 19 (4) of that Order; *ib.* 646.

W. Graham, in reply, referred to *Bradley* v. *Baylis*, 30 W. R. at p. 830, 8 Q. B. D. at p. 231.

Lord RUSSELL OF KILLOWEN, C.J.—We have here to deal with the point presented to us as it is presented to us, and we cannot consider objections which might have been taken before the revising barrister, but which were not taken. The short point in the case is this: There is an entry on the occupiers' list disclosing the qualification of persons on that list as "dwelling-house joint," and the question is whether we are bound to treat that as a claim for the household franchise, in which case it would be bad, or whether we may treat it as a claim for the occupation franchise. It seems to me that the question is settled by authority—namely, the decision in *Townshend* v. *St. Marylebone*—which covers, and covers completely, this case; and that decision is supported by the later case of *Druitt* v. *Gossling*. Then, in the case cited by Mr. Graham of *Bradley* v. *Baylis*, Lord Esher, who dissented from the other members of the court which decided the case of *Townshend* v. *St. Marylebone*, considered the decision in that case as bearing the meaning placed upon it by us, that where there is a qualification stated which may in fact be supported under the Act of 1832, the mere fact that the word "dwelling-house" is used, whether with or without the word joint, will not prevent the claim being a good claim for a qualification other than the household franchise. Darling, J., has called my attention to the case of *Ford* v. *Boon* (20 W. R. 251, L. R. 7 C. P. 150), where the case of *Townshend* v. *St. Marylebone* was again referred to by Brett, J., who there says (L. R. 7 C. P., at p. 156): "As to the main point, I must confess that, but for the decision of this court in *Townshend* v. *St. Marylebone*, I should have considerable doubt. . . . There the claimant, whose qualification was as joint occupier of a house of the value of more than £20 a year, described his qualification as 'dwelling-house.' Under that he might clearly have shown a qualification as an inhabitant occupier under the Representation of the People Act, 1867; and the decision of the court, as I understand it, was, not that 'dwelling-house' did not sufficiently describe the qualification under that Act, but assuming that it did, it also described a qualification under the old Reform Act, and might therefore be applied to that qualification."

It has been conceded in this case for the respondent that a very slight variation of the description would have been enough; if, for instance, the description had been "house and land," or "house and garden," that would have been sufficient. That being the case the point really does not seem to me to be one of substance, and it seems to be in fact decided by the cases I have referred to. I ought to say that, even if we dissented from the decision in the case of *Townshend* v. *St. Marylebone*, we should feel bound to follow it, but we do not dissent from it. In our judgment the decision of the revising barrister was wrong, and ought to be reversed.

WRIGHT and DARLING, JJ., concurred.

Appeal allowed. Leave to appeal.

Solicitors for the appellant, *Ayrton & Biscoe.*

Solicitors for the respondent, *Russell-Cooke & Co.*

C. C. R.
(Lord Russell of Killowen, C.J., and Wright, Kennedy, Darling, and Channell, JJ.) — Nov. 13, 27.

THE QUEEN v. WILLIAM JONES. (*a*.)

Criminal law—False pretences—Obtaining credit by fraud—Obtaining food at a restaurant without having money to pay—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13.

The prisoner was convicted on an indictment containing two counts, the first charging him with obtaining food and wine by means of a false pretence that he was then able to pay, and possessed sufficient money to pay, for what he ordered; the second charging him, under section 13 *of the Debtors Act*, 1869, *with obtaining credit by means of fraud. It was proved that the prisoner entered a restaurant and ordered food and wine, which he consumed, and that he had no money or other means of paying for the articles so ordered and consumed by him. No statement was made by him and no inquiry was made of him at the time of his ordering the articles as to his ability to pay for them.*

Held, that the count for obtaining the articles by false pretences could not be supported, but that he was rightly convicted of obtaining credit by fraud.

Case stated by the Recorder of the City of Worcester.

The prisoner was tried at the City of Worcester Quarter Sessions, held on the 21st of October, 1897, on an indictment which contained two counts. The offence charged in the first count was that on a specified occasion the prisoner did falsely pretend to one Julia Crump that he was then able to pay, and possessed sufficient money to pay, for a plate of cold meat and a pint of sherry, which he requested the said Julia Crump to supply to him, by means of which false pretences he unlawfully obtained from the said Julia Crump certain quantities of mutton, bread, and sherry with intent to defraud.

The second count was under section 13 of the Debtors Act, 1869, the offence charged being that

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

on the same occasion the prisoner, being a person without means, incurred a debt and liability to William Crump amounting to the sum of four shillings in the purchase of the articles of food already mentioned, and with intent to cheat in incurring the said debt and liability of four shillings unlawfully and fraudulently obtained from William Crump credit for the said debt and liability of four shillings by means of fraud.

The material evidence in support of the charge was as follows: Julia Crump stated that her husband William Crump kept a restaurant in Worcester, and that on the 30th of June prisoner came to the restaurant. He asked for some soup and witness replied that she had not got any ready. Prisoner then said, "What have you got?" and witness replied, "Some cold lamb." Prisoner said "he would have the cold lamb and half a pint of sherry," and then went upstairs to the dining room where the lamb and sherry was supplied to him; there was some bread on the table. Ten minutes later, on the witness going upstairs, she found the lamb eaten and the sherry drunk. Prisoner then asked for, and was supplied with, another half pint of sherry. A quarter of an hour afterwards prisoner asked for his bill, which amounted to 4s., and was handed to him; he said nothing. Presently witness went up again and prisoner then said he had not got any money except one halfpenny and would like to see Mr. Crump, who was then sent up. Witness further stated that generally customers paid immediately after they had finished their meal, and that she would not have supplied the prisoner with the wine and food if she had known he was not able to pay for it, though customers who were known were sometimes allowed to pay afterwards.

In cross-examination Mrs. Crump stated that the prisoner was shabbily dressed and that she served him the same as any other customer and made no inquiries about him as she sometimes did. The witness also stated that if an intending customer looked as if he were unable to pay she would make some inquiries about him before supplying food.

William Crump stated that when he was called upstairs by his wife the prisoner said he had no money beyond a halfpenny, and could not pay, but was expecting goods soon. Witness replied that prisoner had no right to come in without any money, and that he would not have allowed him to do so had he noticed before he went upstairs, as from his appearance witness judged he was not fit to be trusted.

The prisoner was immediately arrested.

As regards the first count, the recorder directed the jury that before they could convict the prisoner they must be satisfied (1) that he intended by his conduct to represent that he was of present ability to pay for the wine and food; (2) that he was aware of his want of ability to pay; (3) that the wine and food were supplied by Mrs. Crump in consequence of the false pretence made by the prisoner if it existed; and (4) that there was an intention on prisoner's part to defraud.

As regards the second count, he directed the jury that, before they could convict the prisoner, they must be satisfied that the prisoner was a person without means, and had, in incurring a debt or liability for the articles in question, fraudulently obtained credit from William Crump for 4s. with intent to cheat him of the same.

The jury found the prisoner guilty both on the first and second counts, and he was sentenced to three month's imprisonment with hard labour upon each count, such sentences to be concurrent.

The opinion of the court was requested as to whether the conviction upon both or either of the counts could be sustained. If it could be sustained on either of the counts the conviction was to be affirmed, if not it was to be quashed.

Harington, for the prisoner.—The conviction on the first count is bad for the reason that the prisoner did not by conduct or words hold himself out as able to pay for what he ordered. There was, therefore, no misrepresentation as to an existing fact, an essential element in the offence of obtaining goods by false pretences. The prisoner merely ordered the food, and his conduct at most amounted to no more than an implied promise to pay at some future date, and that is not sufficient to support the charge: *Rex* v. *Goodhall*, Russ. & Ry. 461; *Reg.* v. *Burrows*, 17 W. R. 682, 11 Cox C. C. 258. These cases are not inconsistent with *Reg.* v. *Cooper*, 25 W. R. 696, 2 Q. B. D. 510, or *Reg.* v. *Gordon*, 23 Q. B. D. 354, 37 W. R. Dig. 62.

As to the second count, the prisoner never obtained credit at all. There must always be some interval of time between the delivery of goods and the payment for them, and a transaction is not a credit transaction unless that is the intention of the parties: *Reg.* v. *Slowly*, 12 Cox C. C. 269, 21 W. R. Dig. 88; such an intention is negatived in this case by the evidence of Mr. and Mrs. Crump in the present case.

J. B. Matthews, for the prosecution.—There was evidence on which the jury might properly find that the prisoner obtained the food by false pretences; the prisoner's conduct was such as to imply a present ability to pay for what he ordered, and the case is similar to those in which the giving of a cheque by a person who has no account at the bank has been held to be a false pretence: *Rex* v. *Jackson*, 3 Camp. 370; *Reg.* v. *Hazelton*, 23 W. R. 139, L. R. 2 C. C. R. 134; *Reg.* v. *Giles*, 13 W. R. 327, Leigh & Cave 502. So also the sending of the half of a bank-note was held to amount to a representation that the sender had the other half in his possession, and not merely to a promise that he would send it in the future: *Reg.* v. *Murphy*, 13 Cox C. C. 298, 25 W. R. Dig. 89; *Rex* v. *Crossley*, 2 Moo. & R. 17. But even if there were no false pretence the prisoner was rightly convicted on the second count, for there was ample evidence that he obtained credit by fraud.

Harington, in reply, referred to *Reg.* v. *Masterson*, 2 Cox C. C. 100.

Rex v. *Barnard*, 7 C. & P. 784; *Reg.* v. *Peters*, 34 W. R. 399, 16 Q. B. D. 636; and *Reg.* v. *Powell*, 54 L. J. M. C. 26, 33 W. R. Dig 68, were also referred to.

Cur. adv. vult.

Nov. 27.—The judgment of the court (Lord RUSSELL OF KILLOWEN, C.J., WRIGHT, KENNEDY, DARLING, and CHANNELL, JJ.) was delivered by

Lord RUSSELL OF KILLOWEN, C.J.—This case was reserved for our consideration by the recorder of Worcester. The prisoner was indicted in two counts; in the first he was charged under the Larceny Act, 1861, with obtaining goods by false pretences; in the second with having incurred a debt and obtained credit by fraud, an offence under the Debtors Act, 1869. The facts to which I shall presently refer are fully set out in the case, the questions were left to the jury, and upon the facts and the directions of the learned recorder the prisoner was convicted on both counts, and was sentenced to two periods of three months' imprisonment to run concurrently. The question for us is whether, taking the facts as stated coupled with the recorder's direction to the jury, the conviction can be sustained on both counts or on either—in other

words, whether there was any evidence on which the jury could properly convict the prisoner.

The facts were shortly these: The prosecutor kept an eating-house, and on the 20th of June the prisoner went in and asked for some soup; he was told that there was none ready, and thereupon asked for some cold beef; he was told that there was none, but that he could have some cold lamb and salad, and this he accordingly ordered. He then ordered half a pint of sherry and went upstairs to have his meal, while there he rang the bell and ordered another half-pint of sherry. Subsequently he again rang the bell, and asked what there was to pay, and upon being told four shillings said that he had no means of paying, that he had no money and had (as was the fact) only a halfpenny on him. Such was the state of the facts; all that the prisoner did was to go into an eating-house, order food and refreshment and eat, but not pay for it; no question was put to him and no enquiry was made from him by the prosecutor as to his means, nor was any statement made by him as to whether he had means to pay. The question is whether this can be regarded as a state of things in which a jury would be justified in finding that the prisoner obtained consumable articles by false pretences. I do not desire to say anything which can weaken the authority of the decisions which say that there can be a false pretence by conduct—for example, the case of *Rex* v. *Barnard*, where a cap and gown were used by a man who had no right to wear them in order to convey the notion that he was a member of the university. Nor do I in any way dispute the authority of another class of case, where a man gives a cheque on a bank where he either has no account or has not sufficient means to meet the cheque, and must have known that he had not sufficient means. In the present case the prisoner did nothing beyond what I have already stated, no inquiry was made of him, and no statement was made by him. Under the circumstances I do not think that the case could properly be left to the jury on the first count; there was no evidence for the jury that the prisoner had obtained these articles by false pretences.

Now, it is provided by section 88 of the Larceny Act, 1861, that if upon the trial of any person indicted for the misdemeanour of obtaining goods by false pretences it is proved that he obtained them in such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanour; that is to say, if the facts show a larceny he is not to be acquitted of misdemeanour. But in the present case the prisoner did not commit larceny. In the circumstances of the case it is clear that the prosecutor parted not merely with the possession, but also with the property in his goods, and that he intended to do so, for the goods were intended for immediate consumption. The finding of the jury that the prisoner was guilty of obtaining goods by false pretences cannot, therefore, be supported on that ground, and the conviction on the first count is bad.

The second count is framed upon a different statute—upon section 13 of the Debtors Act, 1869—which provides that in certain cases a person shall be deemed guilty of a misdemeanour: the first case being, if in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud. There are three elements which have to be considered in the construction of that section. First, there must be the incurring of a debt or liability; secondly, there must be an obtaining of credit; and thirdly, there must be fraud. The conjunction of these three ingredients makes the offence. Now, there can be no doubt that the prisoner did incur a debt or liability; he ordered goods under circumstances which implied a promise to pay for them. Then did he obtain credit? I am of opinion that he did. The prosecutor might have said that he would not furnish him with the goods until he paid the price, or he might have insisted on payment in actual exchange for each article as it was supplied, but he did neither. He furnished the goods under circumstances which passed the possession and property in them, relying on the readiness and ability of the prisoner to pay. It does not seem to me to matter that the period of credit was a short period; he trusted the prisoner and parted with his goods without insisting on prepayment. I think, therefore, that credit was obtained. Thirdly, was there fraud? There was debt and there was credit, and I think there was ample evidence to justify the jury in arriving at the conclusion that the prisoner was guilty of fraud. He goes to an eating-house, where the ordinary custom is to pay directly after the goods have been consumed; he knows that such goods are supplied, not on personal knowledge, but on the understanding that the ordinary custom will be observed. The jury found that he had no intention of paying; he intended to cheat, and so the jury found. I think, therefore, that the conviction was right upon the second count, and that it must be affirmed.

Conviction quashed on first count and affirmed on second count.

Solicitors for the prosecution, *Arrowsmith, Maund, & Coombs*, Worcester.

Solicitor for the prisoner, *John Stallard*, Worcester.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Dec. 11.

ATTORNEY-GENERAL v. NEW YORK BREWERIES CO. (LIMITED). (a.)

Inland revenue—Probate duty—Executor de son tort—*Foreign will—Transfer of shares in English company to foreign executors—Liability of company.*

A testator, the registered owner of shares and debentures in an English company, was domiciled and died in America. By his will, made according to American law, the shares and debentures passed to his executors. At the request of the executors the company transferred into their names two of the shares and one of the debentures, and paid them the dividends and interest due thereon. The executors, to the knowledge of the company, had not obtained, and did not intend to obtain, probate of the will in England.

Held, that the company had intermeddled with the estate of the deceased so as to constitute itself an executor de son tort, *and had rendered itself liable to the payment of probate duty.*

Judgment of Wills *and* Grantham, JJ. (45 *W. R.* 606), *reversed.*

Appeal from the judgment of a Divisional Court (Wills and Grantham, JJ.) on the hearing of an information by the Attorney-General (45 W. R. 606).

The information alleged that the defendant company had administered part of the estate of one Henry Clausen, deceased, in respect of whose estate

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

no probate or letters of administration had been obtained in England, and had thereby, as executors *de son tort*, incurred liability for duty and penalties.

The defendant company was an English company incorporated under the Companies Acts, and was established for the purpose of acquiring two businesses which were being carried on in New York, in the United States of America.

Henry Clausen, a person domiciled in New York, was registered in the books of the company in London as the holder of 1,747 preference shares, 274 ordinary shares, and 220 debentures. There was not, and never had been, any register of shares or register of debentures of the company elsewhere than in London.

Henry Clausen died in December, 1893, having, by a will made according to the law of his domicil, appointed H. W. Schmidt and P. V. Stocky, both of New York, his executors. In January, 1894, letters testamentary of the estate of Henry Clausen were duly granted by the Surrogate's Court of the city and county of New York to the said H. W. Schmidt and P. V. Stocky.

The will of Henry Clausen was not proved in England, nor was administration or representation to his estate in any form granted or taken out in England.

At the request of the foreign executors the defendant company transferred in the books of the company in London one of the preference shares, one of the ordinary shares, and one of the debentures, standing in the name of the deceased, into the names of the executors. The defendant company also at the like request paid to the executors dividends on shares which had become due after the death of the deceased and interest on debentures which had become due before his death.

The defendant company, when they so transferred the shares and debenture and paid the dividends and interest, knew that the executors had not obtained probate in this country and did not intend to do so.

The Crown asked for a declaration that the defendant company was liable to pay such duty (including estate duty under section 5 of 52 Vict. c. 7) as would have been payable if probate or administration had been duly obtained in England in respect of the estate of Henry Clausen; and further, that the defendant company was liable to the penalties imposed by section 37 of 55 Geo. 3, c. 184, and section 40 of 44 Vict. c. 12, for administering the said personal estate without obtaining probate or letters of administration.

The Divisional Court gave judgment for the defendants.

The Crown appealed.

Sir R. B. Finlay, S.G., and *Vaughan Hawkins* (*Sir R. E. Webster, A.G.*, with them), for the Crown.

Moulton, Q.C., Asquith, Q.C., Bremner, and *Gore-Browne*, for the defendants.

Dec. 11.—A. L. SMITH, L.J., read the following judgment: This is a test case, and it is brought to determine whether an English company limited by shares and registered in England can, upon the death of a foreign shareholder, with impunity transfer into the names of his foreign executors shares and debentures standing in the name of the deceased shareholder in the books of the company, and pay to such executors the arrears of interest and dividends due thereon at the date of his death, without such executors taking out or being about to take out representation to the deceased in this country. That this is the real question which the parties wish to have decided will be seen from the letter of Messrs. Burn & Berridge, the solicitors of the defendant company, of the 10th of January, 1895, to the Comptroller of Inland Revenue. My brothers Wills and Grantham have held that the company can legally and with impunity do this, the case before them having been specially argued as to whether the defendant company by so doing would bring themselves within section 37 of 55 Geo. 3, c. 184, and become liable to the penalties therein named. The case has been developed in this court into one very different from what it was in the court below, the Solicitor-General, who appeared for the Crown, now stating that he did not ask for penalties.

The material facts are as follows: The defendants are an English company limited by shares, incorporated under the Companies Acts, 1862 to 1886, having their registered office in the City of London, where the share and debenture registers are kept. They carry on the business of brewers in America. Henry Clausen was a share and debenture-holder in this company, and was registered as such in their books in London at the date of his death, which took place in America upon the 28th of December, 1893. He was an American citizen, resident and domiciled in that country, and left a will whereby he appointed two gentlemen of New York his executors, to whom letters testamentary of his estate were granted by the court in New York. Having obtained these letters testamentary, the American executors then requested the defendant company in England to pay to them the interest and dividends due to their testator at the date of his death upon his shares and debentures, and also to transfer into their names the shares and debentures standing in the name of the deceased in the defendants' share and debenture registers in London. The defendants well knew when this request was made that these executors had not taken out and did not intend to take out representation in this country to their testator, and that their object was to obtain, if possible, possession of the English assets of their testator without paying probate duty thereon. The defendants, with this knowledge, paid over the interest and dividends as requested to the foreign executors, who were then in America, and also transferred into their names in the registers in this country one preference and one ordinary share and one debenture, so as to raise the point whether this could be legally done with impunity.

For the main point intended to be raised it should be taken that the interest and dividends were paid to the foreign executors in this country. Now, first of all, what would have been the position of these foreign executors had they come over to this country and obtained from the defendant company in London payment of the interest and dividends due to their testator at the date of his death, and a transfer of the shares and debentures from his name into their names without having taken out or intending to take out representation in this country to their testator? I cannot doubt that, upon receipt in this country of their testator's English assets, they would have constituted themselves executors *de son tort*. They were not, and never intended to be, executors or administrators in this country of the deceased's assets here; but, on the contrary, intended never to be so, and yet they intermeddled, as executors, with the testator's goods and chattels in this country in such a way as to constitute themselves executors *de son tort*.

I see the point is stated thus in Williams on Executors, 9th ed., p. 1827: "It must be observed that if he"—that is, a foreign executor—"should collect the effects or debts of the deceased found or due in

England, without taking out letters of administration here, he would thereby become liable as executor *de son tort* to the extent of the assets so received by him"; and in this I agree. That this would have been the position of the foreign executors in this case when they obtained the English assets of the deceased from the defendant company I do not doubt; and this is so, although they did not personally come to this country.

Now, these foreign executors being, as I think they were, executors *de son tort*, how can the defendant company, when called upon in a court of law, justify what they did at the request of the foreign executors in administering the English assets of the deceased? My brother Wills based his judgment upon the ground that, as an executor derives his power from the will, and can do many acts before taking out probate, and can even sue, which is undoubtedly true, the defendant company could therefore justify administering the English assets of the deceased, as the company had acted upon the request of the executors and had handed over to them the assets of their testator, although they had not at that time taken out probate. If the executors were English executors about to take out probate, this ordinarily would be so, but I must point out that when either an executor has to justify what he has done as executor, or another has to justify what he has done at the request of an executor, each must prove that the executor was in fact the executor of the deceased, and this can only be done by production of the probate, for, as Jervis, C.J., pithily put it in *Johnson* v. *Warwick*, 17 C. B. 516, 4 W. R. C. L. Dig. 168, at p. 522, when the will is proved the court has the legal optics through which to look at it, and that this was so was not in reality disputed at the bar.

My brother Wills says that what the company has done is simply to pay to the executors, who are persons entitled to receive it, money which belonged to them as executors, which had belonged to the testator, and which, upon his decease and upon his will coming into operation, became the property of the executors. But in the present case the American will as regards these English assets had no validity whatever in this country, nor had the American executors any right under it to receive the testator's assets here. Until they had taken out representation to their testator in this country they were pure strangers to the English assets. This American will, to the knowledge of all parties, was never to come into operation as a will in this country; the American executors were never to become executors in this country, it being the express intention of all parties that they should not. This is not the case, as put in argument, of a debtor of a testator paying a debt, due from him to that testator, to the executor named in his English will before that executor has proved the will; but it is a case in which the payment is made to a person who has no legal right to receive it, well knowing that that person would never become legally entitled to receive it. The judgment of Wigram, V.C., in *Sharland* v. *Mildon*, 5 Hare 469, and that of Wood, V.C., in *Hill* v. *Curtis*, 14 W. R. 125, L. R. 1 Eq. 90, in my opinion show that even if there was not such knowledge, the defendant company by what they did were executors *de son tort*.

It cannot be successfully contended that an executor *de son tort* is not liable to pay probate duty upon the assets of a testator which he has administered any less than he would have been liable if he had been a named executor in a will. Without being executor he has intermeddled with the deceased's estate as if he were executor so as to constitute himself executor *de son tort*; and as Wightman, J., in *Paull* v. *Simpson*, 9 Q. B. 365, says, a person who is an executor *de son tort* is executor generally. I find in Mr. Hanson's book on the Probate, Legacy, and Succession Duty Acts, edition of 1870, p. 66, this passage: "Those who receive and administer the property of the deceased either as original or derivative executors . . . or as administrators of his effects or even as executors *de son tort* are the persons primarily liable to account for and pay the duty." Although this work is not an authority in a court of law, I have no doubt that that passage is correct. In my opinion, in the circumstances stated, the defendant company were executors *de son tort*, as also were the foreign executors. The defendants' case really comes to this, that one executor *de son tort*, when challenged in a court of law in this country to justify what he has done in relation to the administering of a deceased's estate, can do so if he can show that he has acted under the directions and at the request of another executor *de son tort*. This cannot be, and it is not surprising that no authority has been produced to support such a proposition.

The defendant company having constituted themselves executors *de son tort*, and thus become debtors to the Crown for probate duty, it is argued that, even if so, there is no way by which the Crown can obtain from the defendants the duty payable to it—that is, the duty payable upon the English assets of the testator administered by them. Elaborate arguments were addressed to us upon the question whether the defendant company were liable to the penalties imposed by section 37 of 55 Geo. 3, c. 184, but that is not the point now sought to be determined, the Solicitor-General not asking for penalties. The question is whether by any proceedings by the Crown against the defendants they can be made to pay probate duty to the Crown.

In my judgment it is open to the Attorney-General to file an information against the defendant company asking that it may be declared that a debt arose and became payable to Her Majesty in respect of probate duty upon the amount of the English assets which were in this country at the date of the death of the deceased, and which the defendants have administered, and it is no answer to such an information to say that they were only executors *de son tort*. In this proceeding the defendant company will have to justify what they have done, and they cannot do so without producing probate or letters of administration with the will annexed or other representation taken out by the American executors in this country. It is true that the person liable to pay probate duty has to swear an affidavit and obtain a stamp of the requisite value to be affixed thereon, and by this means he is to pay the probate duty; but this is mere machinery by which the duty is to be paid. The person who is liable to pay probate duty and does not do so is a debtor to the Crown, and it is no answer for him to say his only liability is to swear an affidavit and procure a stamp. Even if this were an answer, which I think it is not, I do not see why the prayer of the information should not be framed to meet it. That proceedings by way of information to recover probate duty will lie is established by precedents, and even if not, I can see no valid reason against it.

In the year 1831 (*tempore* Sir James Scarlett, A.G.) I find an information to recover probate duty was filed in the case of *Attorney-General* v. *Dimond*, 1 C. & J. 356. In the year 1834 (*tempore* Sir John Campbell, A.G.), in the case of *Attorney-General* v. *Hope*, 1 C. M. & R. 530, like proceedings were had, and this case went to the House of Lords. Again, in 1859, Sir Fitzroy Kelly, when Attorney-General, filed an information for the same purpose: see *Attorney-*

General v. *Brunning*, 7 W. R. 308, 4 H. & N. 94, and this case also went to the House of Lords, 8 W. R. 362, 8 H. L. Cas. 243. I cannot doubt that proceedings by way of information by the Attorney-General can be taken to recover unpaid probate duty.

What I have written above answers the real point raised in this case, in favour of the Crown—viz., that it is not lawful for the defendant company to do what they have done, and that they can be made liable to pay probate duty upon the assets which they have administered in this country. If it is to be taken that the interest and dividends in this case were paid in America, and not here, I think the same result follows, and the reason for this will be found in the judgments about to be delivered by my brothers Rigby and Collins.

It is unnecessary in the view I take of this case to decide whether the penalties imposed by section 37 of 55 Geo. 3, c. 184, can be recovered. The Solicitor-General does not ask for them, but had I to decide thereon, I should agree—though I doubt whether it is open to me to disagree in this court—with the judgment of Giffard, L.J., in *Fernandes' Executors case*, 18 W. R. 411, L. R. 5 Ch. App. 314, which judgment has an important bearing upon this case in favour of the Crown. Nor have I to decide whether section 57 of the Crown Suits Act, 1865, or sections 39 and 40 of 44 & 45 Vict. c. 12, can in the circumstances of this case be resorted to.

For the above reasons in my judgment the Crown succeeds in this appeal, which must be allowed with costs here and below.

RIGBY, L.J., read the following judgment: By English law, with which alone we are concerned in this case, probate duty is payable in respect of all assets of a deceased person, whether domiciled or resident within this country or not, which are within the meaning of the numerous decisions on this point locally situated in England. The authorities show that for this purpose the following are treated as local assets subject to probate duty: (*a*) Any *choses in action* which are incapable of being effectually transferred without some act being done in this country. This would include shares and debentures of a limited company incorporated in England, transfers or transmission of which must, as in the present case, be completed by entries in a register of members or a register of debenture-holders. (*b*) Any debts payable by debtors in this country, including incorporated companies which, as in the present case, are registered, managed, and controlled here. Dividends on shares in the case of the defendant company have to be declared by a general meeting of the company held here, or, as to *interim* dividends, by the board of directors acting here, and when declared can only be recovered as debts due from the company. Interest on debentures can only be recovered as a debt due from the company, and in the present case there are express provisions making the interest payable in London. There can be no doubt that, if representation to a deceased person were taken out in this country, the personal representative here would be chargeable with probate duty in respect of all these assets so far as the interest of the deceased extended. In the regular course the probate duty is chargeable as a stamp duty on the affidavit required from the person applying for probate or letters of administration. But if it were possible to evade the duty by omitting to take out representation to the deceased, the imposition of the duty would in many cases be a vain thing. Accordingly it is, upon authority, plain that the duty is payable by a person who takes upon himself to deal with assets, even though he do so as an executor *de son tort* only. Any person who may be entitled to administration here, including the representative in the country of the deceased's domicil, if he does not make himself personal representative here, becomes, on intermeddling with the assets here, executor *de son tort*, and chargeable as such with probate duty. Any person intermeddling with the assets under the direction of an executor *de son tort* whether he be a foreign representative or not, is himself chargeable as an executor *de son tort*. It makes no difference that the foreign representative is named as executor in the will by virtue of which he is made representative abroad. That will cannot be looked at or given in evidence until representation is taken out here, and the maxim *De non apparentibus et non existentibus eadem est ratio* will apply.

We are asked to decide here that the defendant company and other like companies may, without becoming liable to the Crown for probate duty, lawfully concur in transferring *choses in action* which cannot be effectually transferred without an act done here—viz., the shares and debentures of the deceased, and pay the dividends and interest of the shares and debentures to persons who cannot be recognized by our law as representatives of the deceased and on the hypothesis never intend to be representatives here. In my judgment the defendant company can do none of the things suggested without making themselves liable to the Crown for probate duty, a liability which may, independently of any question of penalties or special remedies given by the Crown Suits Act, be enforced by information against them. It is suggested that by paying the dividends and interest abroad the company may evade liability. Whether the payments be made abroad out of money transmitted for the purpose or out of money of the company which happens to be abroad makes, in my judgment, no difference. They are equally payable by the order and direction of the company; and the payment is the act of the company whereby a *chose in action* of the company locally situate here within the meaning of our law is dealt with so as to constitute the company executors *de son tort*.

It was further suggested that the courts in New York would enforce payment there of the full amount of the dividends and interest regardless of the fact that they are chargeable—and that the payment of them would make the company chargeable—with probate duty in England. I am very far from being satisfied that this would be so, but, if it were the case, however much it might be regretted, I do not think that we are bound, and I do not feel inclined, to decide that it would affect the Crown's right to duty. As this case is brought before the court for decision on a state of facts raised for the purpose of determining a general principle, it would be out of the question for the Crown to exact penalties, and no such claim has been made, though it has been argued that they would be payable, and the information which by agreement was substituted for a special case for the purpose of raising the general question is so framed as to raise the abstract question of penalties. It does not appear desirable to decide anything more than is necessary for determining the real point submitted to us; but without deciding any abstract question as to penalties I may say that for my part it would require very different grounds from any that have been brought before us to lead me to the conclusion that the decision of Giffard, L.J., in *Fernandes' Executors case* would not be applicable. I do not think it relevant to inquire whether, as between the executors named in the will and the defendant company the transfers and payments might not be valid and sufficient to relieve the company from liability. They could have no such effect as against the Crown or any other claimants entitled to

payment out of the English assets. In conclusion I would add that, if the arguments of the defendant company were to prevail, I see no reason why foreign executors who did not wish to sue in this country should ever pay probate duty on assets here. They would only have to get someone here, to collect and transmit to them all the assets here, and there would be an end of the matter. Indeed, that appears to be the precise argument of the defendants in this case.

COLLINS, L.J., read the following judgment: I agree in the result of the judgments delivered, and without recapitulating the facts will shortly state my reasons. I think it cannot be doubted on the facts admitted that the defendant company have taken upon themselves to deal with the English assets of a deceased person. Indeed, subject to the question whether they ever took possession or not, Wills, J., in the court below, thought that they had done so. He says that if they took possession they certainly administered, because if they took possession they dealt with the property. By an act which could only be done by them in London, and without which no transfer would have been complete, they effected a change in the legal evidence of the title to a share and a debenture in the company by transferring them in the register into the names of the American executors. They also paid to the executors out of England, dividends on shares and interest on debentures, which latter, at all events, was by the terms of the debentures themselves payable in London. They did all this knowing that the persons to whom they so transferred and paid, though in fact named as executors in the will of the deceased in America, had no intention of taking out probate in this country, and they were willing to assist them as far as they could in avoiding the necessity of doing so. This appears to me clearly to amount to such an intermeddling with the English assets of the deceased as to constitute the defendant company an executor *de son tort*, unless the fact that these acts were done under the authority of the executors named in the American will can make a difference.

I agree that there is a broad distinction between acts done by or under the direction of a mere intruder not named in the will and acts done by or under the authority of a named executor. The latter taking title under the will is not, in fact, a tortfeasor, neither is anyone acting under him, and for certain purposes this distinction may be material. But if the acts of the persons who have dealt with the assets are challenged, as they now are by the Crown, and their rights have to be ascertained in a court of law before probate is taken out—and *a fortiori* if it was never intended to be taken out—there is no material difference between the position of the mere intruder and his agents, and the executor and his agents. They are each estopped by their acts, whether tortious or innocent, from denying that they are executors, and, as they cannot prove probate, they make themselves liable to probate duty in respect of the assets which they have administered. The distinction is pointed out by Montague Smith, J., in *Sykes* v. *Sykes*, 18 W. R. 551, L. R. 5 C. P. 113; see also *Hill* v. *Curtis*. It is immaterial in this view whether they are named in the will or not, as the court cannot be informed upon this fact except through the medium of probate. The headnote of *Sykes* v. *Sykes* is misleading. There Shaw had been manager of certain works which had been carried on by a deceased person. After her death he at the request of her executors, who had not proved her will, continued to manage the works and to deal with the property. Judgment was obtained against him as executor *de son tort* by a creditor of the deceased, and execution was levied on "the goods in his hands as executor to be administered." The executors afterwards took out probate and brought trover against the execution creditor and the sheriff, and it was held that they were entitled to judgment, as the agent of a rightful executor was not a tortfeasor in obeying the executor's orders. There, probate having been taken out before the executors' action, the court was able to see that they were executors, and as such capable of justifying the acts of Shaw, which, consequently, were not tortious; but the case is far from deciding that, had the executors not taken out probate before action, the acts of Shaw could have been treated as other than tortious. In contemplation of the court he must have been a wrongdoer if he could not prove that he had the authority of the executors.

If I am right in holding that the defendant company did intermeddle with the English assets of the testator by the acts above stated, the case of *Fernandes' Executors*, 18 W. R. 411, is exactly in point. There the deceased, who was domiciled in India, was a creditor of an English bank which carried on business in India. The company was wound up, and the deceased had proved his debt and received a dividend before his death. He died in India, and his will was proved there. The Indian assets of the bank had been remitted to the official liquidator in England. A final dividend became payable after the death of the creditor, and the Indian executors were desirous of receiving it without taking out probate in this country. The liquidator took the opinion of the court whether he would be justified in remitting the amount to India, or paying it to an attorney here for the executors. Giffard, L.J., overruling Lord Romilly, M.R., held that he could not do so, and expressed an opinion that the person who so received and administered the assets would be liable to a penalty under 55 Geo. 3, c. 184.

I agree with A. L. Smith, LJ., that, as the Crown are not claiming a penalty under the latter statute, the real question is whether the defendant company are liable to pay duty, and I have no doubt that an information would lie against them for not doing so. This point does not seem to have been argued in the court below. But I am further of opinion that the processes of transferring the title to the shares and debentures in the register from the deceased to the executors, and paying the interest and dividends, did involve a "taking possession" of these assets within the meaning of the statute. If the operation had been carried out in the ordinary way there must have been a physical taking possession of the documents of title, and even though this step was advisedly omitted in this case, I think there was a constructive taking possession involved in the alteration of the register and the payment of interest and dividends. The interest and dividends, as well as the shares and debentures, formed part of the estate of the deceased in England, being debts due from an English company and payable in England: *Attorney-General* v. *Higgins*, 2 H. & N. 339, 5 W. R. C. L. Dig. 227; *Attorney-General* v. *Bouwens*, 4 M. & W. 171; and *Attorney-General* v. *Hope*; and I think that the company cannot, by paying them in America, escape from the position of having appropriated in their hands, and therefore taken possession of, English assets of the deceased, when they paid these sums for interest and dividends.

Appeal allowed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendants, *Burn & Berridge.*

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Dec. 1.

In re PEVERIL GOLD MINES (LIMITED). (*a.*)

Company—Articles of association—Winding up—Right of contributory to petition for—Limitations imposed by articles—Validity—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79, 82.

It is not competent for a limited company to curtail by its articles of association the statutory right of any of its members to present a winding-up petition to the court.

Appeal from Byrne, J.

A shareholder in the above-named company holding 5,000 fully-paid shares presented a petition to the court for a winding-up order. It was admitted that he was entitled to present a petition but for clause 164 of the articles of association, and the question was whether he was estopped by that clause, as he had not fulfilled any of the conditions precedent.

Clause 164 was as follows: "No petition shall be presented or proceeded with by a member to wind up the company, except and unless (*a*) by consent in writing of not less than two of the then board, or (*b*) in pursuance or by permission of a resolution passed by a majority at a general meeting of the company, or (*c*) the petitioner or petitioners shall hold, or together hold, not less than one-fifth of the then issued capital of the company, upon which all calls shall have been paid."

The company and two shareholders, one holding twenty shares, on which 16s. 6d. had been paid, and the other holding 13,600 fully-paid shares (being £1 shares nominal value), moved the court to stay proceedings.

Section 79 of the Companies Act, 1862, is as follows: "A company under this Act may be wound up by the court, as hereinafter defined, under the following circumstances (that is to say): (1) Whenever the company has passed a special resolution requiring the company to be wound up by the court; (2) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; (3) whenever the members are reduced in number to less than seven; (4) whenever the company is unable to pay its debts; (5) whenever the court is of opinion that it is just and equitable that the company should be wound up"; and section 82 is as follows: "Any application to the court for the winding up of a company under this Act shall be by petition; it may be presented by the company, or by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately."

Byrne, J., being of opinion that clause 164 was inconsistent with sections 79 and 82 of the Companies Act, 1862, refused to stay proceedings, and dismissed the motion.

The company and the two shareholders appealed.

Jenkins, Q.C., and *W. H. Cozens-Hardy*, for the appellants.—Byrne, J., was not prepared to say that a given contributory might not make a bargain with the company that he would not present a petition; but he held that an article to that effect would be invalid. If an article is not invalidated, not made illegal, by the Companies Acts, one may expect to find it in the articles: *Welton* v. *Saffery*, 45 W. R. 508, [1897] A. C. 299. The question of the power of the corporation to do any particular thing does not arise here. A mere attempt to oust the jurisdiction of the court is invalid, in the same way as a mere covenant not to sue for money lent. [CHITTY, L.J.—The only mode of enforcing the rights of contributories *inter se* is by petition to the court.] An article which imposes certain conditions precedent is valid, provided that such conditions are not unreasonable: it is lawful to put some limitation on the right to petition, and this is a reasonable limitation. The articles are a contract between the members of the corporation *inter se*: *Eley* v. *The Positive Government Security Life Assurance Co.* (*Limited*), 24 W. R. 252, 1 Ex. D. 20; *Browne* v. *La Trinidad*, 36 W. R. 289, 37 Ch. D. 1. The general effect of articles of association is that any condition if reasonable may be inserted in the articles if it is not repugnant to the Companies Acts. The Act does not expressly or impliedly prevent a contributory from contracting himself out of section 82 by the articles; *primâ facie* he may contract himself out of any Act of Parliament. [VAUGHAN WILLIAMS, L.J.—I do not assent to your general proposition, that any partner or member of a company can so contract as to limit the rights of the other partners or members.] A contract by two, three, or four members of a company that they will not present a petition to wind up before the happening of a certain event is good and can be enforced. There is nothing to prevent a contributory contracting himself out of the section for good consideration. All the cases which are against us are cases of a company, as a company, releasing its rights.

They referred to *Walker* v. *London Tramways Co.*, 28 W. R. 163, 12 Ch. D. 705; *Hope* v. *International Financial Society*, 25 W. R. 203, 4 Ch. D. 327; *Malleson* v. *National Insurance and Guarantee Corporation*, 42 W. R. 249, [1894] 1 Ch. 200; *Ellis* v. *Dadson*, 60 L. J. Ch. 353, 40 W. R. Dig. 54; and *Cotton* v. *Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454, 41 W. R. Dig. 36.

Eve, Q.C., and *Eustace Smith*, for the respondents, were not called upon.

LINDLEY, M.R.—I will start with reading an extract from the judgment of Lord Macnaghten in *Welton* v. *Saffery*, 45 W. R. 508, at p. 515, [1897] A. C. 324: "These companies are the creature of statute, and by the statute to which they owe their being they must be bound, in regard to shareholders, as well as in regard to creditors, in all matters coming within the conditions of the memorandum of association. Shareholders in these companies require protection just as much as creditors, perhaps even more. Shareholders are not partners for all purposes; they have not all the rights of partners; they have practically no voice in the management of the concern; their security in a great measure depends on the directors adhering to the requirements of the Act." Anybody who is familiar with these Acts knows that these registered limited companies are formed on certain conditions, and are regulated and dissolved under certain conditions. The important sections of the Act of 1862 are sections 79 and 82. Section 79 deals with the circumstances under which a company may be dissolved by the court; and section 82 says who may apply to the court for a dissolution. I take it that any article which is contrary to these—which in substance says that a company was formed on the condition that its life should not cease in conformity with the statute—is an attempt to force upon the shareholders conditions which are at variance with the provisions of the Act. It is saying in effect that,

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

notwithstanding the provisions of the Act, we shall not be dissolved; and that is a condition fundamentally at variance with the statutory obligations. It is no answer to say that such an article merely enables a contributory to waive his individual statutory rights.

I am not disposed to say that a bargain may not be made between the company and the contributories or creditors in certain circumstances, but a bargain such as this, that the company should not be terminated in the circumstances provided by the Act, would be contrary to the true principle of the statute.

Sections 14 to 16, and 161, are not in point. I regard the whole proceeding as contrary to the intention of the Act. The appeal must be dismissed with costs.

Chitty, L.J.—I am of the same opinion. We are not concerned to consider whether a shareholder may contract not to present a petition to wind up the company, or whether the rights given to the shareholders by the Act may be varied, as, for instance, the rights given to dissentient shareholders by section 161 of the Act on the sale of the property of the company to another company. With regard to sections 79 and 82 of the Act of 1862, there is a condition annexed to the incorporation of a company that it may be wound up under certain prescribed conditions; and an article to the effect that the shareholders shall not present a petition cannot be valid. It was not disputed that an article which provided that no one, no creditor or contributory, should present a petition, or that the company itself should not, would not be good.

I think that the condition attached to the incorporation of a company is an essential one, and cannot be varied in the articles by the shareholders. The article in the present case puts a limitation on their rights; but if we held it valid we could not stop short of saying that an article of wider import would be valid.

Vaughan Williams, L.J.—I entirely agree, and have nothing to add.

Appeal dismissed.

Solicitors, *White & De Buriatte; Robinson & Stannard.*

High Court of Justice.

Chan. Div. } Wright, J. } Dec. 9, 10.

Bartlett v. Mayfair Property Co (Limited). (a.)

Company—Winding up—Debentures—Charge on uncalled capital—Special resolution—Uncalled capital not capable of being called up except for winding up—Companies Act, 1879 (42 & 43 *Vict. c.* 76), *s.* 5.

If a limited company pass a special resolution in accordance with section 5 *of the Companies Act,* 1879, *declaring that a certain portion of its uncalled capital shall not be capable of being called up, except in the event of the company being wound up, and afterwards issues debentures charging all its property, including* (inter alia) *its uncalled capital, these debentures are not a first charge on such capital when it is called up in the winding up.*

The Mayfair Property Co. was registered in August, 1892, with a capital of £50,000, in 5,000 shares of £10 each, and both the memorandum of association and the articles authorized the creation of a charge on the unpaid capital for the time being.

By a special resolution in accordance with section 5 of the Companies Act, 1879,* passed on the 21st of September, 1892, and confirmed on the 12th of October, 1892, it was declared, "That such portion of the company's capital as consists of £5 per share remaining uncalled upon all the ordinary shares of the company shall not be capable of being called up, except in the event of and for the purposes of the company being wound up in accordance with the provisions of the Companies Act, 1879."

In June, 1894, the company issued first mortgage debentures for an aggregate of £50,000, purporting to be a charge on all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

On the 8th of August, 1896, the present action was commenced on behalf of all the debenture-holders, and a receiver was appointed on the 12th of August.

On the 8th of August, 1896, a compulsory winding-up order was made against the company. At this time only £5 per share remained uncalled, and the question was now raised whether the debentures were a first charge on £5 per share which had been called up by the official receiver and liquidator in the winding up.

R. F. Norton (*Swinfen Eady, Q.C.*, with him).—The debenture-holders are creditors, and entitled, with other creditors, to be paid in the winding up according to their rights. There is nothing in section 5 of the Act of 1879 which says that the special resolution reserving uncalled capital may not be rescinded by another special resolution. But I do not need any repeal of the special resolution. Charging the debentures on the uncalled capital is only mortgaging it to creditors, and is still available for creditors in the winding up. In *In re Pyle Works*, 38 W. R. 674, 44 Ch. D. 534, it was decided that the charge was still valid, notwithstanding the fact of the capital being called up, so here, though the capital may not be called up till the winding up, yet it then becomes valid. The remarks of Lindley, L.J., in *In re Pyle Works* are only *dicta*. Lord Macnaghten's remarks in *Newton* v. *Anglo-Australian Investment Co.*, 43 W. R. 401, [1895] A. C. 244, apply, for whenever a winding up has commenced the Act of 1879 no longer applies.

Farwell, Q.C., and *G. Henderson*, for the official receiver.—Apart from the Act a company can alter any resolution for reserving its uncalled capital by another resolution: *Malleson* v. *National Insurance and Guarantee Corporation*, 42 W. R. 249, [1894] 1 Ch. 200; but not if made under section 5. Mortgagees are outside of the winding up altogether: *In re David Lloyd & Co.*, 25 W. R. 872, 6 Ch. D. 339. The Act intends this capital to be a reserve.

Norton, in reply.—*Malleson* v. *National Insurance, &c., Corporation* is distinguishable. A mortgage is outside the winding up only for certain purposes—if the mortgage is of uncalled capital it would be within the liquidation.

(a.) Reported by C. W. Mead, Esq., Barrister-at-Law.

* The last portion of section 5 of the Companies Act, 1879, is as follows: "A limited company may by a special resolution declare that any portion of its capital which has not already been called up shall not be capable of being called up, except in the event and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up."

WRIGHT, J.—The question which has to be decided in this case arises under the last paragraph of section 5 of the Companies Act, 1879. [His lordship then read the paragraph of the section in question.] The company, in 1892, passed a resolution reserving a certain portion of their uncalled capital as provided by the section. In 1894 debentures were issued in the ordinary form, but expressly extending to uncalled capital. The company being now in liquidation, the question arises whether the right of the mortgagees does extend so as to include this uncalled capital.

It seems to me, after looking at the language of the section, that one ought to come to the conclusion that the section means what it says, and that after the resolution was passed the company lay under a statutory disability to call up any of its uncalled capital for any other purpose than that of winding up. The object of the section is to reserve for the purposes of liquidation all the uncalled capital, and there seems here, fortunately, hardly any room for doubt. This view is fortified by the *dictum*—if it is not more than a *dictum*—of the present Master of the Rolls in *In re Pyle Works*. At first sight Lord Macnaghten's remarks in *Newton* v. *Anglo-Australian Investment Co.* seem to raise some difficulty about this, but when looked at carefully that case does not conflict with the other, as there the question raised was a different one altogether to this, and the subsidiary point discussed was as to the effect of one of the articles of association which did not deal with the winding up at all. There the article in question was a point of family arrangement between the company and its shareholders, not as in this case a matter of statutory enactment. There must therefore be a declaration that the capital not called up is not charged by the debentures.

Solicitors, *Munns & Longden; Mackrell, Maton, Godlee, & Quincey*, for *Wragge, Holliday, Godlee, Burrow, & Horton*, Birmingham.

Chan. Div. } Dec. 1.
Byrne, J. }

DYE v. PATMAN. (a.)

Local government—Unsanitary area acquired under the Housing of the Working Classes Act, 1890 (53 & 54 *Vict. c.* 70)—*Improvement scheme—Provisional order—Confirmatory Act—Valuation for compensation—Property in premises acquired—Reversioner—Right to sue—Costs—Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *ss.* 4, 5, 6, 7, 8, 12, 20, 21.

Where property in an unhealthy district is compulsorily acquired by a local authority under the Housing of the Working Classes Act, 1890, *persons interested therein retain all their legal rights in respect of the same until the provisional order made in respect thereof under section* 8 *of the Act has been confirmed by Act of Parliament under sub-section* 6 *of section* 8.

Where property is taken under this Act the estimate of the value payable by way of compensation under section 21 *is not limited to the value of the property as given in the estimate made under the improvement scheme provided for by sections* 4 *and* 6.

Trial of action.

This was an action without pleadings, in which the plaintiff claimed an injunction to restrain the defendants from building in Clare Market, Strand, opposite to his premises known as the Fishmongers' Arms in such a way as to damage his ancient lights; and he further claimed a mandatory order to compel them to pull down their new buildings, together with damages.

The plaintiff was the freeholder of premises situate in Clare Market and Holles-street, Strand, known as the Fishmongers' Arms, and by an indenture of lease dated the 2nd of March, 1868, he demised the same for a term of forty years from the 29th of September, 1867. The defendants in 1896 commenced to erect a handsome building on a site of vacant land in Clare Market to be used as printing works. In November, 1894, under the provisions of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 4, a representation was made to the London County Council by the medical officer of health for the Strand district of the unhealthiness of the area within which the plaintiff's premises were situated, and his premises were included in such representation; and the county council thereupon prepared a scheme for dealing with the area under the Act, and under section 8 thereof presented a petition for a confirmatory order. An inquiry, after being duly advertised, was held at the Home Office in March, 1896. A provisional order under section 8 (sub-section 1) was made on the 20th of January, 1897, and a confirmatory Act of Parliament was passed on the 3rd of June, 1897. In the meantime, prior to the making of the provisional order, the plaintiff had issued his writ in the action, which bore date the 13th of October, 1896. Prior to the commencement of the action and to the passing of the Act, the defendants, without prejudice, made an offer for a settlement to the plaintiff, which, in his lordship's opinion, if made after the passing of the Act, would have been reasonable.

Evidence was called to show that the value of the plaintiff's reversion had not been damaged, but as a matter of fact improved, by the building operations of the defendants, and that the premises were unfit and not reasonably capable of being made fit for human habitation, so that the plaintiff's compensation was limited under section 21, sub-section 2 (*c*), of the Act to the value of the land and the materials of the buildings thereon.

Eve, Q.C., and *MacSwinney*, for the plaintiff.—Having regard to the circumstances, the plaintiff does not press for any injunction. It is admitted on the other side that the plaintiff's lights are ancient lights, and that there has been interference in them. This being the case, the plaintiff is entitled to an inquiry as to the damages which he has sustained. They referred to section 21 of the Housing of the Working Classes Act, 1890. The valuation of the premises will be based on the fair market value as estimated at the time of the drawing up of the scheme; and if, as is admitted, the premises have been damaged as to light, there will be less compensation payable. The *onus* of proof to the contrary is on the defendants.

Astbury, Q.C., and *Frank Dodd*, for the defendants.—The premises now practically belong to the county council, and the plaintiff as reversioner has no right to sue in respect of them. If it be too much to say that the premises are entirely the property of the council, at least the beneficial interest is in them. Certainly it is the duty of the council to take them over, and except as to his compensation the plaintiff has no interest in them. The Act existed at the date of the writ, and the writ was issued thirteen months after the preparation of the scheme. [They referred to sections 4, 5, 6 (sub-section 2), 7, 8, 12, 20, and 21 of the Housing of the Working Classes Act, 1890.] [*Eve, Q.C.*, referred to section 8, sub-section 6.] [BYRNE, J.—Until the confirming Act is passed it is clear that the property does not pass.] Further, the plaintiff's premises were unfit for human habitation

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

(section 21, sub-section (2)), and therefore in respect of any loss with regard to his lights he cannot get any compensation. But the plaintiff's premises have as a matter of fact suffered no damage; if anything, the erection of our buildings have made his reversion more valuable. The action is premature, as prior to compensation being fixed between the county council and the plaintiff, he cannot say what damage he has sustained. His compensation has yet to be fixed.

MacSwinney, in reply.—It has not been shown that the plaintiff's premises are unfit and not reasonably capable of being made fit for human habitation. In any event he is entitled to the costs of the action, as until the confirmatory Act was passed he did not lose his right to sue. If the court is of the opinion that he has not sustained any damage in respect to reversion he does not ask for an inquiry.

BYRNE, J.—In this case an action has been brought to restrain interference with ancient lights, for a mandatory injunction, and for damages. The action is brought by a reversioner, by whom has been granted a lease of the premises which expires in 1907. It is common ground that at the time when the action was brought he was entitled to sue, though it is not admitted that he was entitled to all the relief that he sought, because a mandatory injunction is part of it, and as to that no admission is made; but what is admitted is that the lights were ancient lights, that there was an interference with them, and that but for the defences that have been taken now at the trial the plaintiff would have been entitled to an inquiry as to damages. No question of an injunction is now raised at all. Now, the matter would, of course, be perfectly clear and obvious upon that, and an inquiry as to damages would have been granted but for the grounds taken by the defendants in the circumstances. The first of these grounds is that the plaintiff, being the owner in reversion, has no title to sue in respect of a house which has been declared unfit for human habitation, and which is to be taken over by the London County Council prior to the reversion falling into possession, and the plaintiff can only get such compensation as he will be entitled to receive under the Housing of the Working Classes Act, 1890. The second point taken by them is that, as events turned out, the plaintiff has not, in fact, been injured by the acts of the defendants, but the reversion has in fact been rendered more valuable. And, thirdly, the point was taken that prior to compensation being fixed as between the plaintiff and the London County Council he cannot prove damage, and that the action is premature.

Now, this property forms part of what has been found to be an unhealthy area within the meaning of the Housing of the Working Classes Act, 1890. That Act provides for a scheme, for a provisional order, and for an Act confirming it. I need not go on to state in detail the various steps that have been taken; but the confirming Act did not come into operation until the month of June, 1897, and up to that time even after the provisional order has been made, the provisional order is not of any validity unless and until it has been confirmed by Act of Parliament, as is provided in sub-section 6 of section 8 of the Act. Up to the time, therefore, of the confirming Act I am of opinion that the plaintiff was entitled to continue the action, and that had the trial taken place before, he would have been entitled to an inquiry as to damages. Section 21, sub-section 1, of the Housing of the Working Classes Act, 1890, provides: "Wherever the compensation payable in respect of any lands or of any interests in any lands proposed to be taken compulsorily in pursuance of this part of the Act requires to be assessed"—and I pause to say that the property in this case does form part of the lands proposed to be taken compulsorily in pursuance of that part of the Act—"the estimate of the value of such lands or interests shall be based upon the fair market value as estimated at the time of the valuation being made of such lands, and of the several interests in such lands, due regard being had to the nature and then condition of the property and the duration of the buildings in their existing state and as to the state of repair thereof without any additional allowance in respect of the compulsory purchase of an area, or of any part of an area in respect of which an official representation has been made, or of any lands included in the scheme which in the opinion of the arbitrator have been so included as falling under the description of property which may be constituted an unhealthy area under this part of the Act."

It is argued on the part of the plaintiff, in order to show that he has suffered damage in respect of which he will not get compensation from the London County Council, that the true meaning of sub-section 1(*a*) is that "the estimate of the value of such lands or interests shall be based upon the fair market value as estimated at the time of the valuation being made of such lands" refers to a period anterior to the provisional order being obtained. It is said that, inasmuch as plans and estimates have to be furnished before such a provisional order can be obtained, the valuation here referred to is the valuation made as a groundwork of, or as a means of arriving at, the estimate in question. In the first place, I do not think that this construction seems a reasonable one, if the words will admit of another construction, because it would be directing the estimate as between the London County Council and the parties seeking compensation to be made upon the valuation of one of those parties only. Sub-section (*b*) provides that "in such estimate"—that is, the estimate as between those two parties—"any addition to or improvement of the property made after the date of publication in pursuance of this part of the Act shall not (unless such addition or improvement was necessary for the maintenance of the property in a proper state of repair) be included, nor in the case of any interest acquired after the said date shall any separate estimate of the value thereof be made so as to increase the amount of compensation to be paid for the lands." If the view suggested to be put upon sub-section (*a*) was the true one, it is a little difficult to see why sub-section (*b*) was required at all, because in making the estimate you would have based it upon the fair market value as at the previous date; therefore it would not have been necessary to say that you were not to take into consideration any addition or improvement made after the date of the publication of the advertisement.

Sub-section 2 of section 21 also, I may observe, bears out this view to some extent, because it provides that "on the occasion of assessing the compensation payable under any improvement scheme in respect of any house or premises situate within an unhealthy area, evidence shall be receivable by the arbitrator to prove" several different things; that evidence being, it is true, in reduction of price; but this is hardly what one would have expected to find if sub-section 1 (*a*) bore a construction other than what I have indicated.

Now I come to another point—namely, the point that the house is one that has been declared unfit for habitation. Having heard the evidence which has been brought before me on both sides, I am of opinion that it has not been proved at present before me that the house and premises are unfit, and

not capable of being made fit, for human habitation. If that be the true view sub-section 2 of clause 2, section 21, which provides that the compensation shall be the value of the land and the materials of the buildings thereon has no application to the present case.

That so far on the one hand gets rid of the plaintiff's contention that he will not get due and proper compensation for his premises, and on the other hand disposes of the question as to whether it has been declared unfit for human habitation.

The second point taken by the defendants, and which they claim to have shown at the trial, is that the reversion of the plaintiff has not been damaged by their acts, but that, in fact, the reversion has been rendered more valuable. Now, without deciding the question whether the reversion has been rendered more valuable or not, which it is probably not necessary for me to decide, I have come to the conclusion that the reversion has not been damaged by the acts of the defendants. That, therefore, disentitles the plaintiff at the trial to an inquiry as to damages, inasmuch at it could have but a fruitless result.

I have said that, although I am not even now certain that technically the plaintiff would not be entitled to an inquiry at his own risk, no proceedings to be taken upon it until after the compensation payable shall have been ascertained; but I think that it would be idle to direct it, and I have not been asked to direct it in the event of my being of opinion that no damages up to the present time are shown; I mean it has not been even suggested to me that there is even a remote possibility that the London County Council, which has imposed upon it the duty of taking this house, would be likely to go to the Legislature in the course of the ensuing session and ask for another Act of Parliament to be passed to enable them not to take this particular house. I think therefore that it would be much too far-fetched and idle a thing to direct any inquiry of that sort.

Then, as to the next point, it was suggested that prior to the compensation being fixed as between the plaintiff and the county council, the plaintiff cannot prove damages, and the action is premature. I am against that defence upon this ground, that the action was not premature. The utmost that can be said is that the trial has been brought on at too premature a date, and that an application ought to have been made for the trial of the action to stand over until after the period to which I have referred.

Now, under these circumstances, what ought I to do with reference to the costs of the action up to and including the date of the trial? Up to the time of the passing of the Act in the month of June, 1897, I am of opinion that the plaintiff was clearly right and was entitled to go on with the action, and that he is not to be prejudiced because he refused an offer, which, as events have turned out, might not possibly have been an unreasonable one for him to have accepted after that date. He was not then in a position to accept, and he was entitled to say, that until the duty had been cast on the county council of paying this compensation, that he was entitled to go on with the action. Then how do matters stand after that? It did occur to me that it might have been reasonable on the part of the plaintiff to have written a letter after the Act was passed, that as events had now turned out, if the defendants would pay the costs of the action, he would not bring the matter to trial. But I do not say that it was incumbent upon him to do this. An offer had been made to him without prejudice, and it had been refused. No new offer was made after the period at which the defendants would have been entitled to say that the plaintiff was unreasonable in refusing it. I should also add that the plaintiff was entitled to bring his action to trial for the purpose of having the question of costs disposed of; and, under these circumstances, although by reason of events which happened long subsequently to the issue of the writ in this action, the plaintiff is not now in a position to ask for more than what would be a nominal and idle inquiry as to damages—which for that reason I do not direct, and which he, therefore, very properly does not ask for in the event of my being of that opinion—I think it only right that he should have his costs. There will, therefore, be no order, except that the defendants pay the costs of the action up to and including the trial.

Solicitors, *Edell & Gordon; Nicholson, Graham, & Graham.*

Q. B. Div.
(Grantham and Channell, JJ.) Dec. 13.

WATSON (SURVEYOR OF TAXES) v. SANDIE & HULL. (a.)

Inland revenue—Income tax—Trade exercised within the United Kingdom—Foreigner resident abroad—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 42—*Income Tax Act,* 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*

Provision merchants in America consigned goods for sale on commission to the respondents, commission merchants in England. The goods were invoiced in the name of the respondents, who sold the goods and received the proceeds, rendering an account to the merchants in America. The respondents, beyond their charges and commission, made no profit or gain out of the sales.

Held, that the merchants in America exercised a trade within the United Kingdom within Schedule D. of the Income Tax Act, 1853, *s.* 2, *and that the respondents, their agents in England, were assessable to the income tax in respect of the profits arising therefrom.*

Case stated by General Commissioners of Income Tax for the Division of Liverpool.

Two assessments for income tax were made upon the respondents—viz., £500 for the year ended the 5th of April, 1895, and £1,000 for the year ended the 5th of April, 1896. The assessments were made in respect of annual profits alleged to have arisen from a trade exercised within the United Kingdom by Messrs. Squire & Co., of Boston, U.S.A., whose agents the respondents were alleged to be.

Messrs. Squire & Co. were packers and provision merchants who owned or purchased live stock, which they converted into provisions in Boston. The provisions thus manufactured were for the most part consumed in America, but the surplus was exported by Messrs. Squire & Co. to this and other countries. The respondents were commission merchants. Messrs. Squire & Co. made consignments to them for sale, on commission, of lard and bacon, being a part of the surplus provisions exported by Messrs. Squire & Co. The respondents received no remuneration beyond the usual charges and commission. There was no agreement between Messrs. Squire & Co. and the respondents, and Messrs. Squire & Co. might at any time discontinue their consignments. With each consignment Messrs. Squire & Co. sent forward consignment notes, showing in detail the amount drawn against each lot of goods making up the consignment, and bills of lading with the draft attached. The respon-

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

dents took up the drafts and realized the goods. Sometimes the draft exceeded the prices realized, and sometimes the prices realized exceeded the draft.

The risk of profit or loss rested with Messrs. Squire & Co. The respondents had full discretion as to the prices at which the goods were sold. They invoiced the goods in their own name, received the proceeds of sale, assumed all responsibility of payment by the purchasers, and from time to time rendered statements to Messrs. Squire & Co., showing full receipts and debiting the account with their charges and commission. They remitted to, or drew upon, Messrs. Squire & Co. for the credit or debit balance, as the case might be.

The income tax was claimed under the Income Tax Act, 1842, s. 41, and the Income Tax Act, 1853, s. 2, Schedule D.

The commissioners discharged the assessments.

The Crown appealed.

Sir Richard Webster, A.G. (*Sir Robert Finlay, S.G.*, and *Vaughan Hawkins* with him).—The case comes within the Income Tax Act, 1853, s. 2, Schedule D.: "For and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom." *Erichsen* v. *Last*, 30 W. R. 301, 8 Q. B. D. 414; *Tischler* v. *Apthorpe*, 33 W. R. 548, 52 L. T. Rep. 814; *Pommery* v. *Apthorpe*, 35 W. R. 307; *Werle & Co.* v. *Colquhoun*, 36 W. R. 613, 20 Q. B. D. 753; *Grainger* v. *Gough*, 44 W. R. 561, [1896] A. C. 325; *Sully* v. *Attorney-General*, 8 W. R. 472, 5 H. & N. 340.

A. T. Lawrence Q.C. (*James Fox* with him).—The decision of the commissioners is correct. The respondents were carrying on business in the United Kingdom on their own account, and not as agents for Messrs. Squire & Co.: *Bank of Ireland* v. *Livingstone*, 3 W. R. 573, 5 H. L. Cas. 389. The respondents bought the goods from Messrs. Squire & Co. at prices which were ultimately fixed by the sub-sales. The contracts between Messrs. Squire & Co. and the respondents, from which the profits arose, were made abroad. In sending over the goods Messrs. Squire & Co. made an offer which was accepted by the respondents taking up the bills of lading. No case has gone so far as it is contended this should go. In all the cases cited the merchant was ostensibly carrying on his business in the United Kingdom. [GRANTHAM, J.—Who is liable for the loss if the goods are lost *in transitu*?] Nobody, according to the facts as stated in the case. It would, no doubt, be a loss incident to the contract made by Squire & Co.

GRANTHAM, J.—In this case we are of opinion that Messrs. Squire & Co. do exercise a trade within the United Kingdom, and that, consequently, they are, through their agents, liable to be assessed.

The question is really dependent upon the way in which the case is stated, for it seems to me, and I think to my learned brother also, that Mr. Lawrence's contention cannot be permitted on the facts as stated in this case. Mr. Lawrence assumes, in his argument, that the property in the goods passed to the respondents when they arrived here. I think the property did not pass. The goods were only consigned by Squire & Co. to the order of the respondents, but they remained the goods of Squire & Co. The respondents were under no obligation until they had sold the goods and received the proceeds. Suppose that Squire & Co. had overdrawn on the value of the goods. Suppose the goods were worth £3,000, and Squire & Co. drew to the extent of £4,000, were the respondents bound to take the bill of lading under the payment of £4,000? I should say, certainly not. At any rate, if they were, they would not be liable to make up the loss. That is a fair way of testing the matter. If the goods became the goods of the respondents the moment they left America, the respondents must have taken them whatever their value was, and must have paid whatever draft had been granted upon them by the bankers in America. But I do not think that anybody would suggest for a moment that the respondents would be under such a liability as that.

A great many cases with reference to trade carried on in the United Kingdom have been cited, but none of them is so strong as the present one. In nearly all the wine cases the goods, the subject of the contracts, were either in France or Germany until the contract had been made. But in the present case the goods were in the United Kingdom before any dealing with regard to them took place, and it therefore cannot be denied that a trading on which profit and loss depended took place in regard to them in the United Kingdom.

It is true that they were invoiced ultimately in the name of the respondents, but until they were sold they seem to me to remain the property of Messrs. Squire & Co. That being so, there is a dealing with the goods in this country by a foreign principal through the intervention of an agent in the person of the respondents. Under those circumstances it seems to me that all the authorities which have been quoted confirm the view that we have arrived at. The case of *Sully* v. *The Attorney-General*, which is relied on, is very much in favour of this view, because it was there held that people buying goods here for the purpose of making a profit on them in America were not liable to pay income tax on the ground that the profit was not made here. That is exactly the converse of this case. The goods are either bought or manufactured in America, and are then sent here to be dealt with in the way that has been mentioned. For these reasons our judgment will be for the Crown.

CHANNELL, J.—I am of the same opinion. I think that the principles have been perfectly well settled by the numerous cases upon this subject, and the only question is the application of them to the facts of this case.

If Mr. Lawrence could have made out that the respondents purchased from Squire & Co. at a price to be ascertained by reference to the subsequent sub-sales, that might have raised a very difficult question as to whether there was any trade carried on by Squire & Co.; but the only thing he has got to support that contention is that the ultimate sub-sales of these consignments are made by the respondents in their own name, and under such circumstances that as between themselves and the buyer the respondents are probably principals upon the presumption which exists that in such cases credit is usually given to the agent in this country, he being treated as the principal, and not to the foreigner who is the real principal. But it seems to me that that is a mere presumption, and the consideration that as between the parties to the contract the respondents would be treated as the principals, does not in the least, for all purposes in which we are concerned, prevent our dealing with the matter on the footing that Squire & Co. are the real principals and the respondents agents, though the contract is made by the respondents in their own name. On these grounds the case seems to me clearly to come within the decided cases.

Appeal allowed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the respondents, *Rawle, Rowcliffe, & Co.*

Q. B. Div.
(Wright and Kennedy, JJ.) } Nov. 6.

SMITH *v.* GALLOWAY. (*a.*)

Friendly society—Alteration of rules—New rule made under statutory powers—Continuance of rule after repeal of statute—Effect of subsequent alterations on members' vested rights.

A friendly society established in 1842, *which had no provision in its rules for the alteration of its rules, made a new rule under the statutory power given by section* 27 *of the Friendly Societies Act,* 1855, *to alter or make new rules, the rule being in these terms: "No new rule shall be made, nor any of the rules herein contained or hereafter to be made, shall be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting."*

Held, that, having regard to section 6 *of the Friendly Societies Act,* 1875, *this rule continued in force notwithstanding the repeal in* 1875 *of the Act of* 1855, *under which it was made; that the rule conferred upon the society and kept alive the power to alter, amend, or make new rules; that members who joined the society when such rule was in force were bound by subsequent alterations properly made under the rule; and that under it the society had power to make an alteration of rules imposing upon members who were already in receipt of superannuation allowance, conditions for breaches of which they might lose their allowance.*

Case stated by arbitrators under section 19 of the Arbitration Act, 1889.

The Hearts of Oak Benefit Society was a friendly society established in 1842 under the Acts then in force relating to friendly societies, and the rules of the society were duly registered and certified under the Acts on the 6th of July, 1842.

No provision was made in the rules for the alteration of the same, but under the powers conferred by section 27 of the Friendly Societies Act, 1855, the rules were altered in the year 1866, and such alterations were duly registered and certified on the 6th of April, 1866, by the registrar of friendly societies.

Amongst the alterations so made was the introduction of a rule in the words following:

"Alteration of Rules."

Rule 50. "That no new rule shall be made nor any of the rules herein contained or hereafter to be made shall be amended, altered, or rescinded unless with the consent of a majority of the members present at a general meeting of the society specially called for the purpose."

No further alterations were made in the rules of the society until after the year 1875, when the Friendly Societies Act, 1855, was repealed by the Friendly Societies Act, 1875; but since that date the rules had been frequently altered and amended, and all such alterations and amendments had been duly registered under the Acts.

The rule above referred to (rule 30) had never been rescinded, but in one of the earlier amendments of the rules of the society registered under the Friendly Societies Act, 1875, it was altered so as to be, and had ever since been, in the words following:

"Alteration of Rules."

Rule 53. "No new rule shall be made nor any of the rules herein contained or hereafter to be made shall be amended, altered, and rescinded unless with the consent of three-fourths of the delegates present at a meeting specially called for the purpose. Notice of any such amendment, alteration, or rescission shall be forthwith sent to the registrar of friendly societies in the manner provided by the Friendly Societies Act, 1875, and the same shall not be valid until it has been registered."

In June, 1869, Walter Smith applied for admission to the society, and he was approved by the committee and declared to be admitted a member of the society and was then supplied with a book containing his name and registered number and a copy of the rules as altered in 1866.

In May, 1890, Smith declared on the sick fund of the society and he received sick allowance under the rules for the time being in force until the 2nd of September, 1891, when he was, in accordance with such rules, placed on the list for reduced allowance, termed the superannuated list, and he received such reduced allowance until he was excluded from the society as hereinafter mentioned.

By the rules any member on the sick fund was subject to conditions for breach of which he was liable to be excluded from the society, but such conditions did not apply to members on the superannuated list.

In 1896 the rules of the society were altered with the consent of three-fourths of the delegates present at a meeting specially called for the purpose, and notice of such alterations was forthwith sent to the registrar of friendly societies, and such alterations were duly registered on the 4th of February, 1896. Such alterations proposed to make members of the society on the superannuated list under the age of sixty years subject to the conditions applicable to members on the sick fund, and liable equally with such last-mentioned members to be excluded from the society for breach of such conditions.

In January, 1897, Smith, who was then under the age of sixty years, was, under the rules as so altered, excluded from the society for breaches of one of the said conditions—namely, for being from home on three or more occasions after seven o'clock in the evening, that is, after the hour allowed by the rules applicable to members on the sick fund.

At the time of such breaches Smith had had notice of the alterations, and then well knew that by the terms of the altered rules, if they applied to him, he was subject to the said conditions and liable to be excluded from the society for such breaches.

In consequence of such exclusion a dispute arose between Smith and the society, and such dispute was in accordance with the rules of the society, submitted to arbitration, in the course of which Smith admitted the breaches of the said condition for which he had been excluded from the society, but he contended that the society had no power to alter the rules after the repeal of the Friendly Societies Act, 1855, and that, if they had, he was not bound by the alterations made in the rules in February, 1896, and was therefore not liable to be excluded from the society for the said breaches.

Upon these contentions Thomas Galloway (secretary of the society), on behalf of the society, applied to the arbitrators to state a case for the opinion of the court on the questions raised.

The questions of law for the opinion of the court were:

(1) Whether the society had power, after the repeal of the Friendly Societies Act. 1855. to alter the rules, and

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(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

(2) Whether, if so, the said Walter Smith was bound by the alterations registered on the 4th of February, 1896, and subject to the conditions thereby made applicable to members of the society on the superannuated lists.

Sells, for the plaintiff.—The society had no power to alter their rules until the Friendly Societies Act, 1855, gave them the power. Section 27 of that Act gave power to alter, amend, or rescind rules, or to make new rules. Under that section the society altered their rules by the introduction of rule 50. The Act of 1855 was repealed by the Friendly Societies Act, 1875—which in turn has been repealed by the Friendly Societies Act, 1896, and the Collecting Societies, &c., Act, 1896—and upon the repeal of section 27, under which rule 50 was made, rule 50 was repealed also, and ceased to have any operation. That being so, rule 53 and the subsequent alteration in February, 1896, were invalid, and were not binding upon the members who had not assented thereto. As to the first question, therefore, when rule 50 ceased to be operative in 1875, the society had no power, either by their own constitution or by statute (as the Act of 1875 gave no power to alter) or by rule, to alter their rules. As to the second question, even if the society had power to alter their rules, they had no power to make an alteration the effect of which was to take away from the plaintiff a vested right which he already had under the rules in force. At the time when the alteration of February, 1896, was introduced imposing conditions upon those in receipt of superannuation allowance, the plaintiff had become entitled and was in receipt of the allowance. Such a rule, therefore, was *ultra vires*: *Auld* v. *Glasgow Working Men's Building Society*, 35 W. R. 632; 12 App. Cas. 197; *In re Norwich and Norfolk Building Society*, 24 W. R. 103, 1 Ch. D. 481.

E. Morten (*A. T. Lawrence, Q.C.*, with him), for the defendant.—Although the Act of 1855 was repealed in 1875 rule 50 was still in force. There is not the slightest reason for the suggestion that because the Act of 1855 was repealed, therefore rule 50, made under that Act, ceased to be in force. Rule 50 was in force when the plaintiff joined the society in 1869. It gave the society power to alter their rules, and the plaintiff by assenting to rule 50 when he joined the society must be taken to have assented to this power to alter rules, and is bound by that. Rule 50 gave power of alteration, and although the Act of 1875 repealed the Act of 1855, yet section 6 of the Act of 1875 provided that existing societies and their rules then in force should continue in force until altered or amended, and this is made clear by section 13 and the second schedule. Rule 50 remained in force, and under it rule 53 was made, and under rule 53 the alteration of February, 1896, was made. The plaintiff was therefore bound by these alterations, and no vested right was taken away other than what the society had power to deal with: *Stooke* v. *Mutual Provident Alliance*, Times, Jan. 22, 1891; *Strohmenger* v. *Finsbury Permanent Investment Building Society*, *ante*, p. 69, [1897] 2 Ch. 469; *Wilson* v. *Miles Platting Building Society*, 37 W. R. 369, *note*, 22 Q. B. D. 381, *note*.

Sells, in reply.

WRIGHT, J.—The first point made is that rule 50, which was in operation when the plaintiff joined the society, and which authorized further alterations of the rules, had ceased to exist because the Act of 1855 has been repealed. That contention hardly deserves any answer, but the obvious answer is that when the Act of 1855, under which that rule was made, was repealed by the Act of 1875, the Act of 1875 provided that existing societies and their rules as existing in 1875 should continue in force until altered or amended. The Act of 1855, in section 27, gave power to amend rules, and in pursuance of that power, as the case expressly finds, rule 50 was made before the plaintiff joined the society. The Act of 1855 has been repealed, but continuing provisions have been made in the Act of 1875, as section 6 of that Act provides that existing societies shall be deemed to be existing societies under this Act, and their rules shall continue in force until they are altered or amended, and section 13 and the second schedule contain rules as to the mode of making the alterations. It is idle to suggest that rule 50 has disappeared merely because the Act under which it was made has been repealed by another Act to the like effect. Rule 50 remained in force and kept alive for the society the right to make alterations, and the alterations properly made are therefore binding upon the society. The second question is whether the rules of February, 1896, are *ultra vires* on the ground that at the time when they were made the plaintiff was entitled to a benefit from the society, and that the effect of the rules of February, 1896, would be to diminish his security for that benefit—namely, by imposing conditions for breaches of which he would forfeit his right to a superannuation allowance. It appears to me that there is no ground for saying that the alteration was *ultra vires*. The plaintiff joined the society on the basis that the rules might be altered. The alteration made is the ordinary kind of alteration which is constantly made in the conduct of these societies. The distinction seems to me to be plain. Where the only contract between a society and a member is the original contract under which he became a member, and that contract, as in this case, provides for alterations of the rules, then the member is bound by any alterations of the rules. Where there is an additional contract, as in the case of a society where the member has a mortgage, or where anything has been added to the contract, as in the case of *Auld* v. *Glasgow Working Men's Building Society*, then it is not competent for the society, by alterations of the rules without the assent of the member, to alter the effect of that second contract, because the member has not agreed to the alteration of that second contract. But as regards the alteration in this case of the original contract the plaintiff did agree to that when he joined; and the mere fact of his joining was an assent on his part to future alterations of the rules.

KENNEDY, J.—I entirely agree, and for the reasons stated.

Judgment for defendant, without costs.

Solicitors for the plaintiff, *Lucas & Mitchell.*

Solicitors for the defendant, *Shaen, Roscoe, Massey, & Co.*

C. C. R.
(Lord Russell of Killowen, C.J.) } Aug. 7; Nov. 27.

THE QUEEN v. LYNCH AND JONES. (*a*.)

Criminal law—Intimidation—Conspiracy and Protection of Property Act, 1875 (38 & 39 *Vict. c.* 86), *ss.* 7, 16—*Seamen—Seafaring men not actually employed on board ship.*

Persons who follow the sea as a calling, but are not "seamen" within the meaning of the Merchant Shipping — —

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Acts, are not within the exemption in favour of "seamen" contained in section 16 of the Conspiracy and Property Protection Act, 1875, and may properly be convicted of an offence under section 7 of that Act.

Case reserved by Ridley, J., at the Glamorganshire Summer Assizes.

The facts and arguments are stated in the judgment.

J. D. Crawford, for the prisoners.

B. F. Williams, Q.C. (*Arthur Lewis* with him), for the prosecution.

Cur. adv. vult.

Nov. 27.—The judgment of the court (Lord RUSSELL OF KILLOWEN, C.J., POLLOCK, B.,* and HAWKINS, LAWRANCE, and COLLINS, JJ.) was delivered by

Lord RUSSELL OF KILLOWEN, C.J.—The prisoners were indicted and convicted for an offence under the provisions of the Conspiracy and Property Protection Act, 1875 (38 & 39 Vict. c. 86), s. 7, for having, with a view to compel one William Eten to abstain from doing that which he had a legal right to do—that is to say, from performing a contract which he had entered into with the owner of the steamship *Lesraulx* to serve as a seaman on board the said ship—intimidated the said William Eten, and watched and beset the place where he was, and followed him with others in a disorderly manner.

The facts which were proved, and not disputed by the prisoners' counsel, were as follows:

William Eten, together with Henry Chandler and James Owen, signed articles on board the steamship *Lesraulx*, then lying under a coaling tip in Penarth Dock. Articles were signed on board the vessel, instead of at the shipping office as usual because the owners of the *Lesraulx* were paying a lower rate of wages than that allowed by the Seamen and Firemen's Union, and in consequence of apprehended violence from the members of the union. On coming ashore, the prisoners, together with a number of other persons who had been waiting on the dock side, surrounded them, and it was proved that they were intimidated and assaulted by the prisoners who followed them in company with the others for a distance of some 300 yards. There was evidence that the prisoners followed the sea as a calling, each of them having been engaged as a fireman on board steamships, but on the day in question they were not engaged or employed as firemen or seamen on board ship. It was not shown when either of them had been last so employed or engaged, but they followed the sea as an occupation.

At the conclusion of the case for the prosecution, the counsel for the prisoners submitted that there was no evidence to go to the jury in support of the indictment on the ground that, by section 16 of the Conspiracy and Property Protection Act, it is provided that "this Act shall not apply to seamen or apprentices to the sea service," and that, therefore, the prisoners could not be convicted. For the prosecution it was contended that the term "seamen" in the Conspiracy and Property Protection Act applied only to seamen actually engaged or employed on board ship within the definition in the Merchant Shipping Acts, 1854 and 1894—namely (17 & 18 Vict. c. 104), s. 2, and (57 & 58 Vict. c. 66), s. 742.

The learned judge, Ridley, J., directed the jury that for the purposes of this case the defendants were not within the exception contained in section 16, and they were convicted and sentenced accordingly. The sole question, therefore, for the opinion of the court is, What is the proper construction to be put upon the word "seaman" as used in section 16 of the Act of 1875?

If there were no reason to the contrary "seaman" might well be construed in its largest sense as meaning a sea-faring man or person whose ordinary occupation is that of a seaman, just as a person whose usual vocation is that of a carpenter is so-called although he may be out of employment at the particular time. In construing an Act of Parliament, however, it is necessary to inquire into the intention of the Legislature giving just effect to the language employed, having regard to the object in view and taking into account other legislation bearing on the question.

The question at once arises, Why are seamen excepted from the provisions of the Act and not carpenters or any other workmen or artificers? If "seaman" means "seafaring man" it would be difficult to suggest any reason for so large an exception, whereas, if it is taken in the limited sense of the definition in the Merchant Shipping Acts, a reason for such exception might possibly be found in the special legislation of those Acts applicable to the limited class of seamen as therein defined. If, for instance, the Merchant Shipping Act, 1854, contained a series of clauses similar in principle to those which are found in the Conspiracy and Protection of Property Act, 1875, but by their language specially adapted to the case of sailors in actual employment, the distinction would be obvious and the argument in favour of the prosecution would be irresistible.

But although the provisions of the Merchant Shipping Act, 1854, as to sailors in actual employment are not similar to those which are contained in the Conspiracy Act, 1875, the Merchant Shipping Act, 1854, does contain provisions which have an importain bearing upon the determination of the present case.

By the interpretation clause of the Merchant Shipping Act (section 2) it is enacted that "seaman shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship."

By section 243, which deals with offences of seamen and their punishment, sub-section 4, it is provided that "For wilful disobedience to any lawful command a seaman shall be liable to imprisonment for any period not exceeding four weeks, with or without hard labour, and also at the discretion of the court to forfeit out of his wages a sum not exceeding two days' pay." By section 257 it is provided that "Every person who by any means whatever persuades or attempts to persuade any seaman or apprentice to neglect or refuse to join or to proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, shall for each such offence in respect of each such seaman or apprentice incur a penalty not exceeding ten pounds."

These provisions create a wide distinction between a seaman actually employed or engaged under the Merchant Shipping Act and a mere seafaring man not so actually employed or engaged, and the status of the former is thereby rendered very different from that of the latter. With reference to the offence dealt with by the Conspiracy Act, 1875, the captain of a vessel possesses ample power to deal with a seaman under his command. He may require him as a lawful command under section 243, sub-section 4, to abstain from intimidation, or if a seaman persuades or attempts to persuade another seaman to neglect or refuse to join or to proceed to sea in or to absent himself from his duty, he may summon him for the penalty. Under these circumstances the Legislature

* Baron Pollock died before the judgment was delivered—viz., on the 21st of November, 1897.

may well have considered the mischief dealt with by the Conspiracy Act, 1875, already sufficiently provided against, and have declined to add a cumulative remedy. It was suggested in argument that a difficulty might arise in determining whether a seaman was "employed or engaged," and also whether, as the Act adds the words "on board any ship," a seaman would be liable if he committed the alleged illegal acts ashore. These objections have no real foundation, as the employment or engagement must be decided as a fact in each case, and a seaman may well be held to be employed or engaged on board a ship, although at the particular point of time he may have been sent ashore on duties connected with the ship, such as obtaining stores or provisions or taking a letter to the ship's agent. What is found in the case as to the prisoners is that "there was evidence that they followed the sea as a calling, each of them having been employed or engaged as fireman or seaman on board ship. It was not shown when either of them had been last so employed or engaged, but they followed the sea as an occupation." It is consistent with this that they had been out of employment for months, and they appear to have had no immediate or certain prospect of a future engagement. It would be strange if the Legislature intended to exclude such persons from the legislation of 1875, as well as from that of the Merchant Shipping Acts.

On the whole, therefore, it appears that at the date of the passing of the Act of 1875 the Legislature had already in an earlier statute defined what it meant by "seaman"; that the explanation of their exclusion from the later Acts must be sought in the fact that they were already the subject of special enactments giving another remedy for some of the matters included in the latter statute, and that no ground of reason or common sense can be found for excluding from the operation of the Act in question the whole class of seafaring men not actually engaged in sea service.

Under the circumstances we think the view taken by the learned judge at the trial was correct, and the conviction must be affirmed.

Conviction affirmed.

Solicitors for the prisoners, *Pattinson & Brewer.*

Solicitors for the prosecution, *David & Evans*, Cardiff.

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) Dec. 18.

In re PIERS.
Ex parte PIERS *v.* READ. (*a.*)

Bankruptcy—Proof—Amendment — Secured creditor— Omission to value security arising from inadvertence —Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *schedule* 1, *r.* 10.

A secured creditor who has valued his security at nil *owing to a mistaken idea as to its value, and has voted in respect of his whole debt, cannot afterwards be allowed to amend his proof by altering the valuation of his security, because such mistaken valuation cannot be said to have arisen from inadvertence.*

Application by C. P. Piers, the assignee of Turnbull, a secured creditor in the bankruptcy, for leave to amend his proof by altering the valuation of his security from *nil* to the full amount of the debt proved for.

Turnbull, owing to false information as to the value of his security, had valued it at *nil*, and had voted at a meeting of creditors in respect of the full amount of his debt. He subsequently assigned his debt to C. P. Piers, who discovered that the security was equal in value to the whole amount of the debt, and now applied for leave to amend his proof.

A. G. McIntyre, for Piers.

E. A. Nepean (*Reed, Q.C.*, with him), for Read, another creditor.—This amendment ought not to be allowed, for there was no omission to value the security arising from inadvertence within the meaning of rule 10 of schedule 1 of the Bankruptcy Act, 1883: "For the purpose of voting, a secured creditor, shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance, if any, due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the court on application is satisfied that the omission to value the security has arisen from inadvertence." In the present case the creditor did not omit to value his security through "inadvertence," for he deliberately elected to value it at *nil*.

He cited *Ex parte Clarke, In re Burr*, 40 W. R. 608, 67 L. T. Rep. 232.

Kent, for other creditors.—I submit that the present applicant has no *locus standi* here, because Turnbull, having voted in respect of his whole debt, was "deemed to have surrendered his security," and had no interest in it which he could assign to Piers. [WRIGHT, J.—I think there was an omission to value the security; the question is whether that omission arose from "inadvertence."]

McIntyre, in reply.—It was equivalent to "inadvertence," for Turnbull had no chance of learning any more about the value of his security at the date when he sent in his proof. As to the other point, Turnbull still had the debt which he could assign to Piers, even though he had lost the security.

WRIGHT, J.—I have come to the conclusion that the omission to value in this case did not arise from "inadvertence," and I am fortified in my opinion by the case of *Ex parte Clarke, In re Burr*. "Inadvertence" is a peculiar and unusual word to find in an Act of Parliament, and I cannot construe it as the opposite of what it really means, which is the contrary to deliberate election, that a man never meant to do what he really did.

I think I could get over Mr. Kent's point, as Turnbull could in any case assign the debt.

Application refused.

Solicitor for Piers, *W. Eley.*

Solicitor for Read, *Thomas Edward.*

Solicitor for other creditors, *Robert Kent.*

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). July 27, 1897.

GOSLING v. GASKELL. (a.)

Company—Receiver—Principal and agent—Liability for goods ordered.

By an indenture of second mortgage all the land and property, and all the business and undertaking of a limited company were conveyed to the appellant as trustee for the second debenture-holders. By this deed it was provided that the trustee might appoint a receiver of the mortgaged premises, who should have power to enter into possession and carry on the business, and that the person so appointed should be the agent of the company, who alone should be liable for his acts and defaults. The trustee appointed K. receiver, the instrument appointing him containing certain regulations as to payment of money received into the appellant's bank, and that cheques drawn by him should be countersigned by the appellant's solicitor, who was also chairman of the company. Immediately after his appointment the receiver entered into possession and carried on the business, and goods were ordered by him signed in the company's name, with the addition "K., Receiver." Soon after the appointment of the receiver, an order was made for the compulsory winding up of the company, and a liquidator was appointed, who, however, did not displace the receiver. K. continued to carry on the business, and, in the course of doing so, ordered goods from the respondents in the above-mentioned form.

Held, in an action brought by the respondents against the trustee for the price of the goods supplied to the receiver's order, that the receiver was agent for the mortgagors (the company), and that the trustee was under no liability.

Decision of the Court of Appeal ([1896], 1 *Q. B.* 669) *reversed.*

This was an appeal from an order of the Court of Appeal, [1896] 1 Q. B. 669, 44 W. R. Dig. 132 (Lord Esher, M.R., and Lopes, L.J.; Rigby, L.J., dissenting), affirming a decision of the Lord Chief Justice.

The appellant Gosling and another (defendants in the action) were trustees for second debenture-holders under an indenture of mortgage dated the 18th of May, 1892, under which in certain events they could (and did) appoint a receiver to carry on the business mortgaged.

The action was brought by the respondents, Gaskell and others, against the said trustees (one of whom died before service of the writ), for £488 odd, being the balance unpaid of the price of goods supplied by Gaskell and others to the receiver appointed by the trustees.

The respondents obtained judgment against the appellant, and this decision was affirmed by the Court of Appeal.

The facts are given very fully in Lord Watson's judgment.

Jelf, Q.C., and *W. F. Hamilton*, for the appellant.

Herbert Reed, Q.C., and *E. W. Hansell* (*Gregson* with them), for the respondent.

Collen v. *Wright*, 6 W. R. 123, 8 E. & B. 647; *Salomon* v. *Salomon*, 45 W. R. 193, [1897] A. C. 22; *Cox* v. *Hickman*, 8 W. R. 754, 8 H. L. Cas. 268; *Mollwo, March, & Co.* v. *Court of Wards*, L. R. 4 P. C. 419, 21 W. R. Dig. 167; *Jefferys* v. *Dickson*, 14 W. R. 322, L. R. 1 Ch. App. 183; Davidson's Conveyancing, 4th ed., vol. 2, part 2, p. 90; Lord Esher, M.R., in *Owen* v. *Cronk*, [1895] 1 Q. B. 265, 272, 43 W. R. Dig. 147, and Cotton, L.J., in *In re Pound, Son, & Hutchins*, 38 W. R. 18, 42 Ch. D. 402, 421, were cited or referred to.

The House took time for consideration.

July 27.—Lord HALSBURY, C.—I am of opinion that this case is covered by authority. The case of *Cox* v. *Hickman* in this House (8 W. R. 754, 8 H. L. Cas. 268) appears to me expressly in point. Before that case was decided, I could have well understood the arguments presented to your lordships on this appeal on the part of the respondents; but it appears to me to be too late now to take up the position, which was then very plausibly occupied.

The facts in this case are complicated to some extent, by one of the parties being a company, but in truth there is nothing in that circumstance which can alter the application of the law. A company called Poole & White (Limited) had borrowed a large sum of money upon a mortgage of the whole property of the company to certain trustees, who, among other powers given to them, were entitled to enter into possession of the property mortgaged for the purpose of paying to certain debenture-holders the loan, and handing over to the company whatever should remain after the debt and the sums due upon debentures had been paid. In certain events, which happened, the trustees in pursuance of this power entered into possession, and in pursuance of the same power appointed a receiver to take possession of the property and to carry on the business of the company.

Some months after the date of the mortgage a Mr. Kelly, the receiver so appointed, was put into possession of the property mortgaged, and for a period of between two and three years carried on the business of the company. If during the period of so carrying on the business of the company Mr. Kelly or the trustees had been personally sued, the exact question which arose in *Cox* v. *Hickman* would have arisen, and though I shall proceed to discuss what happened afterwards I believe the statement might stop there so far as the decision of the present case is concerned.

It is the fact that Mr. Kelly, on behalf of the trustees, ordered goods and incurred liabilities on behalf of someone in the conduct of the business, and I could well understand that but for *Cox* v. *Hickman* it might very reasonably have been argued that the trustees here, like the creditors and their agent there, were carrying on a business for their own profit; and the agency, such as it was, might well have been held to bind the persons entering into these trading operations as partners in the business. As Blackburn, J., in that case said: "It was very reasonable that those sought to be charged in *Cox* v. *Hickman* had authorized the managers of the business that was being carried on to bind them, as it was an incident attached by law to a participation in the profits that such authority is given to those managing the concern." What Lord Cranworth says seems to me to be the answer to the argument in that case, as it is the answer to the argument here. His lordship says: "It seems to me to follow that the mere coincidence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

creditors, though their consent is necessary in such a case, for without it all the property might be seized by them in execution; but the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on." This is the principle, and I am wholly unable to distinguish the reasoning of the noble and learned lord from the propositions of law that are applicable to this case.

After the period of Mr. Kelly's management an order was made for winding-up the company under the provisions of the Companies Acts, and no difference was made in the management of the business, or in the mode in which it was carried on after that order was made. For some reason or another which I have not been able to follow, it is apparently assumed that immediately on the winding-up order, Mr. Kelly, who it is assumed had been up to that time the agent for the company (as indeed he was so described, and as by the terms of the mortgage deed he was bound to be), suddenly became the agent of the trustees. That no new authority was, in fact, given to Mr. Kelly is admitted, but why the making of the order to wind up the company should suddenly convert Mr. Kelly, who was there as the agent of the company, into the agent of the trustees is a problem that I have not been able to solve.

There is a circumstance which appears to me to be absolutely irrelevant, but which, as it is relied on, it is proper to notice—namely, that one of the conditions on which the security should become enforceable, and under which it was enforced, was that if in the opinion of the trustees the security should become endangered they, the trustees, should appoint a receiver, and that when they had appointed a receiver that receiver was to open an account with the bank in which the trustees themselves were partners, and all moneys received by the receiver appointed must immediately be paid into that bank, and when cheques were drawn by him on the account so created, a Mr. Tryon, the solicitor for the trustees, was to countersign the cheques. Mr. Tryon was chairman of the company. As I have said, this fact is irrelevant. The fact of the trustees keeping a check upon the mode in which the produce of the trade carried on was dealt with (which was all that was done by this provision) appears to me to reflect no light whatever on the relation of the trustees to outside creditors, who were supplying goods to the receiver of Poole & White (Limited).

As I have pointed out before, but for *Cox* v. *Hickman* it might well have been argued that the trustees, though called trustees in the deed, were really managers, and as far as the management of the concern went, the mere agents of the creditors, who had the entire control over them, and as Crompton, J., (in *Cox* v. *Hickman*, p. 291) actually asked: "In what, then, does the present case differ from that of ten persons setting up a new business in the names of two or three managers, they having to divide all the profits? The present case, indeed, is not even one of a trading in the names of the managers, but in a name which may comprehend any partners, and the clause of the deed so much relied on by the plaintiffs in error, which stipulates that they shall carry it on in the name of the Stanton Iron Co., must surely be quite inoperative as to any limitation of the liability to such persons when the rule of law is so well recognized that no agreement amongst partners can prevent the liability to third persons arising from the participation of profits. I can see no hardship under this particular deed in the creditors, who are to have the profits, being liable for the funds and goods from which the profits are to be made, except the general hardship of large liability from small investments, attempted to be remedied by the Limited Liability Acts."

The answer is the one which I have already quoted from Lord Cranworth, and if I were to substitute the word "company" for the word "debtor" in Lord Cranworth's language, every word of that very learned judge's observations would be applicable in this case. The company is still the person solely interested in the profits, save only that it has mortgaged them to its creditors. It receives the benefit of the profits as they accrue, though it has precluded itself from applying them to any other purpose than the discharge of its debts. The trade is not carried on by or on account of the creditors, though their consent is necessary in such a case, but the trade still remains the trade of the company. The company is the person by or on whose behalf the business is carried on.

I am not able to understand in what way the winding-up order is supposed to have affected the persons now sued. I am not aware that there is anything in proof which shows that they accepted any other liability than that which they had already incurred, whatever that liability was. No specific act of adoption of any order given subsequently to the winding-up is even suggested. If the agent was acting under a misapprehension that he still could have the authority of the company to carry on the trade it would not make those who originally appointed him in pursuance of the powers of the deed liable for his acts. They appointed him as they were entitled to appoint him, under the express powers of the deed, and if the argument addressed to your lordships were to prevail, that the authority of the company can no longer be invoked to sanction the trading, inasmuch as his power to trade with the company had ceased with the winding-up order, it could not operate to involve the trustees in a new liability without their knowledge. It could not be said that they were the real proprietors of the business, even if, as two of the learned judges say, the company had ceased to exist. It was not and it never could be their business. Anything that their authorized trading had procured in the way of profit would not have belonged to them; but though, even if unauthorized, it was carried on ostensibly for and on behalf of the company, and if they neither professed to be the principals nor were in fact the principals, I do not understand how they can be made principals.

Under the circumstances I am of opinion that the judgments of the courts below were wrong, and I think this appeal ought to be allowed, and the respondents ought to be made to pay the costs both here and below.

Lord WATSON.—The present appellant and the deceased William Cunliffe Gosling were trustees under an indenture of mortgage, executed upon the 18th of May, 1892, by Poole & White (Limited) for the security of their second debenture-holders. The company had borrowed the sum of £11,000 upon three series of debentures—the first issue being for £7,000, the second for £3,000, and the third for £1,000, which were charged upon the whole assets of the company, present and future, with the exception of its uncalled capital.

By the deed of the 18th of May, 1892, the company mortgaged these assets to the trustees, with certain powers, of which two only need be referred to for the purposes of this case. By the first of these, the trustees, in the event of the security becoming enforceable in the sense defined by the deed, were empowered to enter into possession of and release the subjects mortgaged, accounting for the proceeds realized to the debenture-holders, and to the company

for any surplus which might remain after satisfying their debt. By the second, although the security should not have become enforceable in terms of the deed, the trustees were authorized, upon their certifying that, in their opinion, it was endangered, to appoint a receiver who was to enter into possession of the assets mortgaged and to carry on the business of the company. It was made an express condition of the exercise of that power that "any person so appointed shall be the agent of the company, who alone shall be liable for his acts and defaults." No power was conferred upon the trustees, in any event, to conduct the business themselves.

On the 22nd of July, 1892, the trustees certified, by a writing under their hand, that in their opinion the security was endangered; and by the same writing they appointed William John Kelly to be receiver of all and singular the property and rights mortgaged, with all the powers conferred by the indenture, whether expressly or by implication. A proviso was added which does not occur in the indenture, to the effect that the receiver should open an account with a bank, in which the trustees had a partnership interest, into which all moneys received by him were to be paid on the day of their receipt, and also that the bank should not honour any cheques drawn by him on that account unless they were countersigned by John Tryon. Mr. Tryon was a member of a firm of solicitors who acted for the trustees in these transactions between them and Poole & White (Limited). He was also the chairman of that company, and the holder of its third issue of debentures.

The company accepted and gave immediate effect to the appointment of the trustees by putting Mr. Kelly into possession of its assets, and transferring to him the conduct of its business. From that time until February, 1895, Mr. Kelly continued to carry on the business as the "receiver of Poole & White (Limited)."

On the 1st of September, 1892, a petition was presented to the High Court of Justice for the winding up of Poole & White (Limited), and on the 14th of that month the court ordered that the company should be wound up by the court under the provisions of the Companies Acts. The official receiver became liquidator of the company, and subsequently Mr. Wilding was appointed liquidator in his place. Neither the liquidator nor the first debenture-holders interfered in any way with Mr. Kelly's management of the company's business, which went on after the liquidation order in precisely the same manner as it had done before, with this single variation, that in September, 1893, the counter-signature of Mr. Tryon was dispensed with, and the bank thereafter honoured cheques drawn by the receiver upon his account.

This action was brought by the respondents against both trustees under the indenture of the 18th of May, 1892 (one of whom, the late William Cunliffe Gosling, died before service of the writ), for the sum of £448 9s. 3d., being the balance still unpaid of the price of goods supplied at various times to Mr. Kelly in his capacity of receiver for Poole & White (Limited) between the 5th of December, 1893, and the 31st of January, 1895. They have obtained judgment against the appellant for that amount with costs, before the Lord Chief Justice of England, sitting without a jury, and his decision has been affirmed by a majority of the Court of Appeal, consisting of the Master of the Rolls and Lopes, L.J., Rigby, L.J., dissenting.

It is not part of the respondents' case, and it was not maintained by their counsel at your lordships' bar, that the appellant and his co-trustee were either real or ostensible partners of the concern carried on by Mr. Kelly as receiver of Poole & White (Limited). Their sole contention, which succeeded in both courts below, was that the relations established between the appellants and the receiver whom they appointed, professedly under the power conferred upon them by the indenture, were such that they must in law be held, if not before, at least after the liquidation order, to have given authority to Mr. Kelly to purchase goods for the purpose of carrying on the business, and that, the purchase of the goods in question having been within the scope of that authority, the appellant and his co-trustee were conjointly and severally responsible for their price. In view of that argument, it appears to me to be expedient to consider separately the legal position of the trustees before and after the liquidation of the company, especially seeing that their liability during those two periods was rested upon different considerations. If, before the order, the trustees had given the receiver authority to pledge their credit *cadit quæstio*. If they had not, the question still remains whether they subsequently gave him such authority. Neither of these questions involves any controversy of fact. Every fact in the case, whether relevant or not, has been made matter of mutual admission, and, to my apprehension, the only matter which your lordships have to determine is whether the admitted facts, which I have stated in so far as they were represented to be material, are in law sufficient to sustain the inference that such authority was given.

I think that it would be impossible to affirm that any liability attached to the trustees during the earlier of these periods, unless your lordships were prepared to ignore or reverse the doctrine approved and applied by this House in *Cox* v. *Hickman*, and followed by the Judicial Committee of the Privy Council in *Mollwo, March, & Co.* v. *The Court of Wards*. In *Cox* v. *Hickman* a firm of ironmasters trading as B. Smith & Son, being unable to meet their obligations, entered into a deed of arrangement with their creditors, by which the whole business of the firm was assigned to certain of the creditors as trustees, to be carried on by them under the name of "The Stanton Iron Co." Provision was made for meetings of the creditors, at which the majority in value present were to have the power to make rules as to the mode of conducting the business, or to order the discontinuance of it. The purposes of the trust were to distribute the net income of the business rateably among the creditors of the firm, which net income was always to be deemed the property of the firm of B. Smith & Son, for whom the trustees were to hold the trust estates when all the debts were paid. The trustees, in the course of their management, bought goods of Hickman, and accepted bills to him for the price "*per proc.* The Stanton Iron Co." The object of the action was to make two of the creditors, who were parties to the deed of arrangement but were not trustees, personally liable for the amount of these bills. The learned judges of the Court of Exchequer Chamber, and also the judges who attended the House, were equally divided in opinion; but the four noble and learned lords who constituted the House were unanimous in holding that these creditors were not made partners of the Stanton Iron Co. by the provisions of the deed of arrangement; and that there were no grounds for inferring that they had given authority to the trustees to pledge their credit for goods purchased in the course of carrying on the business.

In the present case the business was carried on by a receiver, who was, until it went into liquidation, the agent of the company; and the trustees upon whom it is now sought to impose liability, had no power either to conduct the business or to control the

receiver in its management, and never attempted to do either the one or the other of these things.

I have had difficulty in speculating upon what principle the Lord Chief Justice, who makes no reference to *Cox* v. *Hickman*, arrived at the conclusion that, consistently with the principle of that decision, the appellant could be held to have given authority to Mr. Kelly to pledge his credit to the respondents. Unfortunately his lordship, after expressing an opinion to that effect, indicates that he did not consider it necessary to give his reasons, probably because he was also of opinion that the appellant had, at all events, given such authority at the time when the goods, the price of which is in question, were purchased by the receiver.

In the Court of Appeal, Lord Esher, M.R., took the same view in regard to the liability of the appellant before the liquidation, and has assigned his reasons. His lordship regarded the proviso inserted in Mr. Kelly's appointment requiring him to open a bank account, and to make daily payment into it of the receipts of the business, and also that his cheques should be countersigned by Mr. Tryon, as introducing conditions which not only were in excess of the power of appointment conferred upon the trustees by the indenture of the 18th of May, 1892, but conditions which gave the trustees control over the management of the receiver. I am unable to assent to either of these propositions. Both conditions appear to me to have been reasonable checks imposed upon the agent of the company, for whose acts and defaults the company alone was liable, in the interest of the company itself. Then, as to the power of controlling the management of the receiver, which the trustees are supposed to have derived from the fact that Mr. Tryon was selected to countersign his cheques, Lord Esher observed that the receiver ought not to have been put in the position of ordering goods "and then having to say to the tradesmen who supplied them that he could not pay for them because those who appointed him had reserved control over all such payments themselves." That reasoning ignores the fact that Mr. Tryon was not only solicitor for the trustees but chairman of the company and holder of the third issue of debentures, and that in these latter capacities he had a material interest in the success of the business carried on by the receiver, and therefore an interest in seeing that its receipts were properly applied in extinction of its current liabilities. He had no right whatever to refuse to countersign cheques drawn in payment of goods actually purchased; his only function was to satisfy himself, before countersigning, that the cheque represented a real transaction by the receiver. It must also be kept in view that the company acquiesced in the terms of the appointment as made by the trustees, and on that footing transferred its assets and the conduct of its business to Mr. Kelly, and that circumstance, in my opinion, affords a conclusive answer to the suggestion that the addition of these provisoes, which constituted a mere check to prevent any improper application of the receipts of the business, and gave neither Mr. Tryon nor anyone else power to control the course of its management by the receiver, were in excess of the power to appoint him conferred by the company upon the trustees for the second debenture-holders. The provisoes must, in these circumstances, be treated on the same footing as if they had been expressed at length in the indenture of the 18th of May, 1892.

The Lord Chief Justice, the Master of the Rolls, and also Lopes, L.J., who held that the appellant would not have been liable for goods bought by the receiver before the liquidation order, were all of opinion that, whether the trustees were or were not responsible for the receiver's purchases before that event, they became so liable upon its occurrence. I am unable to follow the reasoning by which these learned judges have arrived at that result. The Lord Chief Justice says that the company *quâ* company then "ceased to have any real actual existence at all as a going or trading concern," and that the liquidator took no part, direct or indirect, in the carrying on of its business by Mr. Kelly. Lopes, L.J., says that "from the date of Mr. Wilding's appointment as liquidator the company ceased to exist as a company, and ceased to exist as a going concern."

These statements are approximately correct. The company, when in liquidation, although by no means defunct, could no longer act by its directors, and appoint or employ agents capable of binding the corporation or its estate, and was represented by the liquidator, who could not himself carry on its business without the special leave of the court. But the radical right to the business continued to be an asset of the company; and if it had been so successful under the management of Mr. Kelly as to yield profits sufficient to meet the claims of debenture-holders, who had no interest beyond that of mortgagees, it would, no doubt, have been at once reclaimed by the liquidator for the behoof of the general creditors. In point of fact the management of the receiver appears to have been so far successful that neither the first debenture-holders nor the trustees for the second debenture-holders, nor the liquidator, seem to have thought it expedient to disturb it.

None of these circumstances appear to me to be sufficient to afford a solution of the question which your lordships have to decide. If I had been of opinion that the trustees for the second debenture-holders stood in the relation of principals to Mr. Kelly before the liquidation, I should not have hesitated to hold that such relation was not altered by the supervening incapacity of the company to act by, or incur any obligation through, an agent. But, not being of that opinion, I am at a loss to understand upon what principle the trustees of the debenture-holders became subrogated as principals, in room and stead of the company, as soon as it incurred a statutory incapacity to occupy that position. The reasoning of the learned judges who were adverse to the appellant appears to me to involve this proposition, which to my mind is fallacious: that in cases where an individual, acting under a power of attorney or similar warrant, appoints an agent for a company, he necessarily becomes the principal of that agent whenever the company ceases to be legally capable of imparting any authority to the agent, if the agent, without obtaining any new authority from him, chooses to continue his management.

Apart from that general and doubtful proposition, it was admitted by the respondents' counsel that, after liquidation, nothing occurred which could alter the relation in which the appellant and his co-trustee stood to Mr. Kelly, the receiver, with the single exception of the fact that, from and after September, 1893, the counter-signature of Mr. Tryon to the cheques passed upon his bank account by the receiver was discontinued. It was curious to observe that the respondents' counsel, who strenuously maintained the view of the Master of the Rolls, that the observance of that condition was sufficient to make the trustee liable before liquidation, were driven to argue, with equal vigour, that its non-observance after liquidation, at the time when their client sold goods to the receiver, was attended with the same legal result. In point of fact it does not appear by whom or under what authority that check was removed; but, assuming its removal to have been sanctioned by the trustees, it appears to me that the circumstance

could not by itself, or in combination with the other features of this case, have the effect of transforming the trustees into principals of the receiver.

I am therefore of opinion that the judgments appealed from ought to be reversed with costs to the appellant, here and in both courts below. I have only to add that had the case not been attended with much variance of judicial opinion, and been of considerable importance to the large class of persons who lend their money on debentures to limited companies, I should have been content to express my concurrence in the careful and exhaustive judgment of Rigby, L.J.

Lord HERSCHELL (after stating the facts).—The question in the case was, in the opinion of the Lord Chief Justice, one of fact, and not of law at all. But the facts were not in dispute. The goods were ordered by Kelly, and not by the appellant and his co-trustee. They certainly gave Kelly no express authority to purchase for them, nor did they expressly appoint Kelly to act as their agent in carrying on the business, or, indeed, to act as their agent at all, or to pledge their credit. If, then, they are liable to pay for the goods, it must be because, in the circumstances which I have detailed, and notwithstanding the facts to which I have just referred, the law made them Kelly's principals and imposed such liability upon them. Though the Lord Chief Justice did not decide the point, he indicated the impression, at least, that from the outset Kelly was carrying on the business, not for the company, but for the defendants; that from the time when he was appointed receiver they, and not the company, were his principals. The Master of the Rolls, whilst agreeing with the Lord Chief Justice that it was not necessary to decide the point, expressed a distinct opinion that Kelly was appointed, not such a receiver as was contemplated by the contract, but as agent for the trustees.

Though it may not be essential, I think it very important to determine in what capacity Kelly originally acted, and whose agent he was. For so far as he and those with whom he dealt were concerned, he carried on the business in precisely the same manner from the beginning to the end. He gave the orders in the same form. He received in terms no new authority. If the trustees were originally his principals, no doubt they continued so to the end. If, on the other hand, the company were at the outset the principals, it will be necessary to inquire whether there were any acts done by the trustees which, in the absence of an express authority to act for them, made Kelly their agent to purchase goods, or generally to carry on the business.

It is to be observed that at the time when Kelly was appointed receiver the trustees had no power to interfere with the company in the conduct of their business except by appointing a receiver under the 13th clause of the deed of the 18th of May, 1892. The security was not then enforceable; they had no power to enter into possession of the mortgaged premises. Apart, then, from the proviso to be found at the end of the instrument appointing Kelly receiver, I do not think that it could be doubted that he was duly appointed receiver for the company, and that they, and not the trustees, were alone liable for his acts and defaults. Mortgage deeds frequently empower the mortgagee to appoint a receiver for the mortgagor. What, then, was the effect of the added proviso? The Master of the Rolls regarded it as depriving the receiver of the freedom ordinarily incident to his position, and reserving to the trustees a control over him with regard to every step which he might take. I cannot so view it. Its object seems to me clear. I do not think that it was intended to reserve to the trustees any control over the management of the business, but only to act as a check to prevent any improper use by the receiver of the moneys of the company, and to ensure that they should be properly applied. Mr. Tryon, by whom the cheques were to be countersigned, was, it is true, solicitor to the trustees, but he was also the chairman of the company. His function was merely to see that the cheques were drawn for payment of the company's liabilities. But even assuming that the company would have been entitled to refuse to let Kelly occupy the position of receiver for the company on the ground that the terms of his appointment were not such as were warranted by the deed of May, 1892, they did not do so. They allowed him from the date of his appointment to conduct their business as a receiver appointed under that deed. If the proviso introduced a check upon the acts of the receiver which the deed did not authorize, it was quite competent for the company to assent to and sanction the introduction of that check. And one can well understand that the company would regard it as in their interest, and would desire that there should be such a check upon the action of the receiver. I cannot myself entertain any doubt that when Kelly took over the management of the business, under his appointment, he did so with the full assent of the company, and as receiver for them. Supposing that before they went into liquidation an action had been brought against them for the price of goods ordered by Kelly, what answer would they have had? Could they possibly have maintained that he was not receiver for them, but for the trustees, when the trustees had at the time no power to appoint a receiver, except for the company, and when the company had recognized his appointment and permitted him to act as receiver? I cannot think so.

As soon as the order was made for the winding up of the company it became, as from the date of the petition, incapable of entering into contracts without the sanction of the court. The contracts made by Kelly after that date certainly did not bind the company. They could not be principals in those contracts.

The reasoning which led to the conclusion in favour the respondents appears to have been this: That after the winding-up order the company could no longer be principals; that Kelly, who contracted in the same terms as before, was not liable upon the contracts as principal; that the appellant and his co-trustee were aware that the company were no longer principals; that they permitted Kelly to carry on business as before, when they could at any time have displaced him; that the business was really being carried on for them, and that therefore they are liable as principals on Kelly's contracts.

It is clear that after the winding-up order the appellant and his co-trustee did not in terms give Kelly any new authority. They did not interfere in any way. He carried on the business afterwards just as he had done before. They did not expressly authorize him to enter into any contracts, or to carry on the business on their behalf. If, then, they are liable as principals it must be because an authority to do so is to be implied from the circumstances.

I have to observe, in the first place, that even if Kelly could not be made liable on the contracts, and if the company could not be treated as his principals, it by no means follows, in my opinion, that there must be some other principal. Where an agent purports to contract for another in such terms as not to make himself a contracting party, and he has no authority from that other to bind him as principal,

neither the agent nor anyone else can be sued on the contract, though the agent may be subject to the same liability as if he had been a party to the contract in respect of his breach of an implied warranty that he possessed the authority which he represented himself to have. If, then, neither Kelly nor the company are liable on the contract, this does not show that someone else must be, or go a step towards proving that the appellant and his co-trustee were the principals. It is not necessary to decide whether Kelly could be made liable for the price of the goods.

It is said that the appellant and his co-trustee might have displaced Kelly, and so put an end to his carrying on of the business. This is true. But the holders of the first mortgage might equally have taken this step, as indeed they did at a later date. This non-interference by the appellant and his "permitting" Kelly, in this sense, to carry on the business, cannot of itself make Kelly his agent if he was not so otherwise. Kelly was certainly not held out to the world as the agent of the trustees for the second debenture-holders. The respondents knew nothing about them, and did not give credit to them. The respondents, therefore, can only succeed by showing that the contracts were made on behalf of the appellant and his co-trustee and with their authority. What, then, wrought the change by which Kelly not only ceased to be agent for the company, but became the agent of these trustees? I gather that the answer to this question would be that from the date of the winding-up order the business was carried on for the benefit of the trustees. I do not see, however, that it was any more carried on for the benefit of the trustees after that date than before. The profits made by the carrying on of the business of the company were, before as well as after the winding-up order, part of the security for the payment of the debts due to the debenture-holders, and after as well as prior to the winding up the profits of the business, subject to the claim of the mortgagees, belonged to the company. It had not ceased to exist; it could still hold and also acquire property. If the business had proved profitable and the assets of the company had been more than sufficient to discharge the mortgage claims, the liquidator of the company could, and doubtless would, have intervened, and applied the surplus to the payment of the creditors of the company, and all that remained after they had been paid would have been the property of the company.

Prior to the decision of the case of *Cox* v. *Hickman* in this House it would, no doubt, have been open to contention that, under the circumstances which existed in this case, the business was being carried on for the benefit of the mortgagees, and must be treated as their business, and that they would therefore be liable upon contracts made by the person who carried it on. But since the decision of that case such a proposition can no longer be maintained. I think that the effect of the judgments in *Cox* v. *Hickman* has been overlooked in the judgments appealed from.

In that case an insolvent firm, by a deed of arrangement with their creditors, assigned their business to certain of the creditors as trustees. These trustees carried on the business under the name of "The Stanton Iron Co." In that name they ordered goods of the plaintiff and accepted bills for the price. The question in the action was, whether the other creditors (two of whom were sued) were liable as principals in the transaction. It was contended that they were so, because they were parties to the deed of arrangement by which the net income of the business was to be distributed rateably among the creditors of the firm, and a majority in value of the creditors present at meetings called for the purpose were empowered to make regulations as to the mode of conducting the business or to order its discontinuance. Notwithstanding these circumstances, this House held the defendants not liable. There the business was being carried on for the benefit of the creditors of the insolvent firm just as much as it was here carried on for the benefit of the appellant and his co-trustee, or those whom they represented. And those creditors as much authorized and permitted it to be carried on in the way it was carried on as did the appellant and his co-trustee in the present case. Moreover, the persons who conducted the business in the case referred to were subject to a control and interference by the creditors generally, to which there is no parallel in the present case.

It appears to me that the plaintiff in *Cox* v. *Hickman* had a stronger ground for contending that the defendants were liable than the present plaintiffs have, and I think that it would be impossible to decide in favour of the respondents on the ground that the appellant permitted the business to be carried on for his benefit without overruling the decision of your lordships' House in that case.

I entirely agree with the view expressed by Rigby, L.J., and I think that the judgment appealed from should be reversed.

Lord MORRIS.—I am of the same opinion.

Lord DAVEY.—Were it not for the judgments in the courts below I should not have thought that this case presented much difficulty.

In my opinion there can be no doubt that at the date of his appointment the receiver, though nominated by the mortgagees, became, both in fact and in law, the agent of the mortgagor—*i.e.*, of the company. That he was so by the express terms of the power under which he was appointed is undisputed. The purpose for which he was appointed was in order to make provision for payment of the company's mortgage debts, which was, in my opinion, a purpose of the company. It is said that certain directions which were given to the receiver—*e.g.*, to open a banking account with Messrs. Goslings & Sharpe, and that his receipts and cheques should be countersigned by Mr. Tryon—were in excess of the power. Perhaps they were. I do not know. But his appointment with these provisions was accepted and acquiesced in by the company, and the directors gave up the custody of the company to him, and allowed him to conduct the business as a duly-appointed receiver in the manner directed by the terms of his appointment. If the company did not agree, any terms in excess of the power were not binding on the receiver, for it cannot be pretended that there was any intention on the part of the mortgagees to appoint a receiver except under the power, and, indeed, they had no authority at that time to do so. The fact that the mortgagees were to obtain the benefit of the appointment through the payment of their interest or principal, or had the right to exercise certain control over the conduct of the business, would not, of course, make him their agent for the purpose of pledging their credit. One need only refer on this point to the judgments delivered in the House of Lords in *Cox* v. *Hickman*, and the judgment of the Judicial Committee in *Mollwo* v. *Court of Wards*. If he was not agent of the appellants originally, did he become so on the winding up of the company? I assume that the power to carry on the business so as to pledge the credit of the company and make the company liable to be sued on contracts made by him, came to an end. The receiver, however, continued to exercise the power of management and

to carry on the business in the same manner as he had done before the winding up. He purported to exercise powers which I will assume that he no longer possessed. I forbear to say what may be the legal consequence to himself if he did so. But I am unable to see how, without any act or assent on their part, it made him the agent of persons who, for the purpose of pledging their credit, had not previously conferred that authority on him, and never contemplated or intended doing so, or held themselves out as his principals. I agree with the judgment of Rigby, L.J., and I concur with your lordships in the order proposed.

Order appealed from reversed, with costs here and below.

Solicitors for the appellant, *Saltwell, Tryon, & Saltwell.*

Solicitor for the respondents, *C. J. Rawlinson.*

Court of Appeal.

From Q. B. Div. (Chitty and Collins, L.JJ.) Jan. 17.

GOWER *v.* COULDRIDGE. (*a.*)

Practice—Parties—Joinder of defendants—Joinder of separate causes of action against several defendants—Ord. 16, *rr.* 4, 5; *ord.* 18, *r.* 1.

A claim to recover damages from three defendants on the ground of deceit cannot rightly be joined in the same action with a claim to recover damages from two of such defendants on the ground of conspiracy.

Sadler *v.* Great Western Railway Co., 45 *W. R.* 51, [1896] *A. C.* 450, *followed.*

Appeal from an order of Day, J.

The action was brought to recover damages from three defendants, Couldridge, Maw, and Newman, the promoters of a company called Richard Spurgeon (Limited). Couldridge and Maw were directors, and Newman was secretary of the company. The plaintiff was the registered holder of 500 preference shares in the company of £1 each, for which he had applied, and which had been allotted to him, and in respect of which he had paid £500, and which, as he alleged, were of no value.

The statement of claim alleged that the defendants Newman and Couldridge fraudulently conspired to promote and form the company for the purpose of buying and taking over a worthless business, and to get the public, including the plaintiff, to take and pay for shares therein, their object being to receive for themselves large profits and emoluments, and to shift the burden of the business on to those members of the public who might be induced to take shares.

The statement of claim further alleged that the three defendants issued to the public, including the plaintiff, a prospectus containing untrue statements, which they knew to be untrue, and that the plaintiff had been induced by such statements to apply for the 500 shares. It further alleged a cause of action against the three defendants, in respect of such untrue statements, under the Directors' Liability Act, 1890.

On the application of the defendant Maw an order was made by a master that the plaintiff should elect whether he would discontinue the action against the defendant Maw or against the defendants Couldridge and Newman.

This order was reversed by Day, J.

The defendant Maw appealed.

M. M. Macnaghten, for the defendant Maw.—The question is whether a plaintiff is entitled to join separate causes of action against several defendants in one action. The House of Lords has answered this question in the negative: *Sadler* v. *Great Western Railway Co.*, 45 W. R. 51, [1896] A. C. 450. Here the plaintiff seeks to combine in one action a cause of action for deceit against the three defendants, a cause of action under the Directors' Liability Act against the three defendants, and a cause of action for conspiracy against two of the defendants. It is not alleged that Maw had any part or lot in the conspiracy. Maw, therefore, is entitled to object to the torts, which are alleged against him, being joined in the same action with an entirely distinct tort, which is alleged against the other defendants only.

Arthur Powell, for the plaintiff.—*Sadler* v. *Great Western Railway Co.* does not govern this case. In that case no tort was alleged to have been committed by the two sets of defendants jointly, but each set of defendants was charged with separate and independent torts. Here the plaintiff has a cause of action against all three defendants for deceit, and a cause of action against all three under the Directors' Liability Act. There is no decision that under such circumstances he may not join with those causes of action a separate cause of action against two of the defendants. And the words of the rules are clearly wide enough to allow this to be done. Ord. 16, r. 4, says that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative." And rule 5 says that "it shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him." Then ord. 18, r. 1, says that "the plaintiff may unite in the same action several causes of action." Here the plaintiff, having rightly constituted an action of deceit and under the statute against all three defendants, is entitled to join in the same action a separate cause of action against two of them.

He cited *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494; and *Bennetts & Co.* v. *MacIlwraith & Co.*, 45 W. R. 17, [1896] 2 Q. B. 464.

Cur. adv. vult.

Jan. 17.—CHITTY, L.J., read the following judgment: In this action the plaintiff seeks to recover damages for the loss he has sustained by taking shares in the company called "Richard Spurgeon (Limited)." He does not claim any injunction. There are three defendants, all of whom are alleged to be promoters of the company. In accordance with the modern system of pleading the plaintiff in his statement of claim sets forth facts from which it appears that he has three distinct causes of action. Stated shortly they are as follows. The first is a fraudulent conspiracy by two of the defendants—viz., Newman and Couldridge, to promote and form the company to buy a worthless business and to induce the plaintiff to take and pay for the shares which he in fact took. Although there is a statement that the defendant Maw joined in the promotion of the company, it is clear that he is not charged with being party to the conspiracy. This was admitted by the plaintiff's counsel. The second is a statutory liability founded on the Directors' Liability Act, 1890, in respect of statements in the prospectus issued by all three of the defendants. The third is false and fraudulent repre

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

sentations in the prospectus, also charged against all the defendants. The action, then, is founded on three distinct torts or wrongs committed, as to the second and third, by the three defendants, and, as to the first, by two only.

In these circumstances the defendant Maw, objecting to the joinder of the first cause of action with the other two, took out a summons, on which the master made an order, in substance directing the plaintiff to elect whether he would proceed with the action on the first cause against the defendants Newman and Couldridge only, or on the second and third causes against the three defendants. On appeal the learned judge in chambers reversed the master's order, and allowed the action in its present form to proceed against all three defendants. The appeal is by Maw from the judge's order. At the bar the plaintiff's counsel elected, if the court considered that the judge's order could not be sustained, to strike out from the statement of claim all the allegations relating to the fraudulent conspiracy, and to proceed with the action on the second and third causes only. In my opinion the judge's order cannot be sustained. The case is entirely governed by the decision of the House of Lords in *Sadler* v. *Great Western Railway Co.*, where it was held that claims for damages against two or more defendants in respect of their several liability for separate torts cannot be combined in one action. The plaintiff's counsel endeavoured in vain to distinguish that case from the present. He referred to orders 16 and 18 and various rules under those orders, and suggested that the lords who took part in the decision did not deal with the rules. The suggestion is wholly inadmissible. The rules were necessarily before the House and present to the minds of those who advised the House. The decision lays down a principle applicable to the present system of procedure on the subject, and governing all the rules bearing on the question. It would be idle, therefore, for this court to enter upon a discussion of the rules or of any of the authorities relating to them other than *Sadler's case*. In the case before us the cause of action founded on the fraudulent conspiracy is an entirely distinct and independent cause; it is wholly separate from the second and third causes. I hold, then, that the defendant Maw is entitled, as a matter of right, regard being had to the plaintiff's election at the bar, to have all the allegations relating to the conspiracy struck out from the statement of claim, and the order will be to that effect. No question, therefore, arises as to the exercise of any discretion by the court on the ground of embarrassment to the defendant Maw. Had that question arisen, I should have arrived at the same conclusion.

The costs of the appeal and of the summons both before the master and the judge must be the costs of the defendant Maw in any event.

COLLINS, L.J., concurred.

Appeal allowed.

Solicitor for the plaintiff, *T. Durant*, for *E. Cecil Durant*, Windsor.

Solicitors for the defendant Maw, *Learoyd, James, & Mellor*.

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 29.

BATEMAN (LADY) v. FABER. (*a*.)

Married woman—Restraint on anticipation—Life interest determinable on condition—Bonâ fide *but incorrect admission that condition had been fulfilled—Estoppel.*

A married woman, who had, subject to a restraint on anticipation, a life interest in certain estates determinable on her coming into an income of £8,000 a year, executed a deed-poll whereby she admitted that she had come into £8,000 a year and released her life interest.

A mortgagee of her husband, relying on this deed, entered into certain arrangements for the benefit of her husband. It was subsequently discovered that the married woman had not in fact come into £8,000 a year.

Held, that a married woman could not, by an incorrect admission, deprive herself of the benefit of the restraint on anticipation, even though by the admission she had induced someone else to alter his position for the worse.

Judgment of Kekewich, J. (ante, *p.* 151), *affirmed.*

This was an appeal from a decision of Kekewich, J. (reported *ante*, p. 151). The facts are fully stated in the report of the judgment in the court below, but may be shortly set out here as follows:

By an indenture dated the 26th of June, 1867, Lord Bateman mortgaged his life interest in the Kelmarsh and Shobdon Court estates to the executors of Lady Kerrison's will to secure a sum of £11,430, representing trust funds under the will advanced to Lord Bateman; and subject to trusts for repaying the loan, the executors were to pay the surplus rents and profits of the estates to Lady Bateman, the wife of Lord Bateman, during her life for her separate use without power of anticipation, "provided, nevertheless, that if at any time the said Lady Bateman shall succeed to an income in her own right of £8,000 or more per annum for her separate use, then and in such case the trusts in and by this indenture lastly hereinbefore declared shall absolutely cease and determine, and after the determination of the trust lastly hereinbefore declared (but subject and without prejudice to the trusts hereinbefore declared) upon trust for the said Lord Bateman." Lord Bateman subsequently mortgaged such interest as remained to him to Mr. Andrew Montagu, as a collateral security for £110,000.

In July, 1886, Lady Bateman became entitled to a life interest in the Kerrison estates in Norfolk, Suffolk, and Middlesex, and a question was soon afterwards raised by Mr. Montagu whether or not the plaintiff had "succeeded to an income in her own right of £8,000 or more per annum for her separate use," so as to bring into operation the above-mentioned proviso. Lady Bateman was ultimately advised by her then solicitor (who had since died) that now she was tenant for life of the Kerrison estates she must be considered as having succeeded to an income of £8,000 within the meaning of the proviso.

On the 4th of March, 1890, Lady Bateman, relying on this advice, and being desirous of enabling her husband to obtain better terms from the mortgagee, Mr. Montagu, executed a deed-poll, whereby she expressly admitted that her life interest in the Kelmarsh and Shobdon Court estates had determined under the proviso and released that life interest in favour of Lord Bateman. In consequence of, and subsequently to, the deed-poll Mr. Montagu entered into agreements with Lord Bateman whereby the

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

rate of interest on the £110,000 loan was reduced, and payment was arranged for on terms favourable to Lord Bateman. Subsequently, however, Lady Bateman discovered, as she alleged, that her income from the Kerrison estates did not amount to £8,000 a year, inasmuch as she took subject to numerous prior incumbrances, so that the deed of 1890 was executed under a wrong state of facts, and was therefore inoperative to affect the interest secured to her by the deed of 1867. Accordingly, she brought this action against the executor of the mortgagee, Mr. Montagu, who had died, the persons to whom Lord Bateman had conveyed his life estate in the Kelmarsh and Shobdon estates subject to the mortgage, and Lord Bateman himself, claiming a declaration that she, the plaintiff, had not at any time since the execution of the deed of 1867 succeeded to an income in her own right of £8,000 or more per annum for her separate use within the meaning of the proviso; and also a declaration that the admission by the plaintiff in the deed-poll of 1890 was not binding upon her in respect of the income to which, under the deed of 1867, she became entitled for her separate use without power of anticipation, and that, notwithstanding the deed-poll, she had always been, and still was, entitled to that income.

Kekewich, J., held that, by reason of the restraint on anticipation, Lady Bateman could not bind her interest by the admission, and that her right to receive the income continued notwithstanding the deed-poll.

The defendant Faber appealed.

Renshaw, Q.C., and *Brabant*, for the appellant.—The question is, what is the effect of an admission by a married woman which brings into effect the cesser clause? [CHITTY, L.J.—You have a clear case against anyone but a married woman restrained from anticipation.] Married women, even when restrained from anticipation, are subject to the discipline of the court: *Derbishire* v. *Home*, 3 De G. M. & G. 80; *Crofts* v. *Middleton*, 2 K. & J. 194, 4 W. R. Ch. Dig. 115. A married woman can be affected by estoppel as to her separate estate: *Jones* v. *Frost*, 20 W. R. 1025, L. R. 7 Ch. App. 773; *Sharpe* v. *Foy*, 17 W. R. 65, L. R. 4. Ch. App. 35. [LINDLEY, M.R., referred to *Willoughby* v. *Middleton*, 10 W. R. 460, 2 J. & H. 344. CHITTY, J., referred to *In re Queade's Trusts*, 33 W. R. 816.] Those cases were considered in *In re Vardon's Trusts*, 34 W. R. 185, 31 Ch. D. 275. [CHITTY, J.—*Willoughby* v. *Middleton* was discussed in *Codrington* v. *Lindsay*, 21 W. R. 182, L. R. 8 Ch. App. 578, p. 590.] What deprives Lady Bateman of her estate is the proviso which sends the estate over. With the determination of her estate she is relieved from the restraint on anticipation. The only point is what is required to prove this cesser. We submit that this deed is simply evidence of the cesser. *Jackson* v. *Hobhouse*, 2 Mer. 483, which Kekewich, J., relied on, was dealt with in *Sharpe* v. *Foy*. [LINDLEY, M.R., referred to *White* v. *Greenish*, 11 C. B. N. S. 209, 10 W. R. C. L. Dig. 34.] *Stanley* v. *Stanley*, 26 W. R. 310, 7 Ch. D. 589, was discussed in *Cahill* v. *Cahill*, 31 W. R. 861, 8 App. Cas. 420.

Warrington, Q.C., and *Beaumont*, for the respondent, were not called upon to argue.

LINDLEY, M.R.—This case is somewhat new in its details, and it is of great importance. It is of great importance to lawyers and of great importance socially. The conclusion at which I have arrived is that it is impossible to reverse the decision of Kekewich, J., unless we are prepared to lay down as law a proposition which I do not believe is law. If we reverse Kekewich, J.'s, decision, we must hold that it is competent for a married woman entitled for her separate use to property without power of anticipation to get rid of the restraint by telling an untruth, and causing someone else to act on the faith of that untruth. I do not say that the law would be unreasonable if that proposition were well founded; but in the face of the authorities I dare not say that it is law; there are well known cases which say that it is not. Now, the question arises in this way: Lady Bateman was entitled to certain property which I will call the Kelmarsh estates for her life for her separate use without power of anticipation. In the settlement which created that life interest in her there was a proviso that if at any time she should succeed to an income of her own of £8,000 or more a year for her separate use, then the trusts for her should absolutely cease and determine. Now, whether those trusts have ceased and determined depends upon the simple question of fact. Has she or has she not succeeded to an income in her own right of £8,000 a year? If she has, then these Kelmarsh estates have ceased to belong to her. If she has not, then they still continue to be hers. I quite agree with Mr. Renshaw that that is a mere question of fact. What is the evidence before us? The evidence before us is a deed-poll executed by her in which she states that she has succeeded to an income in her own right of £8,000 a year. The first question which arises is, Whether that deed is admissible in evidence against her? I think that it plainly is so. There is no objection to it, and it is an admission by her that this event has happened. Then she says, "I made a mistake; that admission which I made was made by inadvertence, and I claim relief upon the ground of that mistake." The answer to that is, "You are not entitled to take advantage of that circumstance; you are not entitled to say it was a mistake or untrue, because you made that statement with a view to induce and did induce Mr. Montagu to act upon it and change his position by reason of it, and he has done so." Therefore he says, "I do not care whether it is true or untrue, you said you had succeeded to an income of £8,000 a year; you said that, to induce me to make arrangements with your husband which I should not otherwise have made, and I have made them, and therefore you are estopped from denying the truth of your statement."

Now, first let us face that. As regards anybody else except a married woman who is entitled to property for her separate use without power of anticipation, that would be a good answer. But if we admit that to be a good answer here, what are we doing except enabling the married woman, by telling an untruth, to deprive herself of a protection which the clause has been designed to afford to her. In my opinion that cannot be done. I am quite of the same opinion as the learned judge in the court below. I do not think that it is necessary to go through the cases; no case touches this, no case comes up to it. It is new in point of detail, but in principle it is old—that is to say, a married woman cannot by any device, even by fraud (the cases go to that length), deprive herself of the protection which the restraint upon anticipation throws around her. The policy of the law I say nothing at all about, but it has been sanctioned by the Married Women's Property Act, 1882. Of course the result is that a married woman, having an estate settled for her separate use without power of anticipation, can play fast and loose to a greater extent than if she were a *feme sole*. I am of opinion therefore that the appeal must be dismissed, and dismissed with costs.

CHITTY, L.J.—I agree. If this had been the case of a man instead of a married woman restrained from anticipation there would have been a clear case for

estoppel. The circumstance in this case, that there was a deed, is not material on the question of law. The deed only shows that the statement made by Lady Bateman was a solemn deliberate statement. It would be just the same if the case had stood upon letters instead of a deliberate deed of arrangement. Now, the question is whether the law of estoppel, which would apply to a man, or even to a married woman who holds her property for her separate use without any restraint upon anticipation, ought to be so applied against a married woman who is restrained from anticipation as to deprive her of an estate which is subject to the restraint. In other words, whether the law of estoppel as applied against her ought to have that effect or not. Now, no authority has been cited, nor, so far as I am aware, can be cited, in favour of that proposition. It was very well put in argument that the law of estoppel is part of the law of evidence. But then we must have regard to the way in which a married women is treated in courts of equity, and to the way in which that treatment is sanctioned by the Legislature under the Conveyancing Acts. We must consider the effect which it would have. Now, the equity which created the doctrine of separate use made the married woman, for the purpose of that doctrine, a *feme sole*. But then it superadded the restraint on anticipation, and the restraint on anticipation cannot be got rid of when it is for the married woman's benefit, without the aid of section 39 of the Conveyancing Act, 1881, as is shown by the case of *Robinson* v. *Wheelwright*, 4 W. R. 187, 427, 6 De G. M. & G. 535, a well-known case upon which the law as established is founded. So far as I know, the only way in which the restraint can be got rid of is under section 39 of the Conveyancing Act, 1881, by an application to the judge, who can, if he is satisfied it is for her, the married woman's, own benefit, relieve her from the restraint. The result, as has already been pointed out by the Master of the Rolls, of our allowing this appeal would be to give the married woman indirectly, but substantially, the control over property which is thus settled. It appears to me that we should be misapplying the doctrine of estoppel if we allowed it to have that effect against the married woman.

It was said, What would have been the effect supposing in court she had admitted the property she succeeded to was worth £8,000 a year? If the matter had been in court, and the question had been raised and the court had accepted the proofs that were given as being sufficient, and there had been a judgment, the case would have stood differently. It appears to me that she must be allowed to retract this admission when the use that is attempted to be made of the admission is such as has already been pointed out; in other words, when the effect of the admission is to enable her by her own act to get rid of the restraint on anticipation. There is no case of fraud here, and therefore we have not to consider the authorities upon fraud. The better opinion seems to me, as the law stands at the present moment, that a married woman's deliberate fraud, where she is restrained from anticipation, does not suffice to enable her to get rid of the restraint on anticipation.

WILLIAMS, L.J.—I am sorry that the law is such that a married woman cannot relieve herself of this fetter with respect to anticipation in cases where she has been guilty of a fraud, because in the end the fetter as to anticipation is a fetter imposed largely for her benefit. It does not seem very wholesome that she should continue to have the benefit of the fetter upon anticipation in a state of circumstances in which she has chosen to cause another to alter his position, and alter his position for the worse upon the assumption that there is no such restraint. But I do not think that it has been argued here to-day that a married woman can relieve herself of the restraint on anticipation by her fraud. If it had been so argued —which, I repeat, I do not think it has—it seems to me that, since the case of *Stanley* v. *Stanley*, it is impossible to maintain any such proposition as that a married woman's fraud may relieve her from the restraint on anticipation. In those circumstances it seems to me that it follows that the judgment in the court below appealed against was right. It is attempted to put this case outside the rule established in *Stanley* v. *Stanley* by saying it is not sought here to rely upon any dealing by the married woman with her property; but that it is only sought here to rely upon the rule in the law of evidence. It is argued that it may very well be that although a married woman cannot directly affect the restraint upon anticipation by her act, or even by her fraudulent act, yet it does not follow that she is not liable to the same laws of evidence as other people, that if that is so she is bound by this estoppel; that the moment this deed-poll is put in it proves, unless contradicted, that the event has happened on the happening of which she was to lose this life estate; and that it not only proves it, but that she is thenceforth estopped from offering evidence to the contrary. It is further said that she is bound by this rule of the law of evidence, and that there is nothing in the decision of *Stanley* v. *Stanley*, or the other authorities to the same effect, which relieves her from the operation of that rule. I think, however, that such a proposition is based upon a misunderstanding of what the rule really is. It is quite true that in so far as the deed is put in as a deed executed by this lady it is her admission, and as such is evidence. But it is not sought to rely upon this only as an admission. It is sought to say that it is an admission which she ought not to be allowed to contradict; that she cannot contradict it without doing a wrong to those who have acted upon the faith of this representation by her, which is relied upon as an admission by her in evidence. It seems to me that the moment that one says that that is the principle upon which she is prevented from contradicting the admission, one cannot help coming to the conclusion that the rule of evidence is based upon the fact that courts do not allow persons to commit a wrong of this sort in the presence of the court and during its hearing. But it seems to me that when one recognizes that, the result is to bring the reasoning upon which the married woman is prevented from contradicting her admission within the same rule as is acted upon in the decision of *Stanley* v. *Stanley* and the other cases to like effect. I think, therefore, as has already been said by the Master of the Rolls and Chitty, L.J., that it is impossible to decide in a different way from the decision of Kekewich, J., without really holding that a married woman may relieve herself from restraint on anticipation by her own acts. Under these circumstances I agree with the decision of the rest of the court, and the appeal must be dismissed with costs in the usual way.

Appeal dismissed.

Solicitors, *Greenfield & Cracknall; Hudson, Matthews, & Co.*

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Nov. 2, 4.

MAYOR, &c., OF THE BOROUGH OF WEST HARTLEPOOL v. ROBINSON. (a.)

Local government—Public health—Street—Charges for paving, &c.—Duty imposed by Act of Parliament—Memorial to Secretary of State—West Hartlepool Extension and Improvement Act, 1870 (38 & 39 *Vict. c. cxiii.*), *ss.* 3, 69, 80, 82, 349, 350.

Where one of two adjoining owners laid out a strip of land 18*ft. wide, at the edge of his land, to make a road, the other agreeing to give a similar strip to make the road* 36*ft. wide,*

Held, under the West Hartlepool Extension and Improvement Act, 1870, *that the* 18*ft. strip so first laid out was a "street" and not merely part of a street, and that, therefore, charges for paving, &c., that strip could properly be made and enforced against the other owner, notwithstanding that he had laid out the agreed additional strip, and had paved and made it good at his own sole expense.*

If such charges constitute, in the circumstances, any hardship upon the owner, his remedy is, under section 349 *of the Act, to appeal to the Secretary of State by memorial for relief.*

Decision of Stirling, J. (45 *W. R.* 312), *affirmed.*

Appeal from Stirling, J. (reported 45 W. R. 312).

In this action the corporation of West Hartlepool sought to establish and enforce by summons against lands belonging to the defendant two charges for sums of £27 15s. 6d. and £328 3s. 4d. These sums were for the expenses of paving and sewering the street in which the defendant's properties were situate, and the charges were claimed under the West Hartlepool Extension and Improvement Act, 1870, the provisions of which closely resemble those of the Public Health Act, 1875.

In 1878 the lands in question formed part of the Lynnfield estate, which belonged to the defendant, and was occupied by him residentially. In that year a Mr. Callendor and other persons, the owners of the property adjoining the defendant's property on the south, applied to the West Hartlepool Improvement Commissioners (the predecessors of the plaintiffs) to sanction a scheme for the development of their property as a building estate, and submitted a plan showing the proposed road, Middle Park-road, running along the boundary between their estate and the defendant's, half being on each estate. On the plan was a note to this effect, "It is proposed to leave half of Middle Park-road 18ft. wide." The commissioners sanctioned the scheme, and the road, which was in fact called Sandringham-road, was made. At first the new road was only 18ft. wide, but there was an agreement between the defendant and the commissioners that the defendant should afterwards give an amount of land to the north sufficient to make the street 36ft. wide.

In January, 1892, the corporation of West Hartlepool made an order for paving, &c., the 18ft. road. Notice of this order was served on the defendant and the other adjoining landowners, none of whom, however, executed any part of the works required. The works were therefore done by the corporation, the cost was apportioned by the borough surveyor, and notices were sent to the defendant that he had been charged with the two sums above mentioned. The defendant contended that the charges were enforceable, if at all, against one Muir, to whom he alleged that the whole of the Lynnfield estate had passed. The plaintiffs then took proceedings before the magistrates, and succeeded, against Muir. The present summonses had been issued against Muir, but in February, 1896, the defendant's name was substituted for Muir's, on the ground that Muir was simply the defendant's agent. At the hearing it was proved that the defendant had thrown the agreed portion of his land into the road, which was thus made 36ft. wide, and had paved, &c., the new portion of the road, the charges claimed being in respect of the other 18ft. of the road.

Stirling, J., gave judgment for the plaintiffs, and the defendant appealed.

Graham Hastings, Q.C., and *Strachan, Q.C.* (*W. C. Ryde* with them), for the appeal.—The magistrate's order directed us to trespass upon another person's land, and therefore cannot be enforced. This was not a street, but only half of a street, and the only cases of half streets in which the owners have been held liable are under the Metropolis Management Acts, which give the owners no power to do the work themselves, and provide for an assessment, not an apportionment. When we gave a written notice disputing the apportionment, the corporation were bound, under section 82, sub-section 5, to proceed by arbitration.

They also referred to the West Hartlepool Extension and Improvement Act, 1870 (38 & 39 Vict. c. cxiii.), ss. 73, 80, 69, 83, 81, 82, 3, 70, 71, 72, 348; 350; *Reg.* v. *Swindon New Town Local Board*, 27 W. R. 732, 4 Q. B. D. 305; *Sandgate District Local Board of Health* v. *Keene*, [1892] 1 Q. B. 831, 40 W. R. Dig. 131; *Mayor, &c., of the Borough of Folkestone* v. *Brooks*, [1893] 3 Ch. 22, 41 W. R. Dig. 126; *Murray* v. *Epsom Local Board*, 45 W. R. 185, [1897] 1 Ch. 35; *Tidswell* v. *Whitworth*, 15 W. R. 427, L. R. 2 C. P. 326, 333.

Buckley, Q.C., Macmorran, Q.C., and *S. B. L. Druce*, for the plaintiffs, were not called upon.

LINDLEY, M.R., stated the facts, and proceeded: Having regard to the agreement of the parties, it is impossible to treat Mr. Robinson as an adjoining owner having nothing whatever to do with the construction of this 18ft. street, or part street I will call it for the present, on Mr. Callendor's land. He was assenting to a larger building scheme, and assenting to the carrying out of that scheme piecemeal—by steps.

Now, the first point which arises is this: Whether that 18ft. on Callendor's land was a street within the meaning of section 3 of the Act of Parliament to which we have been referred. I cannot for a moment doubt it was; I have not the slightest doubt about it. What does it matter whether the street is made piecemeal—whether one part of it means one portion of the whole width, but not of the whole length, or one portion of the whole length, but not of the whole width? To say that Callendor's 18ft. strip is not part of the wider street which was contemplated appears to me to be an absolutely untenable proposition. It is a street for all the purposes of legislation. It is not the less a street because it was intended to be widened.

As to the order for paving, &c., it is not necessary for us to consider whether, under this Act of Parliament, if the defendant had been no party to these proceedings—if there had been no agreement by him to throw in 18ft. and make the road 36ft., he being an outsider—and if the attempt was to impose upon him an obligation of contributing half the expense of making the road on Callendor's property; whether that could be done under this Act of Parliament I do not know, nor is it necessary for us to

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

consider. The point of this case is that this was a street, 36ft. wide, to be made for the common benefit. It was as much for the defendant's benefit as for Mr. Callendor's; it was a joint operation and a joint construction from first to last, to that extent. Therefore it appears to me that we need not trouble ourselves about what possibly is a much more difficult question—as to what would have been the law if the defendant had been no party to the proceedings. It is said that this dispute must be settled by arbitration. What did the defendant do? He did not in any way dispute the apportionment—that is to say, the amount which he was asked to pay. He took up a perfectly logical and perfectly intelligible position, though in our opinion wrong—that he was a person who was not within the jurisdiction of the commissioners or the corporation at all, and that they had no right whatever to make any order upon him at all, because he had no land whatever abutting on this street. His points turn upon a critical examination of the meaning of the word "street," and upon those points we are against him. He denied the jurisdiction of the commissioners or the corporation, and it appears to me perfectly impossible to say that that is a dispute about the apportionment by the surveyor. It is nothing of the kind—it is far from that.

We were pressed with the case of *The Sandgate District Board of Health* v. *Keene*, more particularly in the Appeal Court. I cannot help thinking that Wright, J., in his observations upon that case, and Stirling, J., in his observations upon it, have construed that decision correctly. I do not understand that that case goes the length of saying that if a person takes up the position that the local authority have no jurisdiction over him at all, the matter is to be referred back to arbitration. If there is any distinction between that case and the present, it is adverse to the defendant, the section here in question being less favourable to his contention. It seems to me that when a man takes up the position which the defendant did, it is absolutely impossible to hold that there is a dispute about apportionment. It is nothing of the kind. Therefore the point about arbitration absolutely fails.

I do not think there is anything else to which I need call attention. It is said that there has been a hardship on the defendant. Of course we have nothing to do with that. At first I was not impressed with that view of the case; but, having read Stirling, J.'s, judgment, I think there may be some hardship upon him, because it may be he is not in a position to obtain compensation. If so, he has so managed matters as to bring that hardship upon himself. But he is not without remedy, because, as Stirling, J., pointed out, section 349 shows that there is a course open to him to have that hardship redressed, if there be hardship in it. It appears to me that legally he is wrong from the beginning to the end, and the wrong is attributable to the fact that he, having agreed to contribute a strip of his own land 18ft. wide, has made his building operations not to work in and tally. He has only himself to thank for his position. The appeal must be dismissed.

CHITTY, L.J.—I agree. The order under appeal is an order enforcing a charge under the 350th section of the West Hartlepool Extension and Improvement Act of 1870. The facts have already been stated by the Master of the Rolls, and I shall not repeat them.

When the order to execute the works of the 5th of January, 1892, was made by the corporation, who had then succeeded to the position of the commissioners, the state of things was this: the defendant had agreed to contribute one-half of the land necessary for a road of 36ft. The Callendors had originally submitted plans to the commissioners in 1878, whereby they proposed that a road of the width of 36ft. should be made, they contributing one-half—namely, the half on their own land. The commissioners, when Mr. Callendor's proposal was brought before them, refused to proceed until the relation of the defendant to this scheme had been first duly ascertained; and in the result the defendant entered into a written agreement that he would contribute 18ft. toward this road of 36ft. He did not agree that he would contribute it at any particular time, nor that he would execute the work required of himself, but still he was a party assenting to this scheme, and that, I think, is an important fact in this case. When the order of the 5th of January, 1892, was made, that being the state of circumstances, a question seems to have been raised in the argument whether that order was an order made within the authority of the 80th section. On looking at the order and referring to the surveyor's plan, which forms part of the order, it is quite plain that the order related to a street then to be made of 18ft. wide. Putting the other circumstances that I have already stated in connection with that order, no doubt there was a street of 36ft. in contemplation; but it was part of this contemplated 36ft. road that was then under consideration, and which was then ordered to be made. The order plainly refers to the 18ft. street, and that appears to me to be a street or part of a street within the meaning of the Act of 1870.

It was urged that the urban authority had no jurisdiction to make an order for the execution of works upon a street less than 36ft. wide; but I refer to the 73rd section, which, no doubt, says that "Every new street intended for carriage traffic shall be laid out and formed at least 36ft. wide unless"—and then there follow certain circumstances which are mentioned, and the section winds up by saying, "or on account of other special circumstances stated in the order." Here there were special circumstances to bring the case within that 73rd section—namely, the circumstances that I have already shortly stated, that the defendant, who was the adjoining owner, had agreed to contribute one-half of the 36ft. road. I entertain no doubt that the street mentioned in the order of the 5th of January, 1892, was a street or part of a street within the meaning of this Act. The result is that in my opinion the order of the 5th of January, 1892, was made within the authority of the Act, and it was served according to the Act upon the defendant; and I can see nothing in the objection which was raised, that the land charged would include the land he had agreed to contribute towards the street. It may be that by reason of subsequent events that charge had become unenforceable against that particular portion of the land—namely, the 18ft. which he was to contribute. There was a charge upon it at the time, although a charge which, in the events that have happened, has become unimportant and unenforceable; because, I take it that it could not be said that there would be jurisdiction to sell that part of the land which is now a part of a public street. I mention that point because it was strongly urged on the appeal; but it appears to me that it is one which, though proper to notice, has no force in it whatever.

The other point is a very simple one, and it turns upon the 82nd section, which section deals with the case of the work not being done. Well, the work was not done within the time mentioned by the Act, one month. Then the section enacts, under a separate head, first, that the commissioners may do the work themselves; secondly, that the commissioners may charge the several owners of the buildings or lands in the street with the expenses; then

the 3rd sub-section shows that "new street expenses" are to be charged to the owners in proportion to the extent of the frontage of their buildings and lands in the street; and then comes the 4th sub-section, and upon this it is said that there was a condition precedent to suing and enforcing the charge that the parties should have gone to arbitration; and unless they had the dispute which arose between them settled by arbitration there was no right on the part of the plaintiffs to seek to enforce the charge. I think that argument cannot be sustained. The 4th sub-section says that the proportion is to be ascertained by the surveyor, which was done; and that the apportionment is to be binding and conclusive on all parties unless the same is by written notice disputed within one month from the time of notice being given by the commissioners of the apportionment; and any such dispute shall be settled by arbitration. I refer also to the 6th sub-section, which enacts that, notwithstanding any dispute, interest on new street expenses shall commence as against each owner from the expiration of one month from the time of demand by the commissioners of his porportion of new street expenses.

Now, I do not find that any difficulty in the way of the plaintiffs arises by reason of these sub-sections. The dispute must be a dispute plainly under the 4th sub-section in relation to the apportionment. There was no such dispute. If there had been such a dispute the arbitrator would have been competent to enter upon it, and, I do not doubt, would have decided it, or sent a special case to the court if he thought it was proper for him to do so. He would have been the right person to decide a dispute of that kind; but on the facts of this case there was no such dispute. The dispute really was with reference to the 2nd sub-section, and generally on the Act, that the commissioners, or the urban authority who had become substituted in their place under the Act, had no jurisdiction to make the charge. I think, therefore, that portion of the case falls to the ground.

It is not necessary for me to say anything about the 249th section, or any of the subordinate parts of the case, after the judgment of the Master of the Rolls, in which I concur.

VAUGHAN WILLIAMS, L.J.—I only wish to add a few words. Speaking for myself, my conclusion is based entirely upon the fact that the street dealt with here is the 18ft. street, and that the appellant had land abutting on this street within the meaning of the 69th section. My conclusion would have been exactly the same whether or not there had been the agreement of 1878 relating to a subsequent extension of that street.

The only other thing that I wish to say is that I have arrived at no conclusion myself as to whether, in the case of the *Sandgate District Local Board of Health* v. *Keene*, there was a decision that under the Public Health Act, 1875, arbitration is a condition precedent to the right to recover even in cases where the dispute is a dispute as to liability only, but I do not think it is necessary to decide that in the present case.

For the reasons given by the Master of the Rolls, under this Act of Parliament it seems to me, there can be no doubt that there is no need to go to arbitration in cases where liability only is disputed, and the apportionment is not disputed.

Appeal dismissed.

Solicitors, *Bell, Brodrick, & Gray*, for *Harrison & Barker*, West Hartlepool; *Baker, Lees, & Postlethwaite*, for *H. Simpson*, West Hartlepool.

High Court of Justice.

Chan. Div. } Kekewich, J. } Nov. 18.

In re HUGHES.
BRANDON v. HUGHES. (*a.*)

Married woman — Protection order — Contract — Feme sole — Appointment — General power — Administration — Property liable to debts and liabilities — Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 21, 25, 26.

A married woman who has obtained a protection order under the Matrimonial Causes Act, 1857, *is to be regarded as a* feme sole *for the purposes of contract. Consequently, where a married woman has obtained such an order, funds appointed by her by will, in exercise of a general power of appointment conferred upon her by a deed executed in* 1894, *and constituting her sole property, will become liable for a debt contracted by her in* 1880, *subsequent to the protection order, and her creditor can come in and prove for his debt in the administration of her estate.*

Adjourned summons.

In the month of February, 1880, Mrs. Walker, otherwise Hughes, obtained a protection order against her husband under section 21 of the Matrimonial Causes Act, 1857. This order was never discharged.

By an indenture dated the 6th of March, 1880, Mrs. Walker covenanted with Mr. J. C. Stogdon to pay him the sum of £450 and any other sum which might become due on the footing of the security therein contained on the 30th of March following, together with interest thereon in the meantime at the rate therein mentioned. The money was not paid.

Mrs. Walker died on the 24th of March, 1896, having by her will appointed certain funds over which she had a general power of appointment under a certain indenture dated the 23rd of July, 1894. The funds so appointed constituted all Mrs. Walker's property at her death.

This was a summons in an action for the administration of her estate, by the assignee of Mr. Stogdon, asking that his claim to prove as a creditor of Mrs. Walker's estate for (*inter alia*) the £450 and interest due under the contract contained in the indenture of the 6th of March, 1880, might be allowed.

Warrington, Q.C., and *Dauney*, for Stogdon's assignee.—After the protection order had been obtained Mrs. Walker must be regarded as a *feme sole* in respect of all her contracts by virtue of sections 21 and 26 of the Matrimonial Causes Act, 1857, and this sum must be treated as a debt due from her. In exercising by her will the general power of appointment she made this property her own, and it is liable for her debts: *In re Ann, Wilson* v. *Ann*, [1894] 1 Ch. 549.

Tanner, for the executor.—I submit that this is a case under section 25 of the Act. It is a case affecting the married woman's property and not her contract, and her property is subject to the same restrictions after she has obtained a protection order as it was subject to before the order: *Hill* v. *Cooper*, 41 W. R. 500, [1893] 2 Q. B. 85, referring to *Waite* v. *Morland*; 36 W. R. 484, 38 Ch. D. 135. Remaining, as she does, a married woman, she can contract as a married woman and not otherwise. On the question of the power of appointment—in the case of *In re Ann*, the wife's liabilities arose after the Married Woman's Property Act, 1882, but in the case of *In re Roper*, 36 W. R. 750, 39 Ch. D. 482, they arose prior

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

to the Act, and it was there held that the appointed fund was not liable.

Warrington, Q.C., in reply.—*Hill* v. *Cooper* did not deal at all with section 26 of the Matrimonial Causes Act, 1857. The marriage tie is not severed by the judicial separation, but she is a *feme sole* for the purposes of contract. *In re Roper* is not an authority on this point.

KEKEWICH, J.—It seems to me that I cannot reject this claim without saying that the Act of 1857 does not mean what it says. Section 21 of the Act says that if any such order for protection, as is contemplated by that section, be made, "the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation." Then on turning to section 26 of the Act I find that "in every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding." It has been urged in argument that in the present case we are dealing with the property of the wife and not with her contract, and the case of *Hill* v. *Cooper* was relied upon in support of that argument. That was a case which decided that a married woman who has obtained a protection order still retains the status of a married woman, and that any property which she is restrained from anticipating still remains subject to the restraint as regards so much of it as became her property before the order was obtained. That case was decided under section 25 of the Act, which says that "in every case of a judicial separation the wife shall from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her." The case of *Hill* v. *Cooper* does not, however, deal with the question before me, for I am dealing with a question of contract and not of property. Sections 21 and 26, read together, say that a married woman shall be considered as a *feme sole* for the purposes of contract, and therefore I think she can enter into a contract freed from those restrictions which are imposed upon married women for their own protection. Mrs. Walker did enter into such a contract with Mr. Stogdon. I decide this case simply in relation to the protection order, and therefore I do not refer to *In re Ann*, which was a case upon a different statute, and does not apply. I rely simply on the 21st and 26th sections of the statute; the counsel engaged in this case have not cited to me any case which helps us, and therefore I think the better plan is to treat the Act as meaning what it says—viz., that the wife is to be regarded as a *feme sole*. At the date of the contract she was a married woman under that protection order, and therefore was entitled to enter into this contract with Stogdon, and having afterwards exercised a general power of appointment, she could enter into engagements for which her estate was liable, and the court always treats the engagements of a married woman as her debts and liabilities. The plaintiff, therefore, of Mr. Stogdon can come into this administration action and prove for his debt.

Solicitors, J. C. Stogdon; G. S. & H. Brandon.

Q. B. Div.
(Lawrance and Collins, JJ.) Aug. 3, 1897.

GRANGE (*Appellant*) v. SILCOCK (*Respondent*). (*a.*)

Animal—Dog—Injury done to cattle or sheep—Liability of owner of dog—Dogs Act, 1865 (28 & 29 *Vict. c.* 60), *s.* 1.

A dog chanced to worry and kill a sheep which was trespassing on the land of the owner of the dog.

Held, that, the words of section 1 *of the Dogs Act*, 1865, *being absolute, the owner of the dog was liable in damages.*

Semble (per Collins, J.), *there might be cases, however, where some qualifying proviso ought to be read into the section.*

Case stated by justices for the city of Sheffield.

The plaintiff, Silcock, summoned the defendant, Grange, under section 1 of the Dogs Act, 1865, for the value of a sheep which had been worried and killed by the defendant's dog. At the time that the dog worried and killed the sheep, such sheep with a number of others was trespassing on the defendant's field. The lands of the plaintiff and the defendant adjoined, and were separated by a stone fence about four feet high. The sheep were Scotch horned sheep, and were capable of jumping any ordinary fence. They had frequently gone over the stone fence on to the defendant's land, and he had complained to the plaintiff of their doing so on several occasions. The land being of a moorland character it was admitted that very little damage was done by sheep trespassing. At the time when the sheep was worried by the dog the plaintiff or his servants were driving such sheep off the defendant's land. The defendant did not allege that he had made any attempt to protect his field, either by empounding the sheep or claiming compensation for damage done, but he contended that he was not liable in that the sheep were trespassing on his land, where his dog had a right to be for the purpose of protecting his grass, and that as the plaintiff had been warned to keep his sheep within bounds he was guilty of negligence in allowing them to stray.

The justices expressed their decision thus: "We were of opinion that under the very definite words of section 1 of the Dogs Act, 1865, 'the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog, and it shall not be necessary to show a previous mischievous propensity in such dog or the owner's knowledge of such previous propensity or that the injury was attributable to neglect on part of such owner,' we were not called upon or entitled to take into consideration the questions which might have arisen between the parties in an action for trespass by or injury to the sheep in another court, but that the dog-owner was under that section liable before us for the injury done to the sheep by his dog, about which, as a fact, there was no dispute, and that therefore we had no other course than to construe literally the words of the section, and to enforce by our own order the payment of the amount of such injury." The justices accordingly made an order for payment by the dog-owner of 15s. for damages and 6s. for costs.

The defendant appealed.

Arthur Sims, for the dog-owner.—The justices are wrong in the view they have taken of the section. The circumstances in each case ought to be considered, otherwise the effect of the section is that the dog-owner, although unheard, is to be held liable for damages on proof that his dog had in fact worried or

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

killed sheep or cattle. The Act merely renders proof of "scienter" no longer necessary evidence, but the owner of the animal at fault may escape from damages by proving negligence on the part of the person claiming damages: *Fletcher* v. *Rylands*, 14 W. R. 799.

Storry Deans, for the informant, was not called upon to argue.

LAWRANCE, J.—I think the justices were right, and therefore the appeal fails. The facts in this case are perfectly clear and not in dispute. Had they been somewhat different an interesting question might have been raised as to the dog-owner's liability under the Act. In this instance it was the owner of the sheep who drove them off the defendant's land, and while doing so the defendant's dog came up, without his master's knowledge and without having, therefore, been sent there by his master, and instead of assisting the plaintiff to do that which his master would have had clearly a right to do—namely, to drive the sheep off his land—the dog set to, worried, and killed a sheep. The statute certainly altered the law, making it no longer necessary, before the owner of the injured cattle or sheep could recover, for him to prove "a previous mischievous propensity or the owner's knowledge of such previous propensity" in the dog. There is nothing in the Act, so far as I read it, which admits of a defence, in circumstances such as these, being successfully raised. It seems to me, indeed, to be a patent example of the very kind of case the statute was especially intended to cover.

COLLINS, J.—I concur. The words of the statute are absolute and make no exception in favour of a dog who has worried and killed a sheep he found trespassing on his master's land. I do not desire to give any opinion on points of construction of the section, which are not really before the court, but I can conceive cases which would render it necessary to read some qualification into the literal meaning of the words of this section as they now stand. Take, for instance, this case: A wild bull escapes into a man's field. The owner of the field puts his dog upon the bull to turn him out. The dog in doing so bites the bull. In such a case surely the owner of the dog would not be liable in damages, and, therefore, the section would have to be read as if there were qualifying words to the effect that the owner of the dog should be liable unless some legal justification for so employing the dog can be shewn. Such a question does not arise here. It is clear that the dog could not be in a better position than his master in respect of this wrongful act. The right of the owner of any land upon which his neighbour's cattle have trespassed is to remove them, using only such violence in so doing as is necessary to enforce his right. Here the dog killed the sheep. His master, therefore, is clearly liable.

Appeal dismissed. Leave to appeal refused.

Solicitors for the appellant, *Campion & Simmons*, for *A. Muir Wilson*, Sheffield.

Solicitors for the respondent, *A. S. E. Doyle*, for *C. Robinson*, Sheffield.

Q. B. Div.
(Grantham and Channell, JJ.) Dec. 15.

CLIFFORD v. THAMES IRONWORKS CO. (a.)

County court — Appeal — Point not raised at trial — County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 120, *and following sections.*

Under the provisions of section 120 *and the following sections of the County Courts Act*, 1888, *the omission of the judge to direct the jury as to the law is a point of law, which must be raised and submitted to the judge at the trial in order to entitle the party complaining thereof to appeal.*

Appeal from the Bow County Court.

The action was an action for damages for personal injuries. The jury returned a verdict for the plaintiff. The defendants appealed, on the grounds (1) that there was no evidence proper to go to the jury; (2) that the learned judge misdirected the jury by omitting to direct them as to negligence and contributory negligence, and by omitting to tell them that if the plaintiff was the author of his own injury he could not recover.

E. Morten, for the respondent, raised the preliminary objection that no point of law was taken in the court below, and cited *Smith* v. *Baker & Sons*, 40 W. R. 392, [1891] A. C. 325.

Jelf, Q.C. (*Morten Smith* with him), for the appellant.—Where the point of law arises during the summing up of the learned judge it is not necessary to take it in order to establish a right of appeal, nor would it be practicable to do so: *Barber* v. *Bart*, 42 W. R. 572, [1894] 2 Q. B. 437.

GRANTHAM, J.—I see no difficulty in counsel drawing the judge's attention to a misdirection at the trial.

CHANNELL, J.—The court has no jurisdiction to hear this appeal. By the County Courts Act only a limited right of appeal is given. Every now and then a point may arise which could not have been taken at the trial. But here both grounds of appeal are points which could have been taken at the trial.

Solicitors for the appellants, *Watson, Sons, & Room.*

Solicitors for the respondent, *Shaen, Roscoe, & Massey.*

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Court of Appeal.

From Q. B. Div.
(A. L. Smith, Rigby, and Collins, L.JJ.) Dec. 3.

In re ESTATE DUTY PAYABLE ON THE DEATH OF THE SECOND EARL COWLEY. (a.)

Inland revenue—Estate duty—Settled property—Value of property passing on death—Mortgage created by tenant for life and remainderman—Annuity charged upon estate in favour of remainderman during life of tenant for life—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 7.

Property was settled upon a person for life, with remainder to his son in tail. The tenants for life and in tail, by deed barred the entail and reserved to themselves a joint power of appointment over the property, the limitation in default of the exercise of the power being to the father for life, with remainder to the son in tail. They then joined in creating mortgages whereby, in the exercise of their joint power of appointment and by virtue of their respective estates, they conveyed the property in fee simple to the mortgagees to secure £230,000. Part of this sum was applied for the benefit of the tenant for life, the remainder being paid to or for the benefit of the

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

tenant in tail. By a re-settlement subsequently executed this property was charged with an annuity of £3,000 in favour of the tenant in tail during the life of the tenant for life. The tenant for life died in 1895.

Held, that, in determining the value of the property passing on the death of the tenant for life, no deduction could be made in respect of either (1) *the* £230,000; *or* (2) *the capital value of the annuity of* £3,000.

Decision of the Divisional Court (45 *W. R.* 538, [1897] 2 *Q. B.* 47) *reversed as to* (1) *and confirmed as to* (2).

Appeal from the judgment of a Divisional Court (Pollock, B., and Bruce, J.) upon a petition of the third Earl Cowley under section 10, sub-section 1, of the Finance Act, 1894, from the decision of the Commissioners of Inland Revenue (reported 45 W. R. 538; [1897] 2 Q. B. 47).

By his will dated the 27th of June, 1863, and proved on the 20th of August in the same year, the late Earl of Mornington devised his real estate to the use of trustees upon trust to pay the interest on certain mortgage debts (all since discharged) and to pay certain annuities. Subject and charged as above mentioned, the testator's real estate was to be held upon trust for the first Earl Cowley for life, and after his death for the second earl for life, and after the death of the second earl for the first and every other son of the second earl successively in remainder in tail male with remainders over. The will also gave powers to the tenants for life of jointuring and charging portions.

The first earl died on the 15th of July, 1884, and his eldest son, the second earl, thereupon succeeded in possession to the estates and interests conferred upon him by the above will.

By a deed-poll of the 1st of April, 1865, the second earl, in exercise of his power of jointuring under the above will, appointed a yearly rent-charge of £500 to his wife Emily Gwendolen Countess Cowley for her life, if she should survive him, to be charged on the trust estates.

By virtue of divers indentures the life interest of the second earl in the trust estates (and certain policies on his life) became charged with payment to the London Assurance Corporation of several annuities during his life redeemable on payment of the principal sum of £64,248, and also with several mortgage debts amounting together to the principal sum of £80,000.

The petitioner (then Viscount Dangan) was the only son of the second earl, and attained the age of twenty-one years in his father's lifetime on the 13th of January, 1887.

On the 14th of January, 1887, the second earl and the petitioner executed a disentailing deed (which was duly enrolled) whereby the interests in the trust property created by or under the powers of the above will and preceding the estate tail of the petitioner (except the life estate of the second earl) were preserved, and subject thereto the trust estates were limited to such uses and subject to such powers as the second earl and the petitioner should jointly appoint, and in default of such appointment to the use of the second earl for life by way of restoration of the estate vested in him immediately before the execution of that deed with all powers annexed thereto, and after his death to certain uses to secure a jointure of £2,000 per annum to the Countess Emily Gwendolen and to secure portions and to enable the petitioner to create a jointure for his widow (if any) with remainder to the use of the petitioner in tail male with remainders over.

In the year 1888 an arrangement was effected under which the Prudential Assurance Co. paid off the mortgage debts owing, and redeemed the annuities payable to the London Assurance Co. (taking transfers of their securities) and made a further advance to the second earl and the petitioner jointly, the total sum so paid or advanced by the Prudential being £210,000. That sum was secured to the Prudential by a mortgage of the 8th of June, 1888, to which the second earl, the petitioner, and the Countess Emily Gwendolen (who joined for the purpose of postponing her jointure) were parties. By this mortgage, after a joint and several covenant by the second earl and the petitioner to pay the principal sum of £210,000 and interest, the second earl and the petitioner in exercise of the power of appointment vested in them by the disentailing deed of the 14th of January, 1887, appointed, and also by virtue of their respective estates and interests therein conveyed, the trust property to the Prudential in fee simple (subject to the annuities then subsisting under the will of Lord Mornington) by way of mortgage to secure the said principal sum and interest.

By a deed of resettlement of the 9th of June, 1888, after recitals stating that part of the £210,000 advanced by the Prudential was applied in discharging incumbrances on the life estate of the second earl, and that the mortgage to the Prudential was executed by the petitioner on an express agreement that the second earl should join with him in executing the present deed, the second earl and the petitioner, in exercise of their joint power under the disentailing deed, appointed that (subject as in that deed mentioned and to the mortgage to the Prudential) the trustees should hold the trust property in default of and subject to any appointment under the joint power upon trust that the petitioner should receive, during the life of the second earl, an annuity which, at the death of the second earl, amounted to £3,000 a year; and subject thereto in trust for the second earl for life by way of restoration of his life estate under the will of Lord Mornington, and after his death upon trust for the petitioner for life, with remainder to his first and other sons in tail male, with remainders over. The resettlement also contained a provision to the effect that as between the second earl and the petitioner the second earl should, during his life, be primarily liable for the payment of the interest on the mortgage debt of £210,000.

By subsequent deeds the trust estates were further charged by the second earl and the petitioner to secure various sums expressed to be advanced to them by the Prudential.

The second earl died on the 28th of February, 1895. At that date the principal mortgage debt owing to the Prudential under the above mortgage and further charges amounted to £230,000, of which £199,987 11s. 8d. had been paid to or for the second earl, and £30,012 8s. 4d. to or for the petitioner.

The petitioner, as the person to whom property under the resettlement had passed on the death of the second earl for a beneficial interest in possession, and as accountable for the estate duty accordingly, duly delivered to the Commissioners of Inland Revenue an affidavit with a schedule annexed. Parts I. and II. of the schedule gave particulars of the trust investments and lands, the total principal value shown being £538,426 11s. 1d. Part III. contained "deductions from the principal value of property comprised in Parts I. and II.," and included five items. Items 1, 2, and 3 represented the capitalized values of the subsisting annuities under Lord Mornington's will and of interest payable during two joint lives on the consideration money received for the sale of an advowson, part of the trust estate comprised in that will. These items, together amounting to £9,140 17s., were allowed by the commissioners,

Item 4 was such part of the mortgage debt of £230,000 as was created wholly for the deceased's own use and benefit—viz., £199,987 11s. 8d. Item 5 was the capitalized value of the life annuity of £3,000 enjoyed under the resettlement by the petitioner at the death of the deceased—viz., £65,200. These two items were disallowed by the commissioners. The net principal value chargeable with estate duty would be, on the basis of the deductions claimed by the petitioner, £264,098 2s. 5d., and according to the determination of the commissioners, £529,285 14s. 1d.

The petitioner in his appeal claimed that the whole of the £230,000 secured on mortgage, and also the £65,200, the capitalized value of the annuity, ought to be allowed as deductions from the principal value of the estate.

The Divisional Court allowed the deduction of the £230,000, and disallowed the deduction of the £65,200.

The Crown appealed, and the petitioner gave a cross-notice of appeal.

Sir Richard Webster, A.G., Sir R. B. Finlay, S.G., and *Vaughan Hawkins* for the Crown.

Haldane, Q.C., and *H. Fellows*, for the petitioner.

The arguments sufficiently appear from the report in the court below. The material sections of the Finance Act, 1894, are set out in the judgments.

Cur. adv. vult.

Dec. 3.—The following judgments were read:

A. L. SMITH, L.J.—The question raised upon this appeal is upon what amount is estate duty payable under the Finance Act of 1894 to be assessed upon the estate of the late second Earl Cowley, who died on the 28th of February, 1895; is it to be upon the sum of £538,426 11s. 1d., the then net principal value of what I will call the settled estate, less only the sum of £9,140 17s., or less also the sum of £230,000, the amount of a mortgage debt more particularly referred to hereafter, and less also the sum of £65,200, the capitalized value of an annuity of £3,000 a year payable to the third Earl Cowley, then Viscount Dangan, by his father, the second earl, during his lifetime? The Commissioners of Inland Revenue have allowed no deductions from the principal value of £538,426 11s. 1d., excepting the sum of £9,140 17s. This last sum consisted of what have been called overriding charges upon the settled estates at the date of the death of the second earl, being the value of annuities charged thereon in favour of annuitants and of another similar charge, and no question is raised by the Crown as to this allowed deduction. The petitioner, the third earl, who succeeded to the possession of the settled estates upon the death of his father, the second earl, insists that a deduction should also be made in respect of the mortgage debt of £230,000, as also in respect of the capitalized value of the annuity of £3,000 per annum — namely, £65,200, and these last two sums the commissioners have disallowed as deductions. The Divisional Court has allowed the deduction as regards the £230,000, and against this the Crown appeals. It disallowed the deduction of the £65,200, and against this the petitioner, the third Earl Cowley, appeals.

The answer to be given to the questions raised depends upon the true construction of the Finance Act, 1894; but before referring thereto it is necessary, considering the course the arguments have taken in this court, that the dispositions which have taken place in relation to the "settled estates" should first be clearly understood. [The Lord Justice stated the dealings above set out, and proceeded:]

I cannot doubt that in these dealings with the settled estates as above mentioned the life estate of the second earl therein was expressly kept on foot as security for the moneys borrowed thereon, and that it was not extinguished or merged into an equitable estate in fee in the Prudential Assurance Co., as excellently argued by Mr. Haldane for the third earl. The real substance of what was done (and this is what is to be looked at apart from the form of conveyancing) was that the second earl mortgaged his life estate in the settled estates to the Prudential Co., and that his son mortgaged his reversion in such estates to that company, to secure the repayment of the £230,000, and that this was the real transaction whether it was to be found carried out by one deed or by two. I cannot agree with the learned judges in the court below when they held that it was one charge on the fee simple of the settled estates; in other words, an overriding charge thereon. It is true that by the conjoint operation of the father and son the Prudential Co. obtained an equitable estate in fee, but the charge remained a charge upon the life estate of the second earl and upon the reversion of Viscount Dangan. The life estate of the second earl remained extant until his death on the 28th of February, 1895, charged with the mortgage of £230,000, when the life estate and the mortgage thereon each ceased and ended. Up to that date the life estate of the second earl was charged with payment of the interest of the money borrowed on mortgage from the Prudential Co. as and when it became due, and also with the annuity of £3,000 a year to his eldest son, Viscount Dangan.

I now come to the Finance Act, 1894 (57 & 58 Vict. c. 30). By section 1 it is enacted that "In the case of every person dying after the commencement of this part of this Act" (which the second earl did) "there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty.'" This section would not, I think, embrace the present case, for the life estate of the second earl ceased at his death and passed to no one.

By section 2, sub-section 1, it is however enacted that "property passing on the death of the deceased shall be deemed to include the property following—that is to say, (*a*) Property of which the deceased was at the time of his death competent to dispose" (this does not embrace the present case); "(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." This sub-section in my judgment covers the case of the life estate of the second earl, which ceased upon his death, mortgaged as it was to the Prudential Assurance Co., and was intended to embrace such a case, and the extent to which a benefit accrues by the cesser of such interest was the extent of the interest which then ceased, and that is the life estate of the second earl, and consequently his life estate when he died became property which by the Act was to be deemed to have passed on his death, and comes within section 2, sub-section 1 (*b*).

I now come to how by the Act property which is to be deemed to pass upon a death is to be valued for estate duty, and this brings me first of all to section 7, sub-section 1. By this sub-section it is enacted that in determining the value of a life estate for the purposes of estate duty, allowance shall be made for reasonable funeral expenses, and for debts and incumbrances, as I read the sub-section, if such debts or incumbrances were incurred or created *bonâ fide* for

full consideration in money or money's worth wholly for the deceased's own use and benefit and to take effect out of his interest. This, I think, means a debt or incumbrance to take effect out of the estate which passes. This does not appear to me to have any application to an estate, as here, which is deemed to pass, for I do not see how an incumbrance can be created thereon which cannot exist at the time of passing. This mortgage debt of the second earl is not a debt or incumbrance upon an estate which passes or is deemed to pass pursuant to the Act, for the mortgage upon the estate of the second earl came to an end when that estate also came to an end, and is no longer a charge upon a life estate which was deemed to pass, and was not a debt upon the estate which passed, but only upon the reversion. I agree with the Court of Queen's Bench that this section 7, sub-section 1, does not apply to this case, though I do not follow their reasons.

I now come to sub-section 7 of section 7. This sub-section enacts that "the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased" (these words evidently refer to the property which is deemed to pass as mentioned in section 2, sub-section 1 (*b*)), "shall," as I read it, be as follows: (*a*) If the interest ceasing extended to the whole income accruing of the property which shall be deemed to pass, the value of the benefit shall be the principal value of that property. This does not apply to this case, because the interest which ceased at the death of the second earl did not extend to the whole income, but only to the whole income less the charges represented by the sum of £9,140 17s. before mentioned; (*b*) if the interest ceasing extended to less than the whole income of the property which shall be deemed to pass, the value of the benefit accruing shall be the principal value of an addition to the property equal to the income to which the interest extended. Now, the interest which ceased upon the death of the second earl in the settled estates did not, as before pointed out, extend to the whole income of the property which should be deemed to pass, and it is under this clause (*b*), therefore, that the value of the benefit accruing is to be ascertained.

I have a difficulty in understanding the exact meaning of the words "of an addition to the property," or for what purpose they were inserted, nor did I hear anything clear as to this in the arguments addressed to us on either side. But whatever may be their true interpretation, they do not mean that the value to be arrived at is by making an allowance for a mortgage debt like the mortgage debt of £230,000 in this case; it is the value of the interest which passes or is deemed to pass which is to bear the estate duty, and when this interest passed it was no longer (except by the man's own act, about which hereafter) clogged with this mortgage, for when the life estate ceased so did the mortgage thereon.

The learned judges in the court below say: "If the income to which the interest of the deceased extended is to be taken as the income of the property after deducting the charges on the property 1, 2, 3 (that is, the £9,140 17s.), why should not the income to which his interest extended be limited in like manner to the amount he was entitled to receive after the interest upon the mortgages (the £230,000 mortgages) had been paid?" It seems to me that in this there is left out of view this cardinal point, that what is to pay estate duty is the value of the interest which passes or is deemed to pass upon the death, not to the extent to which it may have been enjoyed by the deceased, which may or may not have been during his life diminished by what he had borrowed thereon.

As regards the £9,140 17s., this was charged upon the settled estates, which passed so charged upon the death of the second earl; but this is not so as regards this mortgage of £230,000, for the life interest of the second earl upon which it was charged did not pass so charged, for that mortgage, so far as the life estate was concerned, had come to an end though the estate was deemed to pass. The learned judges say that the "mortgages undoubtedly remained subsisting charges at his death," but the mortgage by the second earl upon his life estate did not remain, for that was gone; the mortgage, it is true, remained a charge upon what the third earl came into, but not by reason of anything which the second earl had done in his lifetime, whose interest we are dealing with, but solely by reason of what the son had done by charging his reversion. It is not upon the value of what the man succeeds to, that the estate duty is to be levied; and how can what the reversioner does towards diminishing the value of his reversion, when he gets it, affect what is the value of the property which passes upon a death?

In my judgment, for the above reasons, the value of the benefit accruing upon the death of the second earl must be ascertained under section 7, sub-section 7 (*b*), without making any allowance for the £230,000 mortgages. As regards the annuity of £3,000 a year charged upon the life estate of the second earl, and payable thereout during his life to his son, for the reasons I have given above, I think that no deduction for this can be made.

It appears to me that, as before stated, the Finance Act makes liable to estate duty the value of the estate which passes and not the value it may be to any individual successor, and it appears to me that is the key to the construction of the Act; consequently, the point taken by Mr. Haldane—that the third earl, when he succeeded to the settled estates, was no better off by the cesser of this annuity than he was before—is in reality not in point.

I think that the appeal of the Crown as to the £230,000 mortgage succeeds, that the cross-appeal of the third earl fails, and consequently judgment must be for the Crown with costs.

RIGBY, L.J.—This case is of so much importance that I think it worth while, notwithstanding that I shall be repeating to a great extent what has been said by the lord justice, to state my own view of the facts, and also to give in my own words the construction of the Finance Act, 1894, so far as it relates to this case.

Out of the somewhat complicated statement contained in the petition I will endeavour to extract what seems to be really material. Under the will of the Earl of Mornington, who died in 1863, and subject to certain overriding charges existing under or by virtue of the said will, certain real estate and money directed to be laid out in real estate (hereinafter for greater clearness referred to as "the settled property") stood limited to the use of the second Earl Cowley for life, with remainder to his eldest son, the third Earl Cowley (the petitioner), in tail. The legal estate was outstanding in the trustees of Lord Mornington's will, so that the life estate of the second earl and the remainder in tail of the third earl were equitable estates only. The second earl mortgaged his life interest in the property to the London Assurance Corporation, and at the date of the disentailing deed next hereinafter mentioned there were subsisting mortgages of that life interest in favour of the London Assurance Corporation for securing payment of annuities

to the amount of £5,322 per annum during the life of the second earl, redeemable on payment of £64,248, and mortgage debts for a further sum amounting to £79,500. On the attainment by the third earl of his majority in January, 1888, and by a disentailing deed of the 14th of that month (duly inrolled), the estate tail of the third earl in the settled property was barred, and (omitting minor and unessential complications) the settled property was limited (so far as the father and son were competent to limit it) to such uses as they should jointly appoint, and, in default of appointment, to the use of the second earl for life, by way of restoration of the life estate vested in him immediately before the execution of the disentailing deed, with remainder to the third earl in tail, with remainders over. The life estate of the second earl having been conveyed, as before mentioned, to the London Assurance Corporation, it was, of course, impossible for the father and son to deal with anything beyond the equity of redemption in the life estate, and the reversion thereon in fee simple. The joint power of appointment vested in the two could not have been made to override the security to the London Assurance Corporation, and by the plain language of the disentailing assurance any intention to do so was conclusively negatived. This subordination of the joint power of appointment to the securities of the London Assurance Corporation will prove to be of vital importance when we come to consider the construction of the mortgage to the Prudential Assurance Co. On the 8th of June, 1888, the amount payable to the London Assurance Corporation, for the redemption of their mortgage on the life interest of the second earl, consisted of the above-mentioned sums, £64,248 and £79,500, and some arrears of annuities and interest, making altogether £150,853 6s. 7d. This sum, at the request of the second and third earls, was paid to the London Assurance Corporation by the Prudential Assurance Co.; and, by an indenture to which the second and third earls were parties, the London Assurance Corporation assigned their annuities and mortgage debts and all arrears thereof, and conveyed the second earl's life interest in the property, to the Prudential Co. subject to redemption. The Prudential Co. thereby became transferees of all the rights of the London Assurance Corporation. This transfer was part of an arrangement whereby the Prudential Co. agreed to lend to the second and third earls £210,000, to be secured by the mortgage next mentioned, on the terms that a sufficient part of the loan should be applied for the purpose of obtaining the transfer to the Prudential Co. as a further protection and security for the loan. It was also part of the arrangement that £59,146 13s. 5d., the residue of the £210,000 loan over and above the £150,853 6s. 7d. paid to the London Assurance Corporation, should be paid to the second and third earls jointly. Accordingly by a mortgage deed, dated the same 8th of June, 1888, but executed after the assignment and conveyance by the London Assurance Corporation to the Prudential Co., in consideration of the £150,853 6s. 7d. paid to the London Assurance Corporation, and of the £59,146 13s. 5d. paid to the second and third earls, making up the £210,000, the second and third earls jointly and severally covenanted with the Prudential Co. to pay the sum of £210,000 with interest. By the same mortgage deed the second and third earls, in exercise of the joint power given to them by the disentailing deed, appointed and, by virtue of their estates and interest, conveyed all the settled property to the Prudential Co., to hold to the company, as to such of the premises as were of freehold tenure, to the use of the company in fee simple, and as to the residue freed and discharged, with certain exceptions, from the powers therein mentioned conferred by the will of Lord Mornington, and subject to the charges therein mentioned, to the intent that the premises thereby mortgaged might be held and enjoyed by the company and their assigns freed and discharged from such powers, except as therein aforesaid. The deed contained a proviso for redemption by the second and third earls, or either of them, or any person interested in the equity of redemption of the mortgaged premises. The deed also contained the following proviso containing the terms, as between the Prudential Co. and the second and third earls, on which the assigned securities of the London Assurance Corporation were to be held: "Provided always and it is hereby agreed and declared that the several annuities and mortgage debts and interest transferred to the company by the hereinbefore recited indenture of even date herewith and all securities for the same thereby transferred shall continue on foot as subsisting charges on the life estate of the said Earl Cowley party hereto in the trust estate held on the trusts of the will of the said testator for the benefit of the company and their assigns and so as to protect them against all incumbrances and charges if any such there be and by way of an additional security for the said principal sum of £210,000 hereinbefore covenanted to be paid as aforesaid and interest thereon."

Several questions of importance arose on the mortgage deed hereinbefore stated; but before dealing with them it will be convenient to complete the statement of material facts by setting forth, so far as is necessary, the provisions of a deed of resettlement of the 9th of June, 1888, which completed, as between the second earl and the third earl, the arrangement under which the £210,000 was borrowed. By that deed it was, among other things, provided (*a*) that the settled property should be held in default of and subject to any appointment under the joint power upon trust and to the intent that the third earl should receive during the life of the second earl certain annuities which at the death of the second earl amounted to £3,000 a year, and (*b*) that as between the second earl, his heirs, executors, and administrators, and the third earl, his heirs, executors, and administrators, and the persons entitled to the equity of redemption of the mortgaged premises comprised in the mortgage of the 8th of June, 1888, the second earl, his heirs, executors, and administrators, should be primarily liable for payment of the interest which during his life should accrue due on the mortgage debt of £210,000, and the third earl should be primarily liable for the interest which, if the second earl predeceased the third earl, should accrue during the residue of the life of the third earl, and that after the death of the longest liver of the two the mortgaged premises should be the primary fund for the payment of the said sum of £210,000 and interest thenceforth to accrue due thereon. By certain deeds of further charge additional sums amounting altogether to £20,000 were borrowed from the Prudential Co. under circumstances which made the further advance and the original advance of £210,000 part of a consolidated mortgage debt of £230,000.

We are now in a position to ascertain the true effect of the transactions above described. It was argued that the mortgage deed of the 8th of June, 1888, to the Prudential Co. operated to effect a merger of the equitable life estate of the second earl in the property, and, by the effect of the appointment under the joint power, to vest the fee simple in the Prudential Co. free from the life estate. The appointment under the joint power could have no such effect, for no such appointment could override the pre-existing security

created by the second earl in favour of the London Assurance Corporation, and by them transferred to the Prudential Co. The Prudential Co., and they alone, could have effected a merger of the life interest, and it is plain that they intended not to effect but to avoid a merger, not only by their taking the transfer, but by the express provision in the mortgage deed before set out. In such a case the intention of the parties interested must determine whether there is a merger or not. But for the accident of the legal estate being outstanding, there could not have been room for a suggestion of merger. The legal estate during the life of the second earl would, during the whole of his life, have been vested first in the London Assurance Co., and afterwards in their transferees, the Prudential Assurance Co., and only a surrender could have effected a merger. The life estate of the second earl subsisted, therefore, until his death and then ceased. The sum of £150,853 6s. 7d. payable for redemption of the mortgages of the London Assurance Corporation was part of the loan of £210,000. As between the second earl and the Prudential Co. the liability of the second earl arose under his covenant to pay the £210,000 contained in the mortgage to them, and the rights of the Prudential Co. to the transferred securities are defined by the proviso before set out. The result, as I construe the document, was that the Prudential Co. had no personal claim upon the second earl for the £150,853 6s. 7d., or any part thereof, as a separate debt, nor would such a right have been of the slightest advantage to them. This conclusion, however, is in no way necessary for the decision in this case. As against these incumbrancers, if any, the Prudential Co. were entitled to treat the annuities and mortgage debts transferred by the London Assurance Corporation as subsisting charges on the life estate of the second earl. As between himself, however, and the Prudential Co., he was personally liable for the payment of the whole debt of £210,000 and interest. Finally, as between the third earl and all persons interested in the equity of redemption of the property he was liable only to the interest during his life, and though he might have been sued by the Prudential Co. for the whole debt, he would have been entitled to be reimbursed by the third earl personally as to the interest to accrue after his death during the life of the third earl, and as to the whole capital sum by the settled property. If he had been called upon to pay and had paid the £210,000 to the Prudential Co., he would have been entitled to an assignment of the £210,000 to himself, or a trustee for him, in order to keep up his rights to reimbursement against the second earl and the settled property.

At the second earl's death, which happened on the 9th of February, 1895, the overriding charges under or by virtue of the Earl of Mornington's will consisted of two annuities of £1,000 and £500 a year, and a terminable yearly payment of £40 10s. The third earl in September, 1895, admitting himself to be accountable for the estate duty properly payable on the settled property, filed an affidavit estimating the principal value of the investments forming part of the settled property at £193,502 15s., and the principal value of the real estate at £344,923 16s. 1d., making the estimated principal value of the whole settled property £538,426 11s. 1d., which has been in the argument on the appeal accepted as correct.

From the estimated value the third earl claimed as deductions the capitalized values of the three overriding charges subsisting under and by virtue of the Earl of Mornington's will, and these deductions have been allowed. He also claimed as a deduction that part of the aggregate loan of £230,000, which had been expended in paying off the London Assurance Corporation, or otherwise for the benefit of the second earl, amounting to £199,987 11s. 8d., or alternatively the whole £230,000. He claimed as a further deduction the sum of £65,200 as the capitalized value of the annuities amounting to £3,000 per annum charged upon the whole settled property which were payable to him during the life, and ceased upon the death, of the second earl. The learned judges in the court below allowed the deduction of the whole sum of £230,000, but disallowed the deduction of £65,200 on account of the annuities for £3,000. There was an appeal on behalf of the Crown from the allowance of the £230,000, and a cross-appeal by the third earl against the disallowance of the £65,200.

The validity of these claims depends upon the construction of the Finance Act, 1894, Part I. Part I. of the Finance Act, 1894, is for present purposes a separate Act, and will hereafter be referred to as the Act; it is concerned with the creation and incidence of a new duty called estate duty, and what may be conveniently called the general scheme of the Act is concisely but comprehensively set forth in section 1. The occasion on which the duty is to arise is the death of any person dying after the commencement of the Act, called in the Act and hereinafter "the deceased." The duty is to be levied and paid upon the principal value of all property, real and personal, settled or not settled, which passes on the death of the deceased. The very general word "passes" is not a technical word, but one capable of the widest possible meaning, and there is nothing in the general scheme to limit its meaning to property of the deceased. Indeed, in connection with the words "settled or not settled," it seems to involve plainly property which did not belong to the deceased and may never have belonged to him. So far as the general scheme is concerned there is no reference to the persons to whom the property passes, or the amount of benefit taken by them, and the duty is leviable indifferently whether they are relatives of the deceased or strangers in blood. In other words, there is no reference to or implication of that relation of predecessor and successor or the existence of a succession which forms the basis of the Succession Duty Act, 1853. The duty is in no sense a duty on successions, but in respect of the value of the property passing from or to what person soever it passes. It is an essential feature of the general scheme that the duty is to be a graduated duty, and to be taken in lieu of the existing duties mentioned in the first section; but with these provisions we are not generally concerned in the present case, though it may be observed in passing that the rate of duty does not in general depend at all upon the way in which the property passing becomes distributed upon the death of the deceased.

The general scheme of the Act thus being ascertained by the first section, the rest of the Act (so far as it is necessary for present purposes to deal with it) is concerned with express provisions creating exceptions from the duty, the method (which in the present case is important) of ascertaining the principal value of the property, the mode in which the duty is to be graduated and raised, and provisions explanatory of the terms of the first section. The second section contains the most important for present purposes of these explanatory provisions. It provides by sub-section 1 that property passing on the death of the deceased is to include the property following: (*a*) Property of which the deceased was at the time of his death competent to dispose. We are not here concerned directly with this sub-section, but it is not perhaps unimportant to mention it as indicating, in connection with the subsequent explana-

tory clauses of the Act, how widely the Act here departs from the analogy of previous Taxing Acts, and how impossible it is to construe the Act with reference to them. Clause (*b*) is that with which we are directly concerned. It includes "Property in which the deceased or any other person had an interest ceasing on the death of the deceased." This would include a life interest of the deceased, even though he might have assigned or mortgaged it to any other person, or even a life interest in which he never had a beneficial right, as in the case of an estate for his life originally limited to another person.

It is evident, however, that to levy the duty on property ceasing on the death might, in some cases, involve a purely arbitrary standard, departing altogether from the test of passing at the death of the deceased involved in the general scheme. For instance, to mention one case only, a pension to a retired civil or military servant of the Crown would in general cease on his death, but there would be no passing of it; it would absolutely determine. It was necessary, therefore, to qualify the general words "ceasing on the death of the deceased," and that is done by the following words: "To the extent to which a benefit accrues or arises by the cesser of such interest." These words may at first sight seem to involve a departure from the principle that the Act takes no notice of successions, but that is not so. The words only limit the operation of the word "ceasing" by confining it to cases where something passes, and to the extent to which anything does pass. They in no sense make the duty a duty on the succession. The subsequent words of the sub-section deal with, and except, cases in which there is in a sense something passing, though not in the sense in which "passing" is intended to be used in the Act.

Pausing here, there can be no doubt that on the ceasing of the second Earl Cowley's life interest on his death, estate duty became leviable. How that duty had to be estimated is dealt with later on in section 7, sub-section 7, of the Act. Sub-section 7 is that part of the section which deals with the particular case of an interest ceasing on the death. It provides in terms for the ascertainment of the value of the benefit accruing or arising from the cesser of an interest on the death of the deceased, and these words, at first sight, seem again to indicate a departure from the general scheme of valuing the property passing, by substituting for it a valuation of the succession. But this is explained by the way in which the corresponding words are used in section 2, sub-section 1 (*b*). They are there used, as before pointed out, as a measure of the extent to which the property in which the interest ceases is to be deemed to pass, and section 7, sub-section 7, only shows the way of applying that measure. The value is to be ascertained in alternative cases (*a*) and (*b*) as follows: "Shall (*a*), if the interest extended to the whole income of the property, be the principal value of that property; and (*b*), if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended." In each of these alternative clauses the interest dealt with is clearly the interest which ceases, and not the interest which the deceased enjoyed, or the interest taken. The second Earl Cowley's interest in the settled property did not extend to the whole income, being subject to the overriding annuities of £1,000 and £500 and yearly payment of £40 10s., subsisting under or by virtue of Lord Mornington's will. The case, therefore, falls under the alternative (*b*), and the value is to be the principal value of an addition to the property equal to the income to which his interest extended. The language is somewhat peculiar and requires careful consideration. The key to its meaning is to be found by bearing in mind the general scheme of the Act. The duty is to be levied on the principal value of the property passing. What passes must be ascertained at the moment of passing without reference to any events happening before or afterwards. The income passing, will as in other cases, fix according to the nature of the property the amount of principal value. We find then that the income to which the interest extended is taken as the measure for the purpose of the calculation, and it is treated as though it were income of an addition to the property being dealt with, in order to determine the correct mode in which the principal value is to be arrived at.

In the case before us no question has been raised as to the way in which the deductions made in respect of the overriding charges have been arrived at, but lest it should be treated as a precedent, I feel bound to observe upon it. The principal value for the purposes of the Act has been determined by taking the whole principal value of the settled property, and deducting therefrom the capitalized value of the overriding charges. This is not the method prescribed by the Act, though in the particular case the numerical value is not far off from that which would result from applying the rule of sub-section 7 (*b*). In other cases the result obtained would be widely different from that intended by the Act. Take, for instance, the not uncommon case of an overriding term of twenty-one years from the death of a testator held on trust for raising a fund for payment of his debts or for portions. If the whole income of the settled property were £1,000 a year, and £900 had to be raised during the term for the purposes of it, the income to which the life tenant's interest extended would be £100 only, and the principal value of an addition to the settled property producing £100 a year would be in that case one-tenth of the principal value of the whole property arrived at in the way prescribed for property of that kind. But it might happen that the term of twenty-one years would expire by effluxion of time on the day after the death of the life tenant. The value of the charge under the term would then be next to nothing, and deducting its value from the principal value of the whole property would lead to a totally wrong result. Subject to what has been before pointed out as to the inaccurate mode of dealing with the overriding charges, which in my judgment, if it be worth while, ought to be corrected, the deductions as to those items are right.

The case as to the £230,000 debt may be summed up by saying that its existence in no way affected the interest passing at the second earl's death, but only the extent of his enjoyment of that interest, which is irrelevant. The debt, therefore, ought not to be deducted; and the same line of reasoning would show that the alternative claim for a deduction of that part of the £230,000 which was paid to or for the benefit of the second earl must equally be rejected.

But then it was argued before us that the £230,000 is to be allowed as a deduction under section 7, sub-section 1, and the learned judges in the court below seem to have held that the deductions provided for by section 7, sub-section 1, ought to be allowed in cases within sub-section 7 (*a*), but not in cases within sub-section 7 (*b*). This construction would lead to very extraordinary results, and I see no reason why if the deductions are permissible in the one case they can be excluded in the other. But when it is once established that the valuation in sub-section 7 when

fully carried out is a valuation, not of the interest of the person who takes or even of the deceased, but of the property passing, it follows that no incumbrances created by the deceased on his interest, or by the person taking, on the interest which he takes, can be brought into account; and having regard to this I see no ground on which any of the deductions provided for in section 7, sub-section 1, should be allowed at all. Whatever deductions are provided for in that sub-section are deductions from an "estate," which is the word used in the Act to denote an aggregate of property passing —not a particular property passing. Next, the estate is to be one from which funeral expenses and general debts of the deceased may properly be deducted. Thirdly, the debts and incumbrances to be deducted are to be deducted from the land or other subjects of property liable thereto. It seems impossible to hold that the funeral expenses of the deceased can in any case be payable out of property his interest in which, if he ever had one, has ceased, and debts of his which are not incumbrances are in the same position as funeral expenses. It seems equally impossible to point out any land, or subject of property, out of which any incumbrances of the second earl are now payable, other than assets of his which by law are made subject to debts. I do not think it necessary to discuss in the present case the limitations contained in clauses (*a*) and (*b*) of section 7, sub-section 1, though probably they would be found to involve further objections to the claim now made by the petition. The learned judges were of opinion that a mortgage debt on the life estate only could not be deducted out of property when the life interest ceased, and no doubt this is so; but I see no ground for treating differently a mortgage debt which is only a continuing incumbrance because the owner of the reversion has made it a charge on his reversion. It is not a continuing incumbrance on any property of the owner of the life estate. Different considerations might apply to the case of an incumbrance which the two combined to create on the corpus of the property; but, as before shown, that does not arise here. I think that the Attorney-General was right in saying that for the purposes of this case the mortgage of the life estate and of the reversion might just as well have been made by separate deeds.

The annuities, amounting to £3,000, affected only the enjoyment by the second earl of the property which passed, not the extent of the property passing, and cannot therefore be deducted.

The appeal of the Crown must be allowed, and the cross-appeal dismissed.

Collins, L.J.—I agree with the judgments which have been delivered; but as we are differing from the court below, I will add a few words.

The question is, Had the second Earl Cowley while he lived, or had any other person, an interest which ceased at his death in any property? If so, such property is deemed to have passed on his death "to the extent to which a benefit accrues or arises by the cesser of such interest" (section 2, sub-section 1 (*b*)). I am of opinion that the mortgage of his life interest in the trust property, which was given by the second Earl Cowley to the London Assurance Corporation, to secure in all £140,000 and upwards, assigned by them to the Prudential Assurance Co. under the fresh arrangement made by the second earl and the present earl with that company, whereby it was provided that it should be a collateral security for the whole amount advanced by them, was a subsisting interest in the hands of the latter company which ceased upon the death of the second earl; and the property embraced in that security must, therefore, be deemed to have passed upon his death. This follows from the fact that that mortgage was expressly kept alive by a proviso in the later mortgage by the second and third earl to the Prudential Co., and it is therefore unnecessary to express any opinion upon the point, so ably argued by Mr. Haldane, as to what would have been the effect of the new arrangement but for this proviso, in working a merger of the life estate, and so preventing the cesser of any interest on the death of the second earl. But it is still necessary to put a meaning on the words "to the extent to which a benefit accrues or arises by the cesser of such interest," for to such extent only the property is deemed to pass. For this we must look to section 7, sub-section 7 (*a*) and (*b*). It is clear that the case does not fall within (*a*), as the charges allowed by the Crown never formed part of the life estate of the second earl, and no interest therein ceased on his death. We must, therefore, look to sub-section (*b*) for the measure of the benefit in this case, since it is manifest that the interest which ceased extended to less than the whole income of the property. The value of the benefit, therefore, will be, according to the section, "the principal value of an addition to the property equal to the income to which the interest extended." Why this cumbrous mode of expression was adopted I am at a loss to understand, if it is to be taken to mean what I suppose it was intended to mean—namely, as the court below thought, that just as in case (*a*), where the interest extended to the whole income, you take the principal value of the property, *i.e.*, so many years' purchase of the income, so where it extends to part only of the income, you take the principal value, *i.e.*, so many years' purchase of that part of the income. Why, having ascertained the amount of the income to which the interest extended, you should be invited to capitalize, not it, but "an addition to the property" equal to it, I cannot pretend to surmise, nor were counsel able to remove my difficulty; but it seems quite clear that the section cannot be construed so as to found a claim to deduct the mortgage debt. The life estate of the second earl, and the mortgage debt as a charge thereon, came to an end at one and the same time, and the value of the property in which the interest ceased on his death, and the value of the benefit accruing on such cesser, were therefore, wholly unaffected by the existence of the mortgage.

This train of reasoning is precisely that of the court below, but I think they have ignored the effect of the proviso which kept alive the pre-existing mortgage on the life estate for £140,000, and further constituted it a collateral security for the whole sum, £230,000 in all, advanced by the Prudential Co. And it is the existence of this mortgage so kept alive, and determining, so far as it was a charge on the life estate, on the death of the second Earl Cowley, that is decisive in favour of the Crown in this case.

It only remains to consider whether section 7, sub-section 1 (*a*), has any bearing on the case. This section provides that in determining the value of an estate for the purposes of estate duty, allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made "for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bonâ fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest." These words, if read without qualification, are perhaps wide enough to cover this case. The debt secured by the mortgage on the life estate was incurred *bonâ fide* for full consideration in money wholly for the deceased's own use and benefit, and

takes effect out of his interest. Clauses (*b*) and (*c*) do not apply, and the final words of the section would not seem necessarily to exclude it. They are: "Any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of the property liable thereto," which in this case was the property in which the life interest subsisted. I think, however, the section must mean liable at the time when the deduction is to be made, and must be taken to apply only to deductions from estates which actually pass, and which form assets for the payment of the deceased's debts, which is not the case here. I think, therefore, the court below were perfectly right in holding that this section did not apply to this case.

The claim to deduct the value of the £3,000 annuity fails for the same reasons as the claim to deduct the mortgage debt. The annuity which dropped on the death of the second earl did not affect the value of the property upon which it was charged, and which was deemed to pass upon his death.

The judgment, therefore, must be reversed, and the cross-appeal dismissed.

Appeal of the Crown allowed; cross-appeal of petitioner dismissed.

Solicitors for the petitioner, *Collyer-Bristow, Russell, Hill, & Co.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Jan. 11.

LEEDS AND HANLEY THEATRE OF VARIETIES *v.* BROADBENT. (*a.*)

Mortgage—Principal not to be called in for three years if interest paid "punctually"—Payment within reasonable time after due date, whether "punctual"—Injunction to restrain sale by mortgagee.

When a mortgage contains a proviso that the principal money shall not be called in for a specified period, if in the meantime the interest is "punctually" paid, the mortgagor, to entitle himself to the benefit of the proviso, must make each payment of interest on the day on which it becomes due.

Appeal by the defendants from Kekewich, J.

By an indenture of mortgage dated the 15th of February, 1897, and made between the plaintiffs, of the one part, and the defendants, of the other part, certain real estate was conveyed to the defendants as security for a loan. The mortgage contained a proviso that "it is hereby agreed that payment of the principal money hereby secured shall not be required by the mortgagees or any person claiming under them" within three years from the date of the mortgage "if in the meantime every half-yearly payment of interest shall be punctually paid."

The first half-yearly payment of interest fell due on the 15th of August, 1897, and the money was not then paid.

On the 16th the defendant Broadbent wrote to the secretary of the company asking for immediate payment, and on the 17th the secretary replied that he would submit the matter to the next meeting of directors.

On the 20th Broadbent gave the secretary notice calling in the mortgage money.

On the 24th one Musgrave, a director of the company, sent the defendants a cheque for the interest. The defendants accepted the cheque, but claimed to enforce their notice.

In November, 1897, the plaintiff company issued a writ claiming a declaration that the defendants were not entitled to require payment of the principal moneys under the mortgage. Afterwards, the mortgagees threatening to sell the premises, the plaintiffs moved for an injunction to restrain them from doing so.

Kekewich, J., was of opinion that on the true construction of the mortgage "punctually paid" meant paid within a reasonable time after becoming due, and that nine days was not more than a reasonable time. His lordship therefore granted an injunction to restrain the defendants from selling the premises or advertising them for sale in pursuance of the notice of the 20th of August, 1897.

The defendants appealed.

It was admitted that if a proper notice calling in the money had been given it had never been waived.

Bramwell Davis, Q.C., and *A. J. Allen*, for the appeal, cited *Keene* v. *Biscoe*, 26 W. R. 552, 8 Ch. D. 201; and *Hicks* v. *Gardner*, 1 Jur. 541, which is referred to in Fisher on Mortgage as showing that payment, to be "punctual," must be made on the day.

Warrington, Q.C., and *C. Church*, for the plaintiffs, referred to Davidson's Conveyancing, vol. 2, part 2 (4 ed.), p. 329, and argued that the mortgage, if not to be construed as the plaintiffs contended, did not correctly express the intentions of the parties.

Bramwell Davis, Q.C., was not called upon to reply.

LINDLEY, M.R., after considering the claim for rectification of the mortgage, and coming to the conclusion that it was entirely unfounded, proceeded: I think this case is a singularly plain one. The mortgage contains a covenant to pay on the 15th of August, 1897, the principal sum of £7,000 with interest at 5 per cent., and afterwards to pay interest at 5 per cent. on the 15th of February and the 15th of August. Therefore, if the plaintiffs did not pay on the 15th of August an action could be brought on the 16th. That might have been rather sharp practice; but legally such an action would lie. Then there is this proviso: [His lordship read the proviso above set out, and continued:] That means, if, in the meantime, every half-yearly payment shall be paid on the day on which it becomes due. It cannot mean anything else. I do not think we want authority to show that "punctually" means punctually on the day fixed. There is no authority that it does not mean that. The money was not paid on the day named, or for several days after. Moreover, no provision at all was made for payment—the mortgagors being a limited company—on the first 15th of August, and there being no payment, and no sign of payment, the mortgagees on the 20th served a notice calling in their money, which they were justified in doing. Under the pressure of that notice the mortgagors paid. Can it, then, be right to say that the mortgagees are not entitled to call in the money on the terms of this mortgage? The mortgagors have only themselves to blame if they are put to any inconvenience in consequence of their neglect to discharge their debt according to the tenour of the deed.

I think the learned judge has gone a great deal too far in granting this injunction. The appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. I really

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

have nothing to add as to that part of the case which is confined to the interpretation of the words "punctually paid." The parties must be taken to have meant what they said; and the privilege stipulated for was forfeited by non-payment on the day named. His lordship then dealt with the claim for rectification, coming to the same conclusion as the Master of the Rolls.]

VAUGHAN WILLIAMS, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors, *Goodale & Hobson*, for *Butterworth, Rose, & Co.*, Swindon; *George B. W. Digby.*

From Chan. Div. (Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Dec. 14, 16.

In re ASHTON.
INGRAM *v.* PAPILLON. (*a.*)

Appointment—Rule against double portions—Appointment by mother—Person in loco parentis.

A lady, under a special power for the purpose in her father's will, appointed by will £10,000 equally among her three children. Subsequently by deeds-poll she appointed sums equal to one-third to one daughter.

Held, per Stirling, J., *that the burden of proof lay on those who asserted that the mother intended to put herself* in loco parentis *to her daughter, and that, there being no proof that she did so intend, the rule against double portions did not apply, and the daughter was entitled to share in the unappointed residue equally with the other children.*

But held, by the Court of Appeal, *on further evidence, and without considering the point of law raised in the court below, that on the facts the appointments by deeds-poll were intended to be in satisfaction of the daughter's share in the £10,000, and that she was not entitled to share in the unappointed residue equally with the other children.*

Decision of Stirling, J. (ante, *p.* 138, [1897] 2 *Ch.* 574), *reversed on the facts.*

High Court of Justice.

Chan. Div. Kekewich, J. — Dec. 10.

In re POWELL.
CROSLAND *v.* HOLLIDAY. (*b.*)

Will—Construction—Perpetuity—Gift of income to the children of A.—Gift over of capital to the children's children—Period of ascertaining class.

Under a bequest to the children of a person simpliciter, *only those children in existence at the testator's death will take. Accordingly, where a testator directs the income of a fund to be paid to his sister's children during their lives, and after their death gives the capital of the fund equally between their children, the class of children to take the gift of income will be ascertained at the testator's death, and will consist of his sister's children then in existence; and therefore the gift over to their children will not be too remote.*

In re Wenmoth's Estate, 36 *W. R.* 409, 37 *Ch. D.* 266, *distinguished.*

Summons.

By his will dated the 17th day of October, 1877, Alvara Powell, after certain specific devises and bequests, gave, devised, and bequeathed all the residue of his real and personal estate and effects whatsoever and wheresoever unto his trustee upon trust to pay certain legacies and an annuity, and as to all the residue of his personal estate upon trust to divide the interest, dividends, and annual profits into three equal portions and to pay one of such portions "unto the children of my sister Elizabeth Holmes, and to divide the same equally among them during their lives. And after their deaths to divide one-third part of my personal estate equally between their children; but if they shall all die without leaving any children then I direct my trustee to divide the said third part of my personal estate equally among the children of my nephew, Edward Crosland, share and share alike."

The testator died on the 17th of July, 1879, and his will was duly proved by the executors therein named.

The testator's sister, Elizabeth Holmes, was married once only—namely, to Charles Holmes on the 15th of August, 1820.

There were seven children of the marriage, three of whom, Charles, Elizabeth, and William, predeceased the testator without having been married. The remaining four children were: (1) Ann, one of the defendants, who married Thomas Holliday, and whose only children, Mary and Jane, were still alive; (2) Sarah, who was still alive but had never married; (3) the defendant Alvara, a bachelor and still living; and (4) Mary, who was married once only—namely, to William Goodman Crofts on the 15th of March, 1870, and whose only children, the defendant John Prince, Rose, and Harry, were still living.

Elizabeth Holmes died on the 9th of November, 1888, and Mary Crofts died on the 26th of November, 1895.

This was a summons by the present trustees of the will for the determination *inter alia* of the following question—namely, whether the trust by the said will declared of one-third of the testator's residuary personal estate in favour of the children of the children of the testator's sister Elizabeth Holmes was valid or void as transgressing the rule against perpetuities.

H. Terrell, Q.C., and *A. J. Chitty*, for the trustees, stated the questions raised upon the summons.

Dibdin, for the next-of-kin.—On the construction of the gift all the children of Elizabeth Holmes are included. The rule of convenience for ascertaining the class which takes applies only to a gift of corpus and not to a gift of income: *In re Wenmoth's Estate*, 36 W. R. 409, 37 Ch. D. 266. That authority applies to the present case, that children born after the testator's death might take part of the income, and, consequently, that a gift to their children is void for remoteness.

[*Hill* v. *Chapman*, 1 Ves. jun. 405, was also referred to.]

Renshaw, Q.C., and *Rowden*, for Alvara Holmes.

Warrington, Q.C., and *Buckmaster*, for the defendant Crofts.

KEKEWICH, J.—On the first question—namely, whether according to the language of the will the gift to the "children of my sister Elizabeth Holmes" must be confined to children living at the death of the testator, or ought to be construed so as to admit

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(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

(*b.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

those (if any) who might be born after the death of the testator, I entertain no doubt. The argument that the gift ought to have a more extensive construction so as to admit children born after the death of the testator is founded, and I think founded entirely, on an application, which I venture to call a misapplication, of a decision of Chitty, J., in the case of *In re Wenmoth's Estate*. It is said that the learned judge was there dealing with the same rule of convenience as applies to the will in this case, and that his exception of the application of that rule also applies to this case. The answer to that argument is to my mind conclusive—namely, that whether it be properly called a rule of convenience or not, Chitty, J., was not dealing with the same rule of convenience which I am asked to apply here.

There is no doubt some foundation for the argument to begin with in calling the rule with which I am now dealing one of convenience, because Mr. Theobald, who, as we all know, is a very careful and useful author, classes the rule in question with the other rule with which Chitty, J., was dealing, and also with one or two others as rules of convenience. I venture to think, however, that the law is better stated in Mr. Vaughan Hawkins' book. He devotes chapter 7 to the subject; it is headed "Children, &c., when ascertained." I will read what he says at p. 68: "It might be supposed that a gift to the children of a person *simpliciter* would include all the children he might have, whenever coming into existence; but the testator is considered to intend the objects of his bounty to be ascertained at as early a period as possible; and it may be laid down as a general rule (qualified by the other rules which follow in this chapter) that," in "gifts to children, &c., as a class" the rule is that "a devise or bequest to the children of A., or of the testator, means, *primâ facie*, the children in existence at the testator's death, provided there are such children then in existence." That was the case here. Then he gives some instances and some notes, and cites *Viner* v. *Francis*, 2 Cox Ch. Cas. 190, which is also cited by Mr. Theobald. I have referred to that case. It is over 100 years old, and is point blank. There is no question, therefore, about that authority. Then Mr. Hawkins some way on, at p. 75, deals with the further rule with which Chitty, J., was dealing; it is headed "Gifts to children at a given age," and he makes this exception: "In the cases considered under the preceding rule, the shares of all the objects became payable at the same time, and the period of distribution was the same for them all; where the shares become payable at different times, as in the ordinary case of a gift to children at twenty-one or marriage, the last rule requires to be supplemented by another." Then, he states the rule which hastens the period of distribution and fixes it at the time when the first child becomes entitled to receive his share, which is undoubtedly a rule of convenience merely, so that these two rules seem to me to depend on somewhat different considerations from this point of view. The second rule is purely one of convenience. It is a rule which admittedly contradicts the words of the will, the testator having intended to let in all the children who attained twenty-one. There can be no question about that.

The application of my first rule, however, is not necessarily a contradiction of the words of the testator, because in legal phraseology all the children taking under a gift are intended to mean all the children living at the testator's death. No lawyer would ever doubt that a bequest of so many pounds to the members of a club, or any other class of persons specified in a like manner, would refer only to those who were members or fulfilled that description at the testator's death; and there does seem to me to be that distinction of substance between the first rule, which may nevertheless be in some sense a rule of convenience, and the second rule, which is purely a rule of convenience. In *In re Wenmoth's Estate* I understand Chitty, J., although, no doubt, he treated the two rules, as to some extent they must be treated, as both being instances of fixing the period of distribution, was only dealing with the second rule—that is to say, the rule which fixes the period of distribution at the time when the first child becomes entitled. It is that rule to which he refers, and it is that rule which he declines to extend to a case where only income is given. He does not deal with the other rule, and I take leave to doubt whether it occurred to him to consider at all in that case whether it would be right to alter the rule in any way as regards children taking at the death of the testator without any words with regard to attaining majority or anything of the kind, because they only took income or for any other reason. I do not read his judgment as being at all directed to such a case as the one before me, and it seems to me that this case must depend on the ordinary application of the ordinary rule, and that the children living at the testator's death, and no others, can take. The answer to the first question therefore will be, that the trust is valid and is not void as transgressing the rule against perpetuities.

Solicitors, *Pitman & Sons*, for *Emsley, Son, & Smith*, Leeds; *Ernest Bevir; Peacock & Goddard*,

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Chan. Div. Kekewich, J. — Nov. 2, 3, 16.

PAGET *v.* PAGET. (*a.*)

Married woman—Separate estate—Relief from restraint upon anticipation—Payment of husband's debts—Wife's right to indemnity—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 39—*Practice upon applications for relief under section* 39.

The doctrine that a wife is entitled to be indemnified by her deceased husband's estate (*and* semble, *also, by her husband while alive*) *against loss incurred by her contributions towards payment of his debts will not be extended to a case where the court has thought fit to release unconditionally the restraint upon anticipation of a wife's life interest under section* 39 *of the Conveyancing and Law of Property Act*, 1881, *for the purpose of enabling her to raise money for payment of her husband's debts.*

Action.

The plaintiff, Lucy Annie Emily Paget, was married to the defendant, Gerald Cecil Stewart Paget, in the month of January, 1877.

At the time of the marriage the plaintiff was entitled, under the will of her grandfather, during her life, for her separate use without power of anticipation, to the net income of a moiety of certain warehouse property at Manchester, and of a sum of £100,000.

Two settlements were executed upon the marriage; by one of them the defendant had settled a reversionary interest, to which he was entitled, in two sums of £10,000 and £5,000 upon trust for him during the joint lives of himself and his wife and for the survivor after the death of one of them, and after the death of the survivor for the issue of the marriage.

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

and, in default of issue, for him, the defendant, absolutely.

By the other settlement the plaintiff had settled a sum producing about £2,000 per annum upon the defendant during his life or until bankruptcy or alienation, and subject thereto, upon herself for life, with remainders over.

About fifteen months after the defendant's marriage, he borrowed a sum of £15,000 from the plaintiff's sister, and shortly after the marriage of the latter with Lord Charles Beresford the defendant executed a mortgage to Lord Charles Beresford comprising two policies of assurance on his, the defendant's, life for £4,000 and £11,000 each, and his reversionary interest under his first marriage settlement, to secure the repayment of the £15,000 with interest at £5 per cent.

For some years after their marriage the plaintiff and defendant lived in excess of their income, so much so that in 1882 their indebtedness amounted to £47,050, of which the greater part had been incurred by the defendant alone.

In 1882 an application by originating summons was made to Chitty, J., by Mrs. Paget for the purpose of obtaining relief under section 39 of the Conveyancing and Law of Property Act, 1881, from the restraint upon anticipation of her life interest under her grandfather's will, and thereby enabling her to mortgage her life interest as part security for a contemplated loan of £23,000 by the North British and Mercantile Insurance Co.

In the evidence adduced in support of the application there was no attempt at fixing the responsibility for the indebtedness on either Mr. or Mrs. Paget.

Mrs. Paget said in her affidavit that she and her husband had incurred debts and responsibilities to a very large amount, and that, notwithstanding that their income was only between £7,000 and £8,000, they had spent between £15,000 and £20,000 during the first year after their marriage, and that in consequence of her husband's being pressed by creditors "it was decided that I should consult my solicitors, Messrs. Parker, on the matter. I accordingly did so, and it then appeared that our pressing debts amounted to about £25,000." Mrs. Paget then went on to say that she was "desirous of paying off the said debt." Mr. W. S. Parker stated in his affidavit that he had discussed the matter with Mrs. Paget alone, and that it was at her request that the application was made.

On the 28th of June, 1882, Chitty, J., made an order in chambers which, after expressing an opinion that the arrangement thereinafter mentioned would be for the benefit of the applicant, directed that the £23,000 then proposed to be advanced to her by the North British and Mercantile Insurance Co. should, when advanced, be charged upon her life interest and a policy on her life, together with interest and premiums, the principal sum not to be paid off until her death, unless she desired to pay it or any part of it during her life. By a mortgage dated the 24th of July, 1882, Mr. and Mrs. Paget assigned to the insurance company Mrs. Paget's life interest and a policy on her life to secure the sum of £23,000 then advanced, and Mr. and Mrs. Paget covenanted to repay the same with interest at the rate therein mentioned, Mrs. Paget covenanting so as to bind her separate estate.

The £23,000 was paid to Messrs. Parkers, and they applied the whole of that sum with the exception of £4,000 in paying off their clients' debts. Subsequently Messrs. Parkers absconded, and it was found that they had misappropriated the £4,000. In consequence of this loss and of further joint debts which had accumulated in the meantime it became necessary for Mrs. Paget to make another application to Chitty, J., and by an order of the 11th of August, 1887, she obtained powers to charge her life interest, notwithstanding the restraint upon anticipation, as part security for a further sum of £22,000 which the Pelican Life Insurance Co. were willing to advance. The evidence in support of the application was of a similar nature to that adduced on the occasion of the former summons, Mrs. Paget stating that their joint income formed a common fund, and that she considered any diminution of charges upon the fund to be for her benefit irrespective of the question whether the charges were exclusively debts of her husband or not. Chitty, J., upon this occasion separately examined Mrs. Paget, who attended in chambers for that purpose.

Mrs. Paget subsequently mortgaged her life interest (subject to the prior mortgage) and another policy on her life to the Pelican Life Assurance Co. to secure the £22,000 advanced by them. The £22,000 was applied in paying off the remaining debts and the balance of the £15,000 due to Lord Charles Beresford, who reassigned to Mr. Paget the property comprised in the mortgage of the 9th of November, 1878, with the exception of the £11,000 policy which had been already surrendered. By a deed of the 28th of September, 1889, the £4,000 policy so reassigned was assigned by Mr. Paget to the trustees of the secondly above-mentioned settlement upon trust to make good the £4,000 appropriated by Messrs. Parker, and subject thereto in trust for Mr. Paget absolutely. The mortgages for £23,000 and £22,000 had not been paid off. From May, 1893, Mr. and Mrs. Paget had lived apart, and Mrs. Paget had since then paid the interest on the two mortgages, and had also paid other sums of money towards defraying her husband's debts.

This was an action brought by Mrs. Paget, suing in respect of her separate estate and claiming (1) a declaration that her husband was liable to indemnify her against the mortgages of 1882 and 1887 and the principal sums of £23,000 and £22,000 and interest thereby respectively secured; (2) payment of those two principal sums and of the interest paid by her out of her separate estate since the separation in May, 1893; (3) repayment of the further sums paid by her out of her separate estate since the separation towards satisfaction of debts or liabilities of the defendant or otherwise on his account; (4) a declaration that she was entitled to a charge upon all the interests of the defendant in the two trust funds of £10,000 and £5,000 and in his £4,000 policy for the amount of the mortgage debt of £15,000 and interest repaid to Lord Charles Beresford; and other incidental relief.

In his defence the defendant alleged that the plaintiff had adopted the said indebtedness as her own, and pleaded the Statute of Limitations. He also raised a counterclaim which was abandoned at the trial and which is not material for the purposes of the present report.

Mrs. Paget was called as a witness, and whilst acknowledging that some of the expenditure was attributable to the joint establishment, alleged that most of it was incurred by and on behalf of the defendant alone.

Renshaw, Q.C., Carson, Q.C., and *A. à B. Terrell*, for Mrs. Paget.—We rely upon the principle that a wife's estate is entitled to be indemnified out of her deceased husband's estate against incumbrances incurred on behalf or for the benefit of her husband: *Earl of Huntingdon* v. *Countess of Huntingdon*, 2 Bro. P. C. 1; and the wife is entitled to a similar indemnity from her husband during his life. It makes no difference whether the wife's property is

settled to her separate use or not: *Aguilar* v. *Aguilar*, 5 Madd. 414; *Hudson* v. *Carmichael*, 2 W. R. 503, Kay 613. We are not precluded from this argument by the orders of Chitty, J., for those orders did nothing else than relieve the restraint upon anticipation.

Lawson Walton, Q.C., Warrington, Q.C., and *J. Henderson*, for the defendant.—The right, if any, which vested in the plaintiff by virtue of these orders was a right of indemnity. Now, according to the authorities that right depends upon an implied assumpsit arising from the nature of the transaction and rebuttable by evidence. We submit that according to the evidence the wife adopted this liability as her own. The authorities show that where there is nothing more than a mortgage of the wife's estate to secure the husband's debt then incurred, then, in the absence of anything to the contrary, the presumption is that the husband is the principal debtor and the wife the surety and entitled to have the debt paid out of her husband's assets in the administration of his estate (*Hudson* v. *Carmichael* and *Aguilar* v. *Aguilar*), but this does not apply during the husband's life. In the mortgage deeds of 1882 and 1887 the loan is to the wife, and the payment clause is to the effect that the money is paid to her with the privity of the husband, and therefore the principle of *Huntingdon* v. *Huntingdon* and *Hudson* v. *Carmichael* does not apply. The evidence which the plaintiff adduces, consisting of the two orders and the evidence filed in support of the applications, actually rebuts any presumption in favour of the wife. Again, if the plaintiff ever had any right of indemnity, the evidence shows that she has waived it: *Clinton* v. *Hooper*, 1 Ves. Jun. 173. Moreover, the wife's claim is barred by the Statute of Limitations, 21 Jac. 1, c. 16, s. 3.

Renshaw, Q.C., in reply.—It has been suggested that the wife adopted the liability of her husband and that the payments were a free gift from her. We have shown that this latter contention is not so: as to the former contention, the wife did not adopt the liability exclusively. She did so as between her husband and herself on the one hand and the creditors on the other, but it does not follow that therefore the wife for all purposes takes upon herself, as between herself and her husband, the whole liability. There is nothing to show that she gave up her right against him. In *Clinton* v. *Hooper* the wife had expressly waived the question of her right to be recouped out of her husband's estate, and the waiver was after the death of her husband: *Pawlet* v. *Delaval*, 2 Ves. sen. 663, referred to in *Milnes* v. *Busk*, 2 Ves. Jun. 488, is in the plaintiff's favour. The Statute of Limitations does not apply, for Mrs. Paget has been paying interest on the mortgage down to the present time.

KEKEWICH, J.—The doctrine that a wife is entitled to be indemnified by her deceased husband's estate, or as it seems to necessarily follow by her husband living, against loss incurred by her contributions towards payment of his debts is too well established to need exposition, and there is no occasion to discuss the questions discussed in Lord Hatherley's judgment in *Hudson* v. *Carmichael* and elsewhere how far this doctrine depends on an implied assumpsit, or what are the limitations of the wife's rights as against the husband's creditors. Suffice it to say that the right is necessarily based on the matrimonial relations, and that whether strictly or for all purposes she is to be regarded as surety for him, that may with reasonable accuracy be defined to be her position. What falls to me to decide is whether this doctrine is applicable to a case like the present, where the wife's contributions have been made not by means of a gift from her, operating by legal process, such as a fine or by an assignment of her separate estate, but where resort has been had to the powers conferred on the court by the Conveyancing and Law of Property Act, 1881, s. 39, which enables the court to relieve a married woman from restraint on anticipation where it appears to the court to be for her benefit so to do. This jurisdiction, which to me causes more anxiety than any other that a judge is called upon to exercise, requires minute and careful examination of all the facts and circumstances. It is the duty of a judge considering an application of this character to inquire not merely how it has come to pass that money is wanted, who is responsible for that result, and who is liable for debts already incurred, but also to what extent and in what manner benefit will be secured to the wife by granting the application, and what (if any) conditions can be reasonably and properly imposed.

Regarding the restraint on anticipation as intended for the protection of the wife, I view these applications with extreme jealousy, and when they are occasioned, as is often the case, by the husband's extravagance, I never grant them unless satisfied that the wife's happiness will be seriously endangered by refusal or will really be advanced by such order as is asked; and more than this, I am extremely careful to provide that the scheme submitted, whatever it may be, is so carried out as to secure the intended benefit as far as written provisions can secure it, and I always exact the strictest conditions which seem to me to be capable of fulfilment. For instance, where it is desired to clear off debts incurred by a style of living in excess of the matrimonial income, as, for example, by maintaining an over-large establishment, I insist, if it be feasible, on removal to a smaller house or on a reduction otherwise of outgoings. I have been obliged to illustrate the exercise of the jurisdiction by reference to my own practice, because these applications are almost invariably disposed of in chambers and the practice of other judges is not made public, but I believe that although other judges may and probably do treat as of first importance circumstances which, in my opinion, fall into the second rank, and on the other hand give prominence to some which I treat as of less weight, yet we all approach these applications and endeavour to regard each and every of them from the one standpoint distinctly indicated by the statute, and that is the benefit of the wife. When, therefore, the court is required to consider what is the effect of an order relieving a wife from restraint on anticipation and thereby enabling her to raise money with the assistance of a policy of assurance on her life or otherwise, what are the consequences following from such order? I am bound to conclude that the order was made for her benefit, and that, whether the money could have been raised or could have been applied in any different manner or subject to any different conditions or restrictions, the judge who made the order was convinced that on the whole it was better for the wife that the end should be achieved in the manner provided, in preference to any other. The orders of the 28th of June, 1882, and the 11th of August, 1887, were made without imposing on Mr. Paget any obligation to surrender the life interest provided for him by the marriage settlement, and except that one policy was brought into settlement for the express purpose of recouping to the settled funds the loss occasioned by Mr. Parker's fraud, no conditions were imposed. It was not suggested on either application that Mr. Paget's life interest should be touched, but the existence of that life interest was disclosed and I am

bound to conclude that the learned judge who made the orders and who on the second occasion, we know, went into the case thoroughly and to the extent of seeing Mrs. Paget privately, determined that it was more for her benefit that this life interest should not be surrendered and that no other conditions should be imposed. It is argued that the contributions which she made by means of the relief of restraint on anticipation and which could not otherwise have been made at all, were only made by her as surety for her husband, and that he is now bound to indemnify her as principal and to make liable towards that indemnity the life interest which was left unaffected by the orders themselves. I say nothing about the time which has elapsed since the orders were made. If the plaintiff is right she could have insisted on her rights as surety immediately after their respective dates, but I do not pause to inquire whether she has forfeited such rights (if any) as she had by delaying her action until the present time. I prefer to rest my judgment on the broad ground that where the wife's life interest has been made available for raising money for payment of her husband's debts by means of relief from the restraint on anticipation under the sanction of the court, it is inconceivable that she intended, or that the court intended, that she should have a remedy over against him not reserved by the order giving such sanction, or that a doctrine flowing from the relations of husband and wife and called into operation by her action independently of the court should be thus extended.

I do not think that in a case of this kind, and bearing in mind that the wife's life interest has been largely taken to pay her husband's debts, it would be right to make her pay his costs, and therefore I dismiss her action without costs. The counterclaim, which was not arguable and was not argued, has already been dismissed with costs.

Solicitors, *Leman & Co.; Dawes & Sons.*

House of Lords.

From C. A. (England). Dec. 3.

DARTFORD RURAL DISTRICT COUNCIL v. BEXLEY HEATH RAILWAY CO. (a.)

Railway—Footway—Railway across public footpath—Duty to build bridge—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 46.

Where the special Act (which incorporated the provisions of the Railways Clauses Act, 1845) *of a railway company contains no provisions dealing with footways, the* 46*th section of the Railways Clauses Consolidation Act,* 1845, *imposes no obligation on the railway company to provide a bridge so as to carry the railway over the footway, or the footway over the railway.*

Per Lord Herschell.—*The Railway Clauses Consolidation Act,* 1845, *has not of itself any operation in respect of any road whatever, whether a carriage-way, a footpath, or a public road, unless brought into effect by some rights being given and corresponding obligations created by a special Act.*

Decision of the Court of Appeal (44 *W. R.* 501, [1896] 2 *Q. B.* 74) *affirmed.*

This was an appeal from an order of the Court of Appeal (Lord Esher, M.R., Smith and Rigby, L.JJ.) reported 44 W. R. 501, [1896] 2 Q. B. 74.

The Bexley Heath Railway Co. was incorporated by a special Act for the purpose of constructing a railway in the county of Kent, the special Act incorporating the Railway Clauses Consolidation Act, 1845.

The railway crossed a public footpath in the parish of Crayford, the line being constructed at that point upon an embankment, and the footpath being carried up the embankment by means of wooden steps, across the line on the level, and down the other side of the embankment by means of similar steps.

The railway company's special Act did not contain any reference to or clause dealing with this footway.

The Parish Council for Crayford having represented to the district council, under section 26 of the Local Government Act, 1894, that the public footpath had been unlawfully obstructed, the district council applied for and obtained a *mandamus* directed to the Bexley Heath Railway Co., commanding them to carry the railway over the footpath or the footpath over the railway by means of a bridge.

The Court of Appeal discharged the order of the Queen's Bench Division (Day and Lawrance, JJ.), and the district council now appealed to the House.

Section 46 of the Railways Clauses Consolidation Act is as follows: "If the line of the railway cross any turnpike-road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway or the railway shall be carried over such road by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided, . . . provided always that, with the consent of two or more justices of the peace in petty session, as after mentioned, it shall be lawful for the company to carry the railway across any highway other than a public road on the level."

Macmorran, Q.C., and *Hohler*, for the appellants.

Farwell, Q.C., and *Boyle*, for the respondents, were not called upon.

Lord HALSBURY, C.—I regret, with Smith, L.J., that we do not know the grounds on which this order was made by the Queen's Bench Division. I confess for myself I do not understand why the *mandamus* was issued. It is not the fault of the learned counsel for the appellants, who have both argued very ably and earnestly in favour of their proposition, but I am bound to say that I do not yet understand where the obligation to build the bridge comes from. I cannot find it in the Act of Parliament. All that I can conjecture to be the reasoning is this: Finding that the Act of Parliament (8 Vict. c. 20) certainly does not in terms contain any such obligation, you find in clause 46 a proviso which, unless there is such an obligation there, would, it is said, be an unreasonable proviso to put into the Act, because there is no such obligation in the statute, and by the hypothesis the proviso can only operate where there is such an obligation. I think that is stating fairly the argument which has been presented to your lordships. But that argument assumes that the statute is the final end of legislation; and that is exactly what it is not, because the statute in its terms assumes that special Acts will be passed from time to time containing provisions of their own, and if there are some such provisions, as has been pointed out by the learned counsel, then the proviso has its natural and just operation. The whole argument is that you must try the statute by itself and the proviso by itself, and assume that there must be an obligation (which certainly in terms is not there), because, as they say, if you were to construe the whole

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

that they were responsible if the man so invited was led into the trap by means of which he was injured. That was the case of *Heaven* v. *Pender*.

Now, I am quite unable to see that that case has any application to the present case at all. This wagon at the time it was being used was being used on a new journey initiated by the Glasgow and South-Western Co. for their purposes, and there was nothing in it which can be said to be comparable to a trap created by or permitted to exist by the Caledonian Co., into which they invited and led the deceased man to come. Therefore the case of *Heaven* v. *Pender* seems to me entirely without application to the present case; and, as I have said, I am quite unable to see any duty resting upon the Caledonian Co. to the deceased man, a breach of which has cost the loss of his life, and consequently a right of action in the plaintiff.

In the Court of Session there was a difference of opinion between the learned judges. The majority were of opinion that this statement—these condescendences—did show that there was a case, and judgment was given accordingly by Lord Young, in which the Lord Justice Clerk concurred. Now, with all respect, I think the judgment of Lord Young is founded upon the supposition that it was enough if there might have been a contract under which the Caledonian Co. were under some obligation during the haulage of these wagons; and that there being an uncertainty whether there was such a contract or not, the case ought to go to trial to see whether there was such a contract, because he says it is absurd to suppose that they were led by favour and affection to let their wagons be used, and therefore they must have been used under some contract. That, I think, is what was in the learned judge's mind. It is only in that sense that I can interpret his language and appreciate the view he has taken. but I think it is for the plaintiff to make out a relevant case. If it rests upon a contract, though we may not know what has passed between the parties, and it may be a matter of speculation—still, if a contract is necessary to a relevant case, then a contract must be alleged, and of course it may be that the plaintiff will not succeed in proving it. But in the present case I can find nothing alleged in the whole of this claim to show that any responsibility rested upon the Caledonian Railway Co. after they had delivered the goods at the station, or that they had anything to do, or any sort of connection, with the haulage which took place afterwards from the station to the works of the Gas Commissioners.

For these reasons I think the judgment must be reversed. I may add that my noble and learned friend, the Lord Chancellor, who heard the whole of the argument of the leading counsel for the respondent, desires me to say that he takes entirely the same view.

I move your lordships that the interlocutor appealed from be reversed, and I apprehend some declaration will be necessary.

Lord MACNAGHTEN and Lord MORRIS concurred.

Lord SHAND.—The Caledonian Railway Co., one of the set of defenders in this case, have maintained that they are not bound to submit to a trial upon this claim, and in arrest of the proceedings they have maintained that the pursuers have made no statement relevant in law to infer the liability which is alleged against them. I agree with your lordships in holding that that plea is well founded, and that the action so far as the Caledonian Railway Co. is concerned ought to be dismissed.

In the pursuer's statement it is not alleged that any relation whatever subsisted between her deceased husband and the appellants, the Caledonian Railway Co. There was no such relation as employer or employed, or in any other way. The deceased husband of the pursuer was a servant not of the Caledonian Railway Co., but of the Glasgow and South-Western Railway Co., in whose employment he was; he was acting under their orders in the matter which led to this accident. So far as the Caledonian Co. were concerned, he was an outsider or a stranger to them in every sense of the term. It appears from the pursuer's statement that the only part that the Caledonian Co. took in reference to the use of these wagons was this: that they, under a contract of carriage which they had entered into, carried the coal in their wagons from its place of departure (I do not know that it is very distinctly stated where that was) to its place of destination, and that place of destination was Dumfries. The moment the wagons arrived, hauled by the Caledonian Co. under that contract of carriage into the station at Dumfries, and were placed in the station of the Glasgow and South-Western Co. there, the Caledonian Co. had done with their contract. It appears, however, that a separate arrangement was made for a subsequent journey. I call it a journey, although it was short in distance; it might have been a matter of twenty or thirty miles; but it so happens that it was not so long, but was only a distance of three or four hundred yards through the streets of Dumfries to the works of the Dumfries Gas Commissioners. But for this separate journey, as I call it, there was a separate undertaking between two different parties—I mean between the Dumfries Gas Commissioners, to whom the coals belonged, which were carried on their behalf, and the Glasgow and South-Western Co. It was in the execution of that contract of carriage between the Gas Commissioners and the Glasgow and South-Western Co. that this unfortunate man, an employee of the Glasgow and South-Western Co., met with the accident which led to the action. The only connection, as it appears to me, which the Caledonian Co. had with this matter after delivering the wagons at the station was that they were the owners of the wagons. Beyond that, I can see nothing which can be suggested to fix responsibility upon them. It is true, as has been pointed out and pressed upon your lordships' consideration, that in article 13 of the pursuer's statement it is averred that "as regards the coal conveyed by the defenders, the Caledonian Railway Co., for the Dumfries Gas Commissioners as consignees"—that is, coal carried by them to Dumfries—"it is, and for many years has been, the regular practice for the said defenders to give the use of the wagons belonging to them in which the coal has been carried from coal-pits on their system of railway to Dumfries Station for the conveyance of the coal from the station to the gas-works without necessity for any transhipment." That simply means that, there being an arrangement, that the Glasgow and South-Western Co. are to carry the coals on from the Dumfries Station to the Gas Commissioners' premises, the Caledonian Co., in order to avoid the inconvenience of transhipment of the coal, give the use of their wagons to the Glasgow and South-Western Co.

What is said to follow from that is stated in the preceding sentence—a sentence which, logically speaking, ought to follow what I have now read: "In these circumstances it is the duty and is the practice of the Caledonian Railway Co. and other railway companies to take care that wagons, of which such use is given, are in proper working order, with a view to the safety of those who may have occasion to use and handle them in the loading, unloading, and delivery of the coal." Now, it is all

very well to aver that to be a duty, but a pursuer in circumstances such as these is bound not merely to say that there is a duty, but to give the grounds from which that legal duty is to be inferred; and the only ground upon which that duty is said to be inferred is set forth in the clause I have already read, saying that the Caledonian Co. have been in the habit of giving the use of the wagons. Now, it is very clear to my thinking that the giving the use of the wagons can infer no such duty. If there was any duty at all upon the Caledonian Co. as in a question with the pursuer's deceased husband, it appears to me that it would have been a duty really to give sound wagons—such wagons that, if an accident happened from them, the Caledonian Railway Co. should only be excused on the ground of a latent defect which could not be discovered. But I can see no ground whatever for holding that, having parted with the wagons at the station, and having nothing to do with the contract of carriage subsequently, which might have been for a long or a short journey, there was a duty upon the Caledonian Co. in a question with a stranger to them to have their wagons either in a sound condition or examined with care. It may or may not be that the Caledonian Co. had some duty towards the Glasgow and South-Western Co. When I say "some duty" I mean some obligation under a separate contract; but with that we have nothing to do here, because there is no such contract alleged in the first place, and, even if there were, I do not think that the husband of the plaintiff could have taken the benefit of it.

I notice that there seems to have been a good deal of discussion, or rather consideration, in the Court of Session, on the part of Lord Young and Lord Trayner, who gave the conflicting decision, as to whether the averment I have read amounts to an averment that the carriages were lent by one company to the other, or that there was some valuable consideration given for the use of them. But whether it be a loan gratuitous, or whether it be a use given for payment of money, that is a transaction entirely between the two railway companies. We heard nothing about it here—we cannot look at it; but whatever that transaction may be, whether it might be such as would infer an obligation upon the part of the Caledonian Co., as in a question with the Glasgow and South-Western Co., to furnish sound wagons or to examine the wagon—whether it be such a stipulation as would possibly give the Glasgow and South-Western Co. a right to relief in the case of a claim such as is here made, if it were successful in the court below, it certainly is a question which cannot arise here. There is one thing that is quite clear, and that is, that whatever the arrangement between these two companies one with the other might be, that would never give a stranger to the Caledonian Railway Co., a mere servant of the Glasgow and South-Western Co., a direct right of action against the Caledonian Railway Co. in circumstances such as these.

The only possible view upon which I think such an action as this could have been maintained was that pressed upon us in the case to which your lordships have already referred of *Heaven* v. *Pender*, but I agree in thinking, upon the ground which my noble friend has stated, that that case has really no application to the present. The particular defect complained of there was in a part of the general works which the dock company was obliged to keep up, and, that being so, the general rule that the dock-owners would be responsible for their gangway and other appliances within the dockyard is sufficient to explain the decision arrived at in that case. Nor, as was suggested by the Lord Advocate, is the present case a case in which you can say that the thing used was an instrument noxious or dangerous in itself, which might produce an accident from the mere handling of it. It is not a case of that kind, where it may be that wider and other responsibilities might arise.

This being neither the case of a trap or an invitation, nor a case of a noxious instrument, and there being no contract or obligation between the pursuer's husband and the Caledonian Railway Co. about these wagons, I am of opinion with your lordships that we should hold that the pursuer in this case has failed to state a relevant ground upon which liability can be founded, and that therefore this appeal should be sustained and the interlocutor reversed, with costs.

Interlocutor appealed from reversed; action dismissed with costs as against the appellants.

Solicitors for the appellants, *Grahames, Currey, & Spens*, for *Hope, Todd, & Kirk*, Edinburgh; *H. B. Neave*, Glasgow.

Solicitors for the respondedts, *F. B. Carritt*, for *Elmslie & Guthrie*, Edinburgh.

Privy Council.

(*On appeal from the Supreme Court of Victoria.*)

Dec. 15.

NEW ZEALAND LOAN AND MERCANTILE AGENCY v. MORRISON. (a.)

Company—Winding up—Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104)—*Colonial creditor—Pleading—Foreign court.*

Although the Companies Arrangement Act, 1870, *extends to all creditors when their rights are in question in the courts of the United Kingdom, that Act does not extend to the Colonies; and therefore the proceedings in our courts cannot be pleaded in Victoria as a defence to an action by a Victorian creditor.*

Gibbs *v.* Société des Métaux, 25 *Q. B. D.* 399, 39 *W. R. Dig.* 57 *approved.*

This was an appeal from the Supreme Court of Victoria.

The facts are set out in their lordships' judgment.

Cohen, Q.C., Buckley, Q.C., and *T. T. Paine*, for the applicants.

Cozens-Hardy, Q.C., Upjohn, Q.C., and *Ryland*, for the respondents.

The judgment of their lordships (Lords WATSON, HOBHOUSE, and DAVEY, and Sir RICHARD COUCH) was delivered by

Lord DAVEY.—On the 23rd of January, 1893, the respondent in Victoria placed £3,700 on deposit with the New Zealand Loan and Mercantile Agency Co. (Limited), the present appellants. This company was incorporated in England under the English Companies Acts, with its head office in England, but carried on business in New Zealand and the Australian Colonies, including the Colony of Victoria. On the 12th of July, 1893, a creditor's petition was presented to the court in Victoria for winding up the appellant company. A provisional liquidator was appointed, but no order was ever made on this petition, and there has been no winding

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

up of the appellant company in Victoria. On the same 12th of July, 1893, the appellant company itself presented a petition to the High Court of Justice in England, and on the 21st of July, 1893, an order was made by that court for the compulsory winding up of the appellant company. Subsequently a scheme of arrangement was prepared and submitted to meetings of the creditors and contributories of the appellant company and accepted by the requisite statutory majorities of creditors and contributories in compliance with the provisions of the English Joint-Stock Companies Arrangement Act, 1870. By an order of the 13th of April, 1894, the High Court in England sanctioned the scheme of arrangement with immaterial amendments and declared the same to binding on all the creditors and contributories of the company and also on the official receiver and liquidator thereof. By this scheme it was provided that a new company should be formed with the same name to acquire the undertaking and property of the old company (*i.e.*, the present appellants) and to assume and provide for its liabilities in manner thereinafter mentioned, and that the new company should pay to each unsecured creditor of the old company £12 10s. per cent. on the amount of his claim in cash, with interest capitalized to the 30th of June, 1894, and for the remaining £87 10s. per cent. should issue to such creditor debenture stock. And it was further provided that forthwith, after the scheme should have become finally binding on all parties, each creditor of the old company should, subject to the carrying out of the scheme, hold his claim in trust for the new company and release or deal with the same as the new company should direct. The new company was formed, and is carrying on business in Victoria, and has acquired or has title to all the property of the appellant company. The respondent had due notice of the scheme and of the meetings of creditors to consider the same.

On the 4th of January, 1895, the respondent commenced an action in Victoria against the appellant company to recover her deposit of £3,700 and interest. By their defence the appellant company stated (paragraph 5) the winding-up petition in Victoria, (paragraph 6) the winding-up order in England, (paragraphs 7, 8, and 9) the proceedings under the Arrangement Act, 1870, (paragraphs 10 and 11) the material provisions of the scheme, and (paragraph 13) submitted that the respondent was bound by the scheme as by a new contract, and further that she had no longer any beneficial interest in or right to receive the money claimed by her. In her reply the respondent objected that the Joint-Stock Arrangement Act had no force or effect in the Colony of Victoria, and that the acceptance of the scheme by the three-fourths majority of creditors would not make it binding upon the respondent or be an answer to the action. There was a rejoinder and sur-rejoinder which it is not necessary for the present purpose to notice.

The points of law raised by the above-stated paragraphs of the defence and reply were set down for argument before trial, and by an order of Hodges, J., of the 7th of August, 1895, it was ordered and adjudged that those paragraphs of the defence afforded no answer to the respondent's claim. At the trial of the action before the Chief Justice judgment was given for the respondent. Both orders were appealed to the full court, and by two orders of the 1st of September, 1896, were affirmed. The present appeal is against these orders.

It was contended before their lordships that the Arrangement Act, 1870, extended to all the Colonies as well as the United Kingdom, and that the Colonial courts were, therefore, bound to take notice of the proceedings under that Act and give judicial effect to them. It was the intention of the Act (it was said) to bind all the creditors of the company, and the Act should be construed so as to give effect to that intention so far as possible, and as the Parliament of the United Kingdom can bind the Colonies it must be assumed to have done so. The analogy of bankruptcy was referred to and reliance was placed on a decision of the Court of Common Pleas in *Ellis* v. *M'Henry*, 19 W. R. 503, L. R. 6 C. P. 228.

Their lordships do not think that the Arrangement Act of 1870, when read by itself and detached from the other Companies Acts, does, either by express words or by necessary implication, extend to the Colonies. That Act, however, cannot be regarded by itself, but is only one of a collection of Acts together containing the statutory law relating to joint-stock companies in the United Kingdom which are compendiously referred to as the Companies Acts and ordered to be read together. It is impossible to contend that the Companies Acts as a whole extend to the Colonies or are intended to bind the Colonial courts. The Colonies possess and have exercised the power of legislating on these subjects for themselves, and there is every reason why legislation of the United Kingdom should not unnecessarily be held to extend to the Colonies and thereby overrule, qualify, or add to their own legislation on the same subject.

It is quite true that the provisions of the Arrangement Act are expressed to extend to all creditors, and so they do to foreign as well as Colonial creditors, but only when their rights are in question in the courts of the United Kingdom. Their lordships adopt what was said by Holroyd, J., on this point:

"I am quite willing to admit, indeed I entertain no doubt, that the compromise spoken of in section 2 is one between a company and all its creditors or all of a particular class, that all are to be summoned to any meeting which the court may order, and that the votes of all who attend either in person or by proxy are to be counted. 'All' means 'all,' wherever the creditors may be found, whether in the United Kingdom or in the Colonies or in foreign countries; and within the jurisdiction of the English courts, all, wherever domiciled, will be bound by the result. But we are asked to say, looking at this one section only, that the same clause has a different import according as it is applied to foreign countries or to the Colonies; that with respect to the former its operation is confined to the jurisdiction of the English courts, while upon the latter it imposes a new law, and one in derogation of the legislative powers possessed by those colonies which enjoy self-government. It seems hardly probable that, if such was the purpose of the Imperial Parliament, it should have been expressed in a manner so ambiguous."

Nor do their lordships think that any assistance is to be derived from what has been held with regard to the application of the Bankruptcy Acts to the Colonies. It has been decided that by the express words of the Bankruptcy Acts all the property real and personal of an English bankrupt in the Colonies as well as in the United Kingdom is vested in his assignees or trustees. Their title must, therefore, receive recognition in the Colonial courts from which it has been considered to follow that the bankrupt being denuded of his property by the English law is also entitled to plead the discharge given him by the same law. But how does this assist the appellants? We have to deal with the winding up of a company not with bankruptcy, and there is a material distinction between the effect of bankruptcy and that of winding up. In the former case the whole property

of the bankrupt is taken out of him, whilst in the latter case the property remains vested in title and in fact in the company subject only to its being administered for the purposes of the winding up under the direction of the English courts. Their lordships are not called upon to criticize the decision in *Ellis* v. *M'Henry*, which in their opinion does not apply to the present case.

If, as their lordships hold, the Arrangement Act of 1870 does not extend to the Colonies, the proceedings in the English court are for this purpose proceedings in a foreign court and cannot be pleaded in Victoria as a defence to an action by a Victorian creditor, as was decided in England with reference to a French winding up in *Gibbs* v. *Société des Métaux*, 25 Q. B. D. 399, 39 W. R. Dig. 57.

One other argument was used which should be noticed. It was said that everybody who deals with a corporation has notice of its origin and constitution, and contracts with it subject to all the incidents which according to the law of its constitution may affect its liability upon its contracts. This argument is specious, but when examined is found to beg the question, or rather to be the same point over again. The incident of the constitution of this company which is relied on is that it may be discharged from its liabilities by the order of an English court. But it should be added "so far as the jurisdiction of that court extends," and that brings us back to the same point.

Their lordships will, therefore, humbly advise her Majesty that the appeal be dismissed. The appellants will pay the costs of it.

Solicitors for the appellant, *Paines, Blyth, & Huxtable.*

Solicitors for the respondents, *Stanley, Woodhouse, & Hedderwick.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Jan. 19.

REG. v. THORNTON AND ANOTHER (JUSTICES). *Ex parte* LACON & CO. (a.)

Licensing law—Licence—Order sanctioning removal—Grant of licence on condition of surrendering other licence—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 50.

At a general annual licensing meeting a publican, having obtained a renewal of a licence in respect of his licensed house, proceeded to apply for a new licence in respect of a neighbouring house. The justices made an order granting him such new licence subject to the condition of his giving up the licence of which he had just obtained a renewal.

Held, that the order was in substance an order sanctioning the removal of a licence, and that, inasmuch as the requirements of section 50 *of the Licensing Act*, 1872, *had not been complied with, there was no jurisdiction to make such order.*

Appeal from the judgment of a Divisional Court (Cave and Ridley, JJ.), granting a writ of *certiorari* to bring up and quash an order made by licensing justices.

In March, 1897, G. C. Laceby was the holder of a licence in respect of the Five Alls public-house, at Battersea, for the sale of beer, wine, and spirits, to be consumed off the premises, and he was also the holder of a similar licence in respect of the cellar of the adjoining premises, No. 2, Abercrombie-street. It appeared that in 1890 the then holder of the licence for the Five Alls, finding his premises insufficient, arranged to take the cellar of No. 2, Abercrombie-street, and obtained a separate licence in respect thereof, and since that time the two licences had been renewed from year to year.

Before the general annual licensing meeting for the Wandsworth Division, which was held on the 5th of March, 1897, Laceby gave notice of his intention to apply for renewals of the two licences, and also gave notice of his intention to apply for a licence for the whole of the house No. 2, Abercrombie-street.

The justices having granted the application for renewals of the old licences, the applicant proceeded to make his application for the new licence, which was adjourned in order that the justices might view the premises.

At an adjourned meeting, held on the 26th of March, the justices asked the applicant whether he would give up his licence for the Five Alls if they granted him the new licence which he now asked for. He agreed to this, and thereupon the justices made an order granting him a licence for the sale of beer, wine, and spirits, to be consumed off the premises, in respect of No. 2, Abercrombie-street, subject to the condition of his giving up the licence which he held in respect of the Five Alls.

At the instance of Messrs. Lacon & Co., a firm of brewers, who had purchased the lease of the Five Alls, the Divisional Court granted a writ of *certiorari* to quash the order, on the ground that the justices had no jurisdiction to make it, because it was in effect an order sanctioning the removal of a licence within section 50 of the Licensing Act, 1872, and the requirements of that section had not been complied with.

Section 50 of the Licensing Act, 1872, enacts that the application for an order sanctioning the removal of a licence shall be made by the person desiring to be the holder of the licence when removed; that notice of the intended application shall be given in the same manner as notice is given of an application for the grant of a new licence; that a copy of the notice shall be personally served upon or sent by registered letter to the owner of the premises from which the licence is to be removed, and the holder of the licence, unless he is also the applicant; and that the justices shall not make an order sanctioning such removal unless they are satisfied that no objection to such removal is made by the owner of the premises to which the licence is attached, or by the holder of the licence, or by any other person whom the justices shall determine to have a right to object to the removal.

Laceby appealed.

Bosanquet, Q.C., and *J. C. Earle*, for the appellant.

Lawson Walton, Q.C., Foote, Q.C., Bodkin, and *Travers Humphreys*, for the prosecutors.

Avory and *Edwardes Jones*, for the justices.

A. L. SMITH, L.J.—I am of opinion that the judgment of the Divisional Court is right. The question is whether what took place in this case was a removal of a licence. The appellant was the holder of an off-licence for the Five Alls, and of a similar licence for the cellar underneath the adjoining house, No. 2, Abercrombie-street. At the general annual licensing meeting for 1897 he applied for a renewal of those

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

licences, and having obtained an order for such renewals, he then applied for an off-licence for the whole of 2, Abercrombie-street. The justices thereupon said to him: "Before we entertain your application for 2, Abercrombie-street, will you give up your licence for the Five Alls?"—that is, in other words: "Will you remove your business from the Five Alls to 2, Abercrombie-street?" He assented, and they granted him a licence for 2, Abercrombie-street, on condition that he gave up his licence for the Five Alls. It was in substance the case of the removal of a licence and a business. In my opinion such a case comes within section 50 of the Licensing Act, 1872, and the owner of the premises from which it was proposed to remove the licence had a right to intervene and put his veto on the making of an order.

The appeal must therefore be dismissed.

CHITTY and COLLINS, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *W. W. Young & Son.*

Solicitor for the prosecutors, *Wellington Taylor.*

Solicitors for the justices, *Corsellis, Mossop, & Berney.*

High Court of Justice.

Chan. Div. North, J. } Jan. 19, 20.

In re SWEETING. (*a.*)

Solicitor—Costs—Solicitors Act, 1874 (37 & 38 *Vict. c.* 68), *s.* 12.

In taxing a solicitor's bill of costs, items in respect of business done while the solicitor had no certificate should be disallowed.

In re Jones, 18 *W. R.* 159, *L. R.* 9 *Eq.* 63, *is now obsolete, as the wording of* 37 & 38 *Vict. c.* 68, *s.* 12, *differs from that of* 6 & 7 *Vict. c.* 73, *s.* 26.

Summons to review taxation.

The respondent acted as solicitor for the applicants for a period before the 15th of November, 1896, and extending beyond that date. Upon the 15th of November, 1896, he neglected to renew his certificate, and did not do so before the month of March, 1897. The question to be determined was whether he should be allowed any costs for the period during which he had no certificate. The taxing-master followed *In re Jones*, 18 W. R. 159, L. R. 9 Eq. 63, and allowed these costs.

Rowden.—*In re Jones* has been modified by the passing of the Solicitors Act, 1874, s. 12. That case turned on the submission to pay and the analogy of the statute then in force to the Statute of Limitations. The difference made by the Act of 1874 is shown by *Fowler* v. *Monmouthshire Railway Co.*, 27 W. R. 659, 4 Q. B. D. 334, which expressly states that *In re Hope*, 20 W. R. 1026, L. R. 7 Ch. App. 766, had ceased to be law. When a sum is not recoverable it is not a debt in the eye of the law.

He also cited *In re Simmons*, 33 W. R. 706, 15 Q. B. D. 348; *Kent* v. *Ward*, 70 L. T. Rep. 614; and *In re Margetts*, 44 W. R. 462, [1896] 2 Ch. 263.

Napier.—The later statute does not materially differ from the earlier one, and *In re Jones* is still in force. A submission to pay the amount due is a waiver of the statute, and the Act only takes away the remedy and not the right.

NORTH, J.—The trustees employed a solicitor up the 15th of November, 1896, and on that date he became disqualified as he did not take out a certificate until March, 1897. The question is, Should the latter part of his bill be struck out? *In re Jones* is relied upon, and the taxing-master thought it questionable if he could overrule it. He says, "I think it is for the court to overrule it and not for me, as it is an express decision." The question is rather, Has that case been superseded by a statute in different language from that under which *In re Jones* was decided? I think that it has, and that the passing of the Act of 1874 makes the conclusion that the taxing-master has come to wrong. The Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 25 enacted "that no person who, as an attorney or solicitor, shall sue, prosecute, defend, or carry on any action or suit, or any proceedings in any of the courts aforesaid without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid whilst he has been without such certificate as last aforesaid." *In re Jones* was a case in which the client had submitted to pay his solicitor; it was not an action or suit to recover a bill of costs. In another case, *In re Hope*, in which a plaintiff took successful proceedings, an attempt was made by the defendant to resist payment because during part of the time the solicitor was not duly qualified, but it was held that such costs could be recovered. Then section 12 of 37 & 38 Vict. c. 68 was passed. Under it "no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act shall be recoverable in any action, suit, or matter by any person or persons whomsoever." The provisions are much stronger than those in the Act of 1843. Under the later Act, in *Fowler* v. *Monmouthshire Railway and Canal Co.*, a successful plaintiff recovered costs, but as his solicitor was disqualified the defendant successfully objected to any costs being paid for the time during which the plaintiff's solicitor had no certificate.

Here the summons asks in common form for the delivery of a bill. Whatever is to be paid ought to be paid before taking the papers out of the solicitor's hands, and something is due for the time during which he acted while duly qualified, and the client submits to pay what is due. But reading the twelfth section I do not see how any costs whatever can be chargeable in a bill against the client, if they cannot be recovered as against the other side. The different decisions in the two cases I have referred to clearly show the alteration made by the Act of 1874. *In re Hope* is not overruled, but there is a difference. Cockburn, C.J., says (4 Q. B. D., p. 336): "Under 6 & 7 Vict. c. 73 and earlier Acts relating to the qualification of solicitors, it was held that although the solicitor was prevented from recovering costs and disbursements in respect of business done while he was uncertificated, yet that the client himself could recover them from the opposite party. Then came the Act 37 & 38 Vict. c. 68, which in section 12 introduces new words. The effect of these words is to extend the operation of the former Acts, . . . and to prevent not merely the solicitor himself but also his client from recovering such costs." The remarks of Esher, M.R., in *Kent* v.

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Ward are also in point. A submission to pay the amount due on taxation is only a submission to pay a sum which is owing. When a client claims papers, and a solicitor claims payment of costs before he delivers them up, the solicitor can only claim for costs which he is entitled to charge. I think that I ought to decide that the Act of 1874 is very different from the Acts of 1843 and 1860, and that whatever was the position of parties before the Act of 1874 was passed, since the passing of that Act solicitors can have no costs whatever for work done by them during the period of disqualification.

Solicitors, *Greig, Meikle, & Briggs; Sweeting.*

Chan. Div. North, J. } Nov. 23.

PEGGE v. NEATH DISTRICT TRAMWAYS CO. (a.)

Company — Debentures—Equitable security—Option to call for debenture.

An option to call at any time for a specified amount of debentures in satisfaction of a promissory note may be exercised at any time while the issue is unexhausted. The holder of such a security is in equity a debenture-holder.

In re Queensland Land and Coal Co., Davis v. Martin, 42 W. R. 600, [1894] 3 *Ch.* 181, *followed.*

Summons to vary the master's certificate.

The defendant company in November, 1875, issued debentures for £6,000 at 4½ per cent. interest. One of these debentures for £600 was held by Charles Pegge, a director, and the applicant on this summons. In January, 1879, a series of second debentures for £10,000 at 4½ per cent. interest were issued. In November, 1882, the company borrowed money from the applicant and three other directors on the security of four promissory notes at 5 per cent. interest, coupled with an undertaking that the company would, at any time when called on by the holder of any such note, issue debentures for the amount out of the second debentures. The applicant, on the 11th of November, 1882, lent £300 on these terms, and on the 28th of October, 1884, a further sum of £100. He declined to change his note for a debenture in 1883.

In September, 1894, the applicant was one of the plaintiffs in a debenture-holders' action; a receiver and manager was appointed, and interest on the applicant's note was paid till the date of the appointment. The property was sold, and £8,000 paid into court. This being insufficient for the payment of the debentures, there was no surplus for ordinary creditors, and on the 7th of October, 1896, the applicant in an affidavit claimed his right to exchange his note for second debentures. The master's certificate, dated the 30th of June, 1897, disallowed the applicant's claim.

Swinfen Eady, Q.C., and *Ashton Cross*, for the debenture-holders.

Dighton Pollock, for the applicant.—The option can be exercised at any time until the debentures are exhausted or the company is wound up: *In re Queensland Land and Coal Co., Davis* v. *Martin*, 42 W. R. 600, [1894] 3 Ch. 181, is exactly in point, and we are equitable debenture-holders.

Hume Williams, for the company.

NORTH, J.—The facts are undisputed. The promissory notes bear interest at 5 per cent. free of income tax, and their holders had a right to call for debentures at any time at their pleasure. Four such agreements were made, and the other three directors exercised their options before 1883, and it is said that the applicant ought to have exercised his option at the same time, but I do not see why. In 1884 the applicant made a further advance of £100 upon the same terms, so it is clear that the company recognized that its liability to issue debentures at any time when called upon still existed. What has occurred since to disentitle the applicant to exercise his option? The total issue authorized was £10,000, and a sufficient margin to satisfy the option is still unissued. The applicant has been repeatedly asked to take up his debentures but refused, preferring the 5 per cent. interest on his promissory note; but that fact does not deprive him of his option.

Then, in 1894, the applicant, as holder of a first mortgage debenture, and J. D. Llewellyn, as holder of a second mortgage debenture, sued on behalf of themselves and all other holders of mortgage debentures of the company, and judgment was given on the 12th of January, 1895, declaring that both series constituted a charge. I cannot see that the applicant waived his right to a second mortgage debenture by not mentioning it in the statement of claim. On the 7th of October, 1896, the applicant first formally claimed to exercise his option to take second debentures. The reason is obvious, and I think he is entitled to have them, following *In re Queensland Land and Coal Co., Davis* v. *Martin*. He is equitably entitled to a second debenture and to stand on the same footing as a legal debenture-holder. I do not see how he is disqualified from asserting this right. He had the choice of two securities, promissory notes or debentures, and could take up which he liked at any time. He made his formal claim by affidavit on the 7th of October, 1896, and debenture interest should run from that date, but as the funds are insufficient this is immaterial. I cannot call upon him to return any of the interest at 5 per cent. he has received, and he has the right of proof for any arrears at the date of the exercise of the option. I must make a declaration that he is equitably entitled to a debenture and to rank as a debenture-holder. He can add his costs to his security.

Solicitors, *Everett & Hodgkinson; Tamplin, Tayler, & Joseph*, for *C. V. Pegge*, Neath, Glamorgan.

Chan. Div. Stirling, J. } Jan. 18, 26.

DEUTSCHE NATIONAL BANK v. PAUL. (a.)

Practice—Writ—Service out of jurisdiction—Foreclosure action—Ord. 11, *r.* 1 (e) (g).

Mortgagees purchased an equity of redemption and had it conveyed to trustees for themselves. They then brought a foreclosure action against the trustees and a second mortgagee who was resident out of the jurisdiction. On a motion to discharge an order for service of the writ out of the jurisdiction,

Held, (1) *that the action was not founded on a breach of contract so as to fall within ord.* 11, *r.* 1 (e); *and* (2) *that the trustees, though necessary parties to a foreclosure action, were not necessary defendants so as to bring the action within ord.* 11, *r.* 1 (g), *and that the order for service out of the jurisdiction must, therefore, be discharged.*

(a.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

This was a motion to discharge an order which had been made for service of the writ on the defendant Ebbeke out of the jurisdiction.

The writ which had been served was issued by the plaintiffs against two gentlemen named Paul and Farish, who were resident in England, and the defendant Ebbeke, who was resident in Bremen. The writ claimed a declaration that the plaintiffs were entitled to charge for £6,022 6s. 2d. and interest on six policies of assurance, and also asked for foreclosure and further relief. The action arose in the following way: The firm of Messrs. Jellings, Blow, & Co., who carried on business in London, applied to the plaintiffs for a credit by a letter of the 1st of May, 1890, which contained the terms of the credit. On this letter the plaintiffs advanced Messrs. Jellings, Blow, & Co. £6,022 6s. 2d., and the policies in question were deposited with them by way of security for this sum. On the 21st of August, 1894, Messrs. Jellings, Blow, & Co. charged the policies in favour of the defendant Ebbeke, subject to the prior charge. Subsequently, by deed of the 14th of December, 1894, the same firm conveyed all their property to a Mr. Jackson as a trustee for the benefit of their creditors. On the 5th of June, 1897, the plaintiffs issued a writ against Jackson and the defendant Ebbeke claiming the same relief as was asked for in the present action. This writ was never served on Ebbeke, but was served on Jackson, and an arrangement was made by which the bank became purchasers of all interest which Jackson had in the policies as trustee; and the equity of redemption, subject to the defendant Ebbeke's claim, was conveyed to the defendants Paul and Farish as trustees for and by the direction of the plaintiffs. That action was then dropped, and the writ was issued in the present action against Paul, Farish, and Ebbeke, and leave was obtained for service out of the jurisdiction. This leave was obtained on an affidavit which did not disclose the fact that the defendants Paul and Farish were simply trustees for the plaintiffs.

The defendant Ebbeke now moved to have the order for service discharged on the ground that the action was not properly brought against Messrs. Paul and Farish as they were merely trustees for the plaintiffs. It was suggested that they were made defendants merely to bring the defendant Ebbeke within a jurisdiction which would not otherwise exist. On the other hand it was contended that Messrs. Paul and Farish were necessary parties to the action, and that consequently leave was rightly given.

The question turned on the effect of ord. 11, r. 1, which provides as follows: (1) Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever (*e*) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which according to the terms thereof ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or (*g*) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

Grosvenor Woods, Q.C., and *George Lawrence*, for the motion, referred to: *Massey* v. *Heynes*, 36 W. R. 834, 21 Q. B. D. 330; *Indigo Co.* v. *Ogilvy*, 39 W. R. 646, [1891] 2 Ch. 31; *Witted* v. *Galbraith*, 41 W. R. 395, [1893] 1 Q. B. 577; *Société Generale de Paris* v. *Dreyfus*, 36 W. R. 609, 37 Ch. D. 215; *Williams* v. *Cartright*, 43 W. R. 145, [1895] 1 Q. B. 142.

Butcher, Q.C., and *Kirby, contra*, referred to *Witted* v. *Galbraith* and *Massey* v. *Heynes*.

Woods, Q.C., in reply, cited *Castellan* v. *Hobson*, 18 W. R. 731, L. R. 10 Eq. 47.

Cur. adv. vult.

Jan. 26.—STIRLING, J., stated the facts and continued: I assume that under section 25, sub-section 6, of the Judicature Act, 1873, the legal right to sue on the policies is now vested in the defendants Paul and Farish. It is admitted that they are simply trustees for the plaintiffs and are bound to act with reference to the subject-matter of the trust as the plaintiffs direct, and that they have not refused so to do and do not object to become co-plaintiffs in the action. To justify service out of the jurisdiction the case must be brought within the provisions of ord. 11, r. 1: see *In re Eager*, 31 W. R. 33, 22 Ch. D. 86; *In re Cliff*, 43 W. R. 436, [1895] 2 Ch. 21. Clause (*g*) of that rule was mainly relied on, but at a late stage of the argument a suggestion was made that clause (*e*) might apply, and with that I shall first deal. The writ claims a declaration that the plaintiffs are entitled to a charge for the sum of £6,022 6s. 2d. and interest on six policies of assurance, and that the charge may be enforced by foreclosure and all accounts and enquiries necessary for that purpose and for further and other relief. The object of the writ, therefore, so far as specific relief is thereby sought, is to compel the defendant Ebbeke to redeem the plaintiffs by paying off what is due to them, and, in default, to become the absolute owners of the property on which the charge exists. Under the claim for general relief the plaintiffs would, I apprehend, be entitled to ask that, in the event of the court refusing to give relief by way of foreclosure, the policies might be sold and the proceeds applied in payment of the plaintiffs' debt. In my judgment an action so framed is not founded on a breach of contract within the meaning of ord. 11, r. 1 (*e*). The plaintiffs' title to a charge may have arisen by reason of a breach on the part of Jennings, Blow, & Co. in not paying what they owed to the plaintiffs. The action, however, is not founded on that breach of contract, or indeed on any other breach of contract, for the defendants have not committed any breach of any contract with the plaintiffs; it is founded on the existence of a charge constituting a security for the debt due to the plaintiffs. I think, therefore, it does not fall within clause (*e*) of rule 1. Coming, then, to clause (*g*), the question is whether the present action is properly brought against Paul and Farish. The practice of the court requires that to an action for foreclosure all persons who have or claim an interest in the equity of redemption should be parties, and I think that to such an action as the present, the defendants Paul and Farish are extremely proper if not necessary parties. The rule would be satisfied, however, if those gentlemen had been made co-plaintiffs instead of defendants; and I think that they ought more properly to have been made plaintiffs, in this sense, that any extra costs occasioned by making them defendants might, upon a proper application for that purpose, be ordered to be borne by the plaintiffs. Now, Paul and Farish are made parties simply to comply with this rule of practice. Against them no relief is sought, no right is claimed to be enforced. No substantial reason is given why they should be defendants rather than plaintiffs. If the plaintiffs had taken an assignment to themselves instead of to the defendants, the action would not have fallen within ord. 11, r. 1. I do not think it is necessary for me to come to the conclusion that the assignment to them as trustees was a mere device to enable this action to be brought, but, in my judgment, the action is not properly brought against them within

the meaning of the rule. The order for service out of the jurisdiction must therefore be discharged.

Solicitors, *Druces & Attlee; Norton, Rose, & Co.*

Chan. Div. Stirling, J. } March 25-27, 31; April 1, 1897; Jan. 18, 1898.

AJELLO *v.* WORSLEY. (*a.*)

Injunction—Trader—Misleading advertisement—Sale of goods at less than cost price.

A trader may offer for sale goods at any price he chooses, and it is immaterial whether such goods are actually in his possession or not. Consequently, where a trader advertised for sale goods at less than cost price, not having any such goods in his possession, and by so doing injured the plaintiffs,

Held, that he could not be restrained from so doing, as the damage to the plaintiffs arose not from the misrepresentations in the advertisements, but from the underselling of their goods, which was not an actionable wrong.

The statement of claim in this action sought (1) an injunction to restrain the defendant from maliciously, or for the purpose of injuring the plaintiffs in their trade, advertising or otherwise offering for sale (*a*) either a new pianoforte of the plaintiffs' manufacture at the price of 15 guineas (such being less than the plaintiffs' wholesale price for a similar pianoforte) or any other sum less that the said wholesale price, or (*b*) what is not in fact a new pianoforte of the plaintiffs' manufacture as a new pianoforte of the plaintiffs' manufacture; (2) an injunction to restrain the defendant, his servants and agents, from passing off or attempting to pass off pianofortes not of the plaintiffs' manufacture as or for the goods of the plaintiffs by advertisement or in any other way; (3) damages for injuring the plaintiffs in their trade; (4) damages for passing off; and (5) costs.

So far as it sought to restrain the defendants from passing off or attempting to pass off goods of other manufacturers as those of the plaintiffs the case was abandoned at the trial, it being admitted that there was no evidence to support any such charge against the defendant. At the bar what was sought was an injunction not in the form asked by the statement of claim but in a modified form. The facts, so far as they are necessary to be stated, were these: The plaintiffs were manufacturers of pianos, carrying on business in London, who made and supplied their customers with various classes of pianos, among which it is only necessary to mention class 1, the Britannia model, supplied to the trade at 15 guineas; class 2, which is supplied at 17 guineas; and then a class described in the price list as "class 6*a*, an upright grand, iron-frame, check action, trichord," supplied to to the trade at £23 10s. The defendant was a furnishing contractor who carried on business in an extensive way at Manchester. In the early part of 1895 the plaintiffs supplied the defendant with several pianos, two of class 2 at the trade price, on the 26th of January and the 15th February, one of class 6*a* on the 25th of April and two of the Britannia model on the 23rd of April and the 5th of May. The two last, the Britannia models, formed part of an order for twelve pianos of that class, which had been given by the defendant to the plaintiffs, but which in consequence of some dissatisfaction of the plaintiffs with the advertisements issued by the defendant, the plaintiffs refused to execute. Their definite refusal so to do became known to the defendant at an interview between him and the senior partner of the plaintiffs' firm in August, 1895. After this, on the 22nd of February, 1896, defendant published in the Manchester *Evening News*, a newspaper having a large circulation in Manchester and the neighbourhood, an advertisement in the following form:

"Great Sale of Pianos at Worsley's.
Hundreds of Bargains on View.
Pianos by all the great makers.
Worsley's, The Pantheon, Gaythorn.
. . . . . .
Special List.
. . . . . .
New Instruments at Worsley's.
. . . . . .
A fine Upright Grand by Ajello!
Iron frame, check action, trichord!
Price 15 guineas, or 15s. per month.
. . . . . ."

A similar advertisement appeared in the same paper from the 24th to the 29th February both inclusive, and on the 2nd to the 7th of March. And a similar advertisement appeared in the *Northern Daily Telegraph* on the 5th, 25th, and 28th March, and on the 2nd, 4th, 6th, 7th, 8th, 16th, and 17th April. The object of the action was to restrain the continuance of these advertisements. The advertisements, in the opinion of the judge, were such that a member of the public, on reading them would be led to believe that the defendant had in stock and for sale at 15 guineas a new piano of the plaintiffs' manufacture which might be properly described as an upright grand with check action and trichord. It was admitted that at the date of the several advertisements the defendant had no piano of the plaintiffs' manufacture in stock, though the defendant had a piano of the Britannia model class in stock at the date when they began. It was also established that the plaintiffs had incurred loss by reason of these advertisements.

Graham Hastings, Q.C., and *J. Cutler, Q.C.*, for the plaintiffs.—We are entitled to the injunction except as to passing off: *Mogul Steamship Co.* v. *McGregor*, 40 W. R. 337, [1892] A. C. 25. The cases of *Bradford Corporation* v. *Pickles*, 44 W. R. 190, [1895] A. C. 587; *Flood* v. *Jackson*, 43 W. R. 453, [1895] 2 Q. B. 21, are distinguishable. The latter case is still under consideration *sub nomine Allen* v. *Flood*.

Grosvenor Woods, Q.C., and *Macnaghten, Q.C.*, for defendant.—The defendant may carry on a lawful trade in any lawful manner, whether it causes loss to any rival tradesmen or not. In the course of business he may sell goods at any price he pleases even at a loss, either to attract customers or to get rid of stock. There is no evidence of malice in anything the defendant has done, and even if there were, no action would lie. If there were any misrepresentations either as to the class of goods or as to goods being in stock, the plaintiffs must show that they were affected by these misrepresentations. There is nothing unlawful in advertising for sale goods which are not in stock, and such an advertisement would give rise to no cause for action.

They referred to *Mogul Steamship Co.* v. *McGregor*; *Bradford Corporation* v. *Pickles*; *Flood* v. *Jackson*; *Jenkinson* v. *Nield*, 8 Times L. R. 540; *Peek* v. *Gurney*, 22 W. R. 29, L. R. 6 H. L. 377; *Glover* v. *London and South-Western Railway Co.*, L. R. 3 Q. B. 25, 16 W. R. C. L. Dig. 46; *Sharp* v. *Powell*, 20 W. R. 584, L. R. 7 C. P. 253; *Canham* v. *Jones*, 2 V. & B. 218; *White* v. *Mellin*, 43 W. R. 353, [1895] A. C. 154.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Graham Hastings, Q.C., replied.

Cur. adv. vult.

STIRLING, J., after stating the facts, continued: What the plaintiffs claimed at the Bar by their counsel was an injunction to restrain the defendant from advertising for sale any of the plaintiffs' pianos unless he had in his possession a piano of the plaintiffs' manufacture and of the class advertised. By limiting the claim to an injunction so limited they virtually admit, and I think rightly, that if the defendant had in his possession a piano of the plaintiffs' manufacture and of the class advertised at the time he might offer it for sale at any price he chose. Indeed it appears plain that the owner of any property is entitled to sell or dispose of it for such consideration as he may see fit, and either at a profit or at a loss. And, I take it, that it is settled by the case of *Allen* v. *Flood*, [1898] A. C. 1, that the motive of the owner in so acting cannot be inquired into. I further think that the general rule is that any person may sell or offer for sale at any price whatsoever goods of which he is not the owner, but which he hopes or expects to acquire. It is expressly provided by section 5 of the Sale of Goods Act, 1893: (1) The goods which form the subject of a contract for sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods"; (2) there may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen; (3) where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods. And these last-mentioned goods in the Act are designated by the convenient term "future goods."

If a seller contract to sell future goods he must be at liberty as a first step of such contract to offer them for sale. And I see nothing to prevent his making such an offer by advertisement or in any other lawful way. Again, it seems to me that he is entitled to make the offer at any price he pleases, remunerative or not. It may be worth a trader's while to sell some goods at a loss so long as he is able to sell others at a countervailing or more than than countervailing profit. In all this I assume that the seller is acting honestly. If what he does is tainted with fraud he may be guilty of an actionable wrong. An illustration is afforded by the case of *Richardson* v. *Silvester*, 22 W. R. 74, L. R. 9 Q. B. 34. There the particulars of the plaintiff's claim in an action in a county court were as follow: "The plaintiff sues the defendant in tort for legal fraud and deceit committed under the following circumstances, for that the defendant in March, 1872, caused to be inserted in a public newspaper an advertisement for the letting by tender with immediate possession of a farm; and the plaintiff, believing in the *bona fides* of such advertisement and desiring to become tenant of a place of the description advertised, did take trouble and pains and incurred expense in going to and inspecting the property and in the employment of persons to inspect and value it for him with a view of becoming tenant thereof; whereas afterwards it appeared that the defendant had no power to let the property as advertised, and caused the advertisement to be issued to serve some purpose of his own other than that appearing by the advertisement, and that the defendant knew at the time he caused such an advertisement to be published that he had not the power to let the farm, and that the farm was not to be let." The county court judge ruled that the particulars disclosed no cause of action and nonsuited the plaintiff. Held, that the particulars contained allegations amounting to a fraudulent representation for which an action would lie.

In the present case the plaintiffs had, in the autumn of 1895, refused to supply the defendant with any of their pianos, and they continued such refusal down to the commencement of the action. The defendant therefore could not get from the plaintiffs any of their new pianos, but, in my opinion, he might, by indirect means, have acquired new pianos of theirs upon terms which would not indeed enable him to sell at a profit, but which need not have involved a ruinous loss. If, then, the defendant had seen fit to advertise that he was prepared to supply new pianos of the plaintiffs' manufacture, of Britannia model type, then I think he would have been within his legal rights. It is said, however, that the advertisement actually published contained two misrepresentations—first, that the piano to which it related (being, according to the defendant's statement, of the Britannia model type) was described as "upright grand, with check action and trichord"; and second, that such piano was in the possession of the defendant at the several dates when the advertisement appeared.

As regards the first point, as I have already stated, in my opinion the description cannot be treated as inaccurate, and in argument the main stress was laid on the second point. In my judgment this misrepresentation does not make the advertisement fraudulent, and in order that misrepresentation may be actionable it must not only be untrue but must cause damage. Therefore, beyond the damage to the plaintiff it must be attributable as a cause of damage to the person who complains of it. The question then arises, Is the damage complained of by the plaintiffs attributable to the misrepresentation of fact contained in the advertisement? It appears that this question must be answered in the negative, for an advertisement such as in my opinion the defendant might legally have issued would have produced precisely the same consequences and have been followed by the same damaging results. No decision in support of such an action as the present was cited in argument. What was mainly relied on by the plaintiffs' counsel was the general statement of the law laid down by Lord Bowen in the Court of Appeal in the well-known case of *Mogul Steamship Co.* v. *McGregor*. He states the law thus: "What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it." Then he proceeds to give a number of illustrations and what I think are general propositions. I do not think it necessary to inquire whether the law laid down by the House of Lords in *Allen* v. *Flood* imposes any limitations or qualifications on the views there expressed, for in my opinion the present case does not fall within the class in which damage caused by misrepresentation arises within the meaning of the lord justice. The class of cases which he probably had in mind was that of which *Ratcliffe* v. *Evans*, 10

W. R. 578, [1892] 2 Q. B. 524, is an example. It was there held that where a defendant had intentionally published an untrue statement regarding the plaintiffs' business, and thereby had in the ordinary course caused damage to the plaintiff, he was liable. Here the untrue statement related to the defendant's own business, and I may point out that if it affected the plaintiffs' business at all it did not effect it exclusively, for Mr. Sharples and every music dealer in the neighbourhood of Manchester who happened at the time to have the plaintiffs' pianos in his shop suffered damage as well as the plaintiffs. However, for the reasons I have already stated, I think the damage to the plaintiffs was not caused by the misrepresentation contained in the advertisement. Consequently the action fails, and must be dismissed. I cannot, however, approve of the defendant's conduct. The advertisement was not such as ought to have been published, and great negligence has been shown as regards the withdrawal of it. I think, therefore, that the defendant is not entitled to any costs of the action, except in so far as those costs have been incurred by the unfounded charge—namely, that of passing off as of the plaintiffs' manufacture a piano that was not—which forms the subject of paragraph 2 of the prayer in the statement of the claim. These costs will be paid by the plaintiff.

Solicitors, *Ralph Raphael & Co.; Pritchard, Engelfield, & Co.*, for *G. R. Lloyd & Davies*, Manchester.

Chan. Div. } Jan. 13.
Kekewich, J. }

In re WHITE.
PENNELL *v.* FRANKLIN. (a.)

Solicitor—Executor—Will—Power to solicitor-executor to make professional charges—Insolvent estate—Creditors' action.

The power given by a will to a solicitor-executor to make professional charges is a legacy, and consequently the solicitor is not entitled, if the estate be insolvent, to any profit costs of acting as solicitor to the estate, as against creditors.

Walter White, who died in 1891, by his will, after directing payment of his debts, funeral and testamentary expenses, appointed three gentlemen, one of whom was a Mr. Franklin, a solicitor, executors and trustees of his will, and by a clause therein declared that Mr. Franklin should be the solicitor to his estate, and as such, notwithstanding his acceptance of the trusteeship and executorship of the will, should be allowed all professional and other charges for his time and trouble which, if employed as solicitor to the trustees and executors, not being himself a trustee and executor, he would be entitled to make. The testator's estate being quite insolvent, the will was proved by Mr. Franklin alone, the two other trustees and executors renouncing probate and disclaiming the trusts. An action being brought by creditors against Mr. Franklin as executor of the testator's estate was defended by Mr. Franklin, who appeared and defended the action in person, acting as solicitor for himself.

This was a summons upon the further consideration of the action taken out by the creditors asking for an order that, the testator's real and personal estate not being sufficient to pay his debts in full, it might be declared that the defendant, Mr. Franklin, was not entitled to any profit costs by reason of the declaration contained in the testator's will.

Church, for the creditors.—The power to make professional charges is in fact a legacy; it cannot, therefore, prevail against the right of the creditors. Mr. Franklin acts for himself alone, his fellow-trustees having renounced: *In re Barber, Burgess* v. *Vinnicome*, 34 W. R. 395, 31 Ch. D. 665; *In re Pooley*, 37 W. R. 17, 40 Ch. D. 1; *Cradock* v. *Piper*, 1 Mac. & G. 664; *Broughton* v. *Broughton*, 3 W. R. 602, 5 De G. M. & G. 160. [KEKEWICH, J., referred to *In re Thorley, Thorley* v. *Massam*, 39 W. R. 565, [1891] 2 Ch. 613].

J. G. Wood, for Mr. Franklin.—The power to charge is not really equivalent to a legacy, for work has to be done in return for the power. It will bear very hardly on Mr. Franklin. The creditors knew he took office on certain terms, which they ought to be willing to give effect to.

KEKEWICH, J.—It is not my duty to consider whether it may or may not be hard upon the solicitor, neither can I consider whether it would be better for the estate that he should act and charge as solicitor, I must consider the facts of the case. The solicitor, by a clause in this will, which is a very common one, is allowed to charge profit costs, notwithstanding that he is executor and trustee of the will. He is the sole executor, and the estate is insolvent, and the question is whether he is entitled to charge his profit costs against an insolvent estate. This power in the will is really a gift by the testator upon a condition. It is a gift to a solicitor of the power of charging for costs which he would not otherwise have if he chooses to act as executor. It is for him to say whether he will or will not act. He does act, and must therefore take the risk of getting paid out of the estate. It seems to me it must be a matter of bounty, for but for this clause the solicitor could not charge at all for profit costs. It is a gift by the testator to the solicitor of that which the law does not give. The testator, in fact, says, "I give to my trustee and executor the right to act as solicitor and to charge therefor." That is just as much a legacy as a gift of £100 would be. There is no difference between giving profit costs and giving a sum of money. It is a legacy, and is chargeable with legacy duty. The Court of Appeal was clear on the point, I think, in the case of *In re Thorley*. If it is a legacy the whole question is settled, because a legatee cannot compete with a creditor, he can only come in after a creditor, for a legacy can only come out of such part of an estate as is left after payment of debts and funeral and testamentary expenses. This is not a debt but a bounty, and it therefore fails as against the creditors. It may be hard upon the solicitor who acts upon the impression that there is a large estate which may be subsequently destroyed by some claim, but the law is as I have said, and with the propriety of it I have nothing to do.

Solicitors, *Maitlands, Peckham, & Co.; S. Franklin.*

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Chan. Div.
Romer, J. } Jan. 26.

In re CASTELL & BROWN (LIMITED).
Ex parte UNION BANK OF LONDON. (a.)

Company—Debentures—Priority between equitable mortgagees—Notice—Negligence of first mortgagee in custody of deeds.

A company had created by way of equitable mortgage certain debentures, which were secured by a floating charge on all the property of the company. There was a condition that the company should not be at liberty to create any charge upon its freehold or leasehold property in priority to the debentures. The title-deeds of such property were left in the possession of the company, and were, subsequently to the issue of the debentures, deposited with the company's bank to secure an overdraft. The bank had then no notice of the existence of the charge created by the debentures. In the liquidation of the company the bank claimed to have a prior charge, and to retain the title-deeds until their debt was paid.

Held, that though, as between equitable incumbrancers, the general rule is that, where other equities are equal, the first in time has priority, that in the present case, having regard to the possession of the title-deeds and other circumstances, the bank had the better equity, and were entitled to priority for their charge.

Adjourned summons.

The question in this case was that of priority between two equitable incumbrancers. In 1885 the company issued debentures to the amount of £28,000, each debenture purporting to charge all the property of the company whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. One of the conditions indorsed was to the effect the charge was to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge upon its freehold or leasehold hereditaments in priority to the debentures.

No legal mortgage of the freehold or leasehold property of the company was ever made to the debenture-holders, and the title-deeds remained in the possession and control of the company.

The debenture-holders, therefore, were the first equitable incumbrancers in point of date. The second was the Union Bank, who, in 1892, had allowed the company an overdraft on their depositing the title-deeds of their leasehold property. This overdraft was paid; but in 1895 a further overdraft was allowed on the company giving a memorandum of equitable charge on the deeds and undertaking to execute a legal mortgage. The interest on the debentures being in default, the above action was instituted by the debenture-holders, and in July, 1896, the usual judgment was made for the appointment of a receiver and directing inquiries as to the charges and their priorities. In April, 1896, the company passed resolutions for voluntary liquidation, and in June, 1897, an order was made for the continuation of the liquidation under the supervision of the court. In February, 1897, the bank was served with a notice of judgment in the action. At that date the overdraft at the bank amounted to some £220.

The bank stated that until served with the notice of the judgment they had not had any notice of the company having issued any debentures, or that it had created any charge upon the property comprised in the deeds deposited with the bank. The company being stated to be insolvent the bank claimed to have a prior charge for £220 and interest and to retain the deeds until their debt was paid.

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Farwell, Q.C., and *E. Ford*, for the debenture-holders.

Neville, Q.C., and *Gore-Browne*, for the Union Bank.

ROMER, J., said: This is a question of priority between two equitable incumbrancers. The debentures are prior in date. But the Union Bank at the date of its charges had no notice, express or implied, of the prior incumbrance, and obtained possession of the title-deeds, and, under the circumstances of the case, claims priority. If the equities of the two incumbrancers are in other respects equal then, of course, priority depends upon the dates of the charges. But the question is whether, under the circumstances of this case, the bank has not the better equity so as to entitle it to priority. Now, as between equitable incumbrancers in determining priority, the possession of the deeds has always been treated as a circumstance of great importance. And, indeed, in some of the numerous cases which show this there are observations of the judges who decided them which go very far. For instance, in *Rice* v. *Rice*, 2 W. R. 139, 2 Drew 81, Kindersley, V.C., said: "We have here, then, ample authority for the proposition or rule of equity that, as between two persons whose equitable interests are of precisely the same nature and quality and in that respect precisely equal, the possession of the deeds gives the better equity." And in *Lloyd's Banking Co.* v. *Jones*, 33 W. R. 781, 29 Ch. D. 221, p. 229, Pearson, J., observed: "I think upon the authorities which have been cited, and which are so well known, that it would be pedantry for me to go over these again. The doctrine of the court has always been that, where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them." But, in my opinion, these observations, if taken without any limit or restriction, go too far, for I do not think a prior equitable incumbrancer would lose his priority where he did not obtain the deeds, and the deeds came to the hands of the subsequent incumbrancer through no default of any sort on his part.

I therefore proceed to inquire into the circumstances under which, in the present case, the deeds came into the hands of the bank. In the first place, I cannot hold that there was any negligence on the part of the bank. When making its advances to Castell & Brown (Limited) (which I will hereafter call the company) it found the company in possession of the deeds in question, and, apparently, able as unincumbered owner to charge the property. The company purported as such unincumbered owner to give a charge to the bank, and I think the bank was, under the circumstances, entitled to rely upon obtaining a charge free from incumbrance.

It is suggested on behalf of the debenture-holders that the bank ought to have made some special inquiries of the company. But it is not suggested that the bank wilfully abstained from making inquiries, and as the bank had no reason to suppose that the company were not fully able to give a valid first charge, and found the company in possession of the deeds which showed no incumbrance, I think the bank was not bound to make any special inquiry. It is said on behalf of the debenture-holders that it is so common for companies to issue debentures that the bank ought to have assumed there were some in this case, or, at any rate, to have specially inquired about debentures. But every company does not issue debentures, and, moreover, every debenture does not charge property of the company, and certainly not property the title-deeds of which were left with the company. It might just as well be said, because it is common for private individuals to mortgage

their properties, that a person asked to make advances to a borrower who appears to be unincumbered owner, and has the deeds showing him to be such owner, is bound to assume that the borrower has previously mortgaged, or to make special inquiries of him on the footing that he has previously mortgaged. Such a contention appears to me unreasonable. I therefore hold that there was no negligence on the part of the bank; and I now look to see how it was that the company retained possession of the deeds, notwithstanding the issue of the debentures. The reason appears to me to be obvious. The debentures were only intended to give what is called a floating charge—that is to say, it was intended, notwithstanding the debentures, that the company should have power, so long as it was a going concern, to deal with its property as absolute owner. And I infer it was on this account that the company was allowed to, and did, retain possession of the deeds. In other words, the debenture-holders, notwithstanding their charge—and, indeed, by its very terms—authorised their mortgagor, the company, so deal with its property as if it had not been incumbered, and left with their mortgagor the deeds in order to enable the company to act as owner. It is true that, having given this general authority to the company, the debentures purported to put a certain special restriction on its exercise. By the first condition it was provided that, though the charge was to be a floating security, the company was not to be at liberty to create any mortgage or charge upon its freehold and leasehold hereditaments in priority to the debentures. This restriction was, no doubt, quite valid as a private arrangement between the company and the dedenture-holders.

But can the debenture-holders, under these circumstances, set it up as against the bank taking its securities without notice? I think not. I take it to be established that if a first mortgagee, even though he has the legal estate, authorizes the mortgagor to retain the deeds in order that the mortgagor may thereby, as ostensible owner of the property, be able to deal with it, though only to a limited extent, yet, if the mortgagor takes advantage of the deeds so left with him to deal with the property to an extent beyond what was authorized, then the mortgagee cannot set up his charge as against a purchaser for value without notice who claims under the unauthorized dealing, and relied on the deeds and the apparent ability of the owner to deal with the property free from incumbrances. In *Perry Herrick* v. *Attwood*, 6 W. R. 204, 2 De G. & J., at p. 39, Lord Cranworth, L.C., says, with reference to a case of this kind, that if a person taking a legal mortgage chooses to leave the deeds with the mortgagor, not through negligence or fraud, but with the intention of enabling him to raise a sum of £15,000 which is to take precedence of the legal mortgage, the mortgagee cannot, as against subsequent mortgagees, complain if, instead of the £15,000, the mortgagor raises £50,000, because he had himself put it into the mortgagor's power to raise any sum of money he pleased; and the principle has been acted on in numerous later cases, amongst which I may mention *Briggs* v. *Jones*, L. R. 10 Eq. 92, 18 W. R. Ch. Dig. 84 This being the case as between a prior legal mortgagee and a subsequent equitable incumbrancer, it is an *a fortiori* case where the first mortgage is only equitable. In my opinion, therefore, the bank has a stronger equity than the debenture-holders and is entitled to priority. I may add that if I am not mistaken in my inference that the deeds were allowed to remain with the company because the debentures created a floating charge only, and it was intended that the company should be authorized to act as owner (subject to the special conditions imposed by the debentures), then I cannot see why the debenture-holders should not have obtained possession or control over the deeds in some shape or form, and they would come within the series of cases which have decided that a first mortgagee, even a legal one, who negligently leaves the deeds in the hands of the mortgagor, is postponed to a subsequent mortgagee who obtains the deeds without notice; see *inter alia Clarke* v. *Palmer*, 21 Ch. D. 124, 30 W. R. Dig. 135; and *Northern Counties of England Fire Insurance Companies* v. *Whipp*, 32 W. R. 626, L. R. 26 Ch. D. 482.

I therefore declare that the bank's charge has priority, and their costs will be added to their security.

Solicitors, *Pritchard & Sons; Campbell, Reeves, & Hooper.*

Q. B. Div. (Kennedy, J.) — Jan 22.

MARKS v. FROGLEY. (*a*.)

Army—Volunteer—"Persons subject to military law"—Training with regular forces—Breaking up of camp—Subsequent detention in military custody—Army Act, 1881 (44 & 45 *Vict. c.* 58), *ss.* 41, 45, 158, 176, *sub-section* 8 (a).

The plaintiff, a member of a volunteer corps, was with other members of the corps in military training with a portion of the regular forces at a camp at S. On the morning of the day on which the camp was broken up, the plaintiff was arrested on a charge of having commited a larceny in the camp. He was taken in military custody to the S. railway station, and there, by order of the officer in command, was given into the custody of the defendants, a sergeant and two other members of the same volunteer corps, and taken by them by train to B. railway station, a journey of three and a-half hours, and thence on foot to H., where the plaintiff was handed over to the civil authority. The plaintiff was subsequently tried at quarter sessions on the charge of larceny and acquitted.

Held, that, after the arrival of the plaintiff and the defendants at S. railway station, they were no longer "being trained or exercised" with the regular forces within section 176, *sub-section* 8 (a), *of the Army Act*, 1881, *and were, therefore, not subject to military law; that the subsequent detention of the plaintiff in military custody by the defendants was not justifiable under sections* 41, 45, *and* 158 *of the Army Act*, 1881; *and that an action for false imprisonment and assault would lie against the defendants.*

Action tried before Kennedy, J., and a special jury.

The plaintiff claimed damages for false imprisonment and assault.

The jury found a verdict in favour of the plaintiff with £300 damages.

The facts, and arguments of counsel, are fully stated in the judgment.

Tassell, for the plaintiff.

Lawson Walton, Q.C., and *R. D. Muir*, for the defendants.

Cur. adv. vult.

Jan. 22.—KENNEDY, J., read the following judgment: Henry Marks, the plaintiff in this action, who is a member of a Bedfordshire volunteer corps, has obtained, in an action for assault and false imprisonment which was tried before me, sitting with a special

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

jury, a finding of the jury of £300 damages against three defendants—Arthur Cooper, who is a sergeant, and Thomas Lovelock and George Albert Short, who are privates in the same corps as that to which the plaintiff belongs. A further defendant in the action, Frederic Frogley, who is a superintendent of the Herts County Police, has had, upon the findings of the jury, a judgment in his favour, and no question arises in his case. The points affecting the three first-named defendants, which I reserved after argument for consideration, are of a somewhat peculiar nature. The facts relevant to the decision of the points are as follows: The plaintiff and these defendants, with other members of the corps, were in August last in military training with a portion of the regular forces at Shorncliffe. The camp was broken up on the morning of August 8. Early on that morning, and whilst the preparations for the return of the volunteers to their respective homes were proceeding in the camp, a disturbance took place in and around the tent in which the plaintiff and others had been lodged in consequence of some of the plaintiff's comrades accusing him of having stolen and hidden in his kit bag a number of articles which belonged to them. The adjutant of the corps, Captain Foote, having been informed as to the disturbance, came to the spot, and ultimately (to omit details on which there was some conflict in the evidence) ordered Sergeant Killin to form an escort and take the plaintiff to the guard tent, where he would find Lieutenant Roberts on the point of proceeding with the luggage and its escort to Shorncliffe railway station. Sergeant Killin was to direct Lieutenant Roberts to take the plaintiff with the baggage guard to the railway station, and there keep him until the D (plaintiff's) Company arrived. By the further orders of Captain Foote, conveyed through Sergeant Killin, the plaintiff, after his arrival at the railway station, was to be taken in military custody in the special military train which was then about to start for the conveyance of volunteers to Watford, Boxmoor, and other stations to which the plaintiff and other members of his volunteer corps belonged; and on his arrival at Boxmoor (the railway station, about two miles distant, for Hemel Hempstead, where the plaintiff lived) the plaintiff was to be taken by his escort to the police-station at Hemel Hempstead, and then handed over to the civil authority. Captain Foote at the same time directed that information as to what had happened should be given at Hemel Hempstead to Captain Smeaton, the officer in command of the plaintiff's company. These orders were carried out. After the plaintiff had reached Shorncliffe station with the baggage guard, under Lieutenant Roberts, and the train was ready to receive her passengers, the defendant Cooper selected, in the usual way, from the ranks of the volunteers who were drawn up in the railway station, his two co-defendants, Lovelock and Short, to form the prisoner's escort on the journey to Boxmoor and Hemel Hempstead. The plaintiff was then placed in a compartment with these defendants, and the four so travelled together in the train to Boxmoor (a journey of about three and a-half hours). On the arrival of the train at Boxmoor the prisoner, under the charge of his escort, was directed by the defendant Cooper to remain in a waiting-room, while the rest of the volunteers, other than certain persons who would be required as witnesses in the plaintiff's case, were formally dismissed. The defendant Cooper directed Corporal Young to keep these witnesses together, and, with them, to follow prisoner's escort to the police-station at Hemel Hempstead. The defendants then marched with the plaintiff, who was placed between the two privates, to the police-station, and there charged by the defendant Frogley with the offence of larceny. After inquiry, and after hearing the evidence of some witnesses, the defendant Frogley took the plaintiff into custody. As there is now no question affecting the defendant Frogley it is unnecessary further to pursue the history of the case, except to say, in justice to the plaintiff, that when put on his trial, as he afterwards was, at the quarter sessions at Canterbury, he was honourably acquitted on the charges made against him. Upon these facts the plaintiff's case against these three defendants, Cooper, Lovelock, and Short, is a case of assault and false imprisonment, based upon the treatment to which they subjected him by keeping him in detention as their prisoner from the time when they took him in charge at Shorncliffe station to the time when they gave him in charge at Hemel Hempstead. It was not pleaded or contended on behalf of the defendants in answer to the plaintiff's claim that a felony had been committed. Therefore, if the matter had been one touching ordinary civilians the action was, except as to damages, an undefended action. The defendants, however, contended that this was not a case touching ordinary civilians, but a case in which they, and the plaintiff also, ought to be treated as persons under military law; that the order of Captain Foote was, under the law, justifiable; that even if it was in any respect illegal, it was not obviously illegal, and that as they simply obeyed an order which they were bound to obey they were in no case responsible. These being, as regards these defendants, the only defences of law, and the facts upon which they were based not being in dispute, the only question I had to ask the jury in regard to the claim against these defendants was as to the amount of damages to be awarded to the plaintiff in the event of the defences in point of law being held to be bad. The jury assessed these damages at £300.

I have now to decide whether the defendants are entitled to succeed upon any of the points of law which they have put forward. I have come to the conclusion that they are not. In the first place, at the time of the acts of which the plaintiff complains—*i.e.*, during the conveyance of the plaintiff in custody from Shorncliffe to Boxmoor railway station and then to Hemel Hempstead police-station—I do not think that either the plaintiff or the defendants were subject to military law. The matter depends upon the provisions of the Army Act, 1881. The most important of these is section 176. That section commences by enacting: "The persons mentioned are persons subject to military law as soldiers, and this Act shall apply accordingly to all the persons so specified." The statute then enumerates in several sub-sections, which have no bearing upon the present case, various classes of persons; and in sub-section 8 it proceeds to include all non-commissioned officers and men belonging to the volunteer forces of the United Kingdom, (*a*) when they are being trained or exercised with any portion of the regular forces or with any portion of the militia when subject to military law. Now there is no question that whilst in the camp at Shorncliffe, and, in my view, until the dispatch of the prisoner, in fact (although he stated that he was unaware of it), from Shorncliffe railway station, both plaintiff and defendants were volunteers who were being trained and exercised with a portion of the regular forces, and were therefore, according to this enactment, persons subject to military law. Captain Foote in his evidence deposed to his opinion—and this is the contention of the defendants' counsel—that the "training" or "exercise" mentioned in the section ought to be held to continue in regard to each volunteer after the camp was broken up by the departure of the volunteers, and

until the moment of his formal dismissal at his home destination, which in the case of the Hemel Hempstead party would be such a point either at Boxmoor station or after leaving Boxmoor station as the officer in command of the party might desire for the dismissal of the men. Indeed, I understand Captain Foote to go so far as to say that, in his opinion, if one of these volunteers had stolen a sheep on his way home between Boxmoor and Hemel Hempstead he could have been tried by court-martial for the offence. I cannot so construe the statute. The words in question appear to me to have a plain and sensible meaning, and to confine the subjection of the volunteer to military law within the period of his being trained and exercised with any portion of the regular forces or of the militia when subject to military law. The interpretation of Captain Foote and the defendants' counsel would add to the sub-section the words, "and when they are proceeding to or from such training or exercise." I hold that upon the departure of the plaintiff and defendants from the camp they ceased to be subject to military law; their *status* ceased to be that of soldiers, and became that of civilians subject only as to discipline to the provisions of the Volunteer Act, 1863, and subsequent statutes relating to volunteers, under none of which could the defendants justify their treatment of the plaintiff.

It is, however, contended for the defendants that even if this be the true view, and they and the plaintiff ceased to be subject to military law after leaving the camp at Shorncliffe, they are entitled to immunity by the combined effect of sections 41, 45, and 158 of the Army Act. I think this defence fails also. There is no doubt that the charge of larceny committed during his training with the regulars in the camp was an offence for which he might have been tried by court-martial under section 41; there is no doubt that his arrest by order of Captain Foote, when that charge was preferred against him, was perfectly proper and legal under section 45; and I am inclined to think that, if after his arrest it had been judged better that, instead of being tried by court-martial, the plaintiff should be handed over to the local police with the view of his being tried by the civil court, the arrest might properly have been continued, provided due diligence was used, until he was so handed over. I understood the plaintiff's counsel to be willing to concede so much. But Captain Foote did not adopt this course. He adopted the course he did with, no doubt, the best intentions, believing it to be both lawful and also expedient, and in order to prevent the inconvenience which would arise from delaying (as the holding of a court-martial or the sending of the parties concerned to Hythe police-station would delay) the breaking up of the camp and the departure of the plaintiff and the witnesses for their homes by the special train which had been ordered for their conveyance from Shorncliffe. But the course which he preferred was one for which I can find no justification in any section of the Army Act. The provision of section 158 (1) upon which reliance was placed for the defendants, appears to me not to afford any, for more than one reason. In the first place, its sanction for taking into and keeping in military custody, and for trying and punishing a person who has been, but has ceased to be, subject to military law, is, by the opening words of the sub-section, confined to cases in which "an offence under the Act has been committed" by that person. Here, *ex concessio*, Marks had not committed an offence. One might, perhaps, I agree, have expected that the sanction would have extended to the case of an offence under the Act being alleged to have been committed; but the words as they stand seem plain enough. Even, however, if the words could be interpreted as they must be interpreted in order to avail the defendants, I could find in this section no justification for that which the defendants did under Captain Foote's orders when, after they had ceased to be subject to military law, they kept the plaintiff as a prisoner during a long railway journey and a two-mile march, not in order that he might be tried by court-martial, but in order that he might be handed over to the police authority, not at the place of the alleged offence, but in a different county. I doubt whether, even if the plaintiff and the defendants continued, as Captain Foote thought they did, to be subject to military law, a detention of this kind and for this purpose could be treated as a proper exercise of the powers of military custody given by section 45 of the Army Act.

The last point taken for the defendants was that, even if the order which they obeyed was unjustifiable or illegal, still it was not obviously unjustifiable or illegal, and the defendants, who were at the time when it was given by Captain Foote subject to military law and bound to obey his orders and simply did what he ordered, ought not to be held liable for what they did. The principles of law applicable to a case such as the present, I take as they are stated by Willes, J., in his judgments in *Keighly* v. *Bell*, 4 F. & F. 763, pp. 790, 805, and in *Dawkins* v. *Lord Rokeby*, *ib.* 806, p. 831. In accordance with those principles, as I understand them, I should hold this to be a good plea for the defendants if I were of opinion that they and the plaintiff continued subject to military law during the time of the doing of the acts by the defendants of which the plaintiff complains. Even if the order were in excess of the powers as to military custody given by section 45, it would be an excess which, in my view, would not be obvious to persons in the position of the defendants. I am, however, for the reasons which I have already stated, of opinion that at the time of the acts complained of neither the plaintiff nor the defendants were subject to military law, and therefore—also, I think, in accordance with the law as laid down by Willes, J., in the cases to which I have referred—I must decide that this defence also fails. I give judgment for the plaintiff for the amount of the damages fixed by the jury.

Judgment for the plaintiff.

Solicitor for the plaintiff, *H. W. Lathom.*

Solicitors for the defendants, *J. N. Mason & Co.*, for *Sworder & Longmore*, Hertford.

Q. B. Div.
(Grantham and Channell, JJ.) Dec. 13.

ATTORNEY-GENERAL *v.* EARL GREY. (*a.*)

Inland revenue — Estate duty — Gift inter vivos—*Possession assumed to entire exclusion of donor—Interest reserved—Power of revocation—Customs and Inland Revenue Act*, 1881 (44 *Vict. c.* 12), *s.* 38 (2) (a) (c), *as amended by Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *s.* 11.

G. by deed transferred his estates, including a manor house, to the defendant, his nephew, subject, as regards property other than the mansion house, to an annual rent-charge in favour of G. for life, and subject also to the manor house being enjoyed as theretofore by G. By the same deed the defendant entered into several

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

covenants relating to the estates, and a power of revoking the deed and reassuming the property in the estates was reserved to G. upon the breach of certain of the said covenants by the defendant. The annual value of the estate at the death of G. was considerably in excess of the rent-charge reserved.

Held, that a sufficient interest and a sufficient power of revocation were reserved in the property so as to bring it within the description of property contained in the Customs and Inland Revenue Act, 1881, *s.* 38 (2) (c), *and that, on the death of G., in October,* 1894, *the whole of the property became chargeable with estate duty under the Finance Act,* 1894, *s.* 1.

Information.

By a deed dated the 19th of October, 1885, Henry, third Earl Grey (since deceased), transferred to his nephew, Albert Grey, now fourth earl, his estates in Northamptonshire, including the mansion house of Howick and its appurtenances and the effects therein, subject to an annual rent-charge of £4,000 in favour of the third earl, issuing out of all the property transferred other than the mansion house and its appurtenances and the effects therein. The deed provided that the mansion house, &c., should be held by the fourth earl in trust to permit the third earl to occupy and enjoy the same as theretofore. By the same deed the fourth earl covenanted (1) to pay certain annuities; (2) to pay the mortgages and other charges on the land and all interest then or thereafter due under them; (3) to pay the rent-charge of £4,000; (4) to keep up the mansion house; (5) to deliver farm or garden produce required for the use of the household at Howick; (6) to pay the funeral expenses, debts, &c., of the third earl; (7) not to sell or dispose of certain of the lands; and (8) at the request of the third earl to produce receipts and vouchers for payments made under clauses (1), (2), (4), or (6). It was also provided that in the event of Albert Grey, now fourth earl, dying in the lifetime of the third earl, or of any breach by the fourth earl of any covenant on his part, that it should be lawful for the third earl to revoke the deed either wholly or in part.

By a deed dated the 26th of September, 1894, the third earl, in consideration of £5,000, released the rent-charge of £4,000, and also released the fourth earl from the covenant to retain unsold the lands named in the 7th clause of the covenant in the deed of 1885, as well as from the power of revocation reserved in the same deed.

The third earl died on the 9th of October, 1894.

The average net income of the property comprised in the deed of the 19th of October, 1885, was before, as well after, the 26th of September, 1894, very considerably in excess of £4,000.

The fourth earl paid estate duty upon the value of the mansion house of Howick and the effects therein only.

The information claimed that estate duty was payable upon the value of the whole of the property comprised in the deed of the 19th of October, 1885, as property passing on the death of the third Earl Grey within the meaning of sections 1 and 2 (1) (c) of the Finance Act, 1894, and having regard to section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889.

Section 2 (1) (2) of the Finance Act, 1894, provides that property passing on the death of the deceased, which is by section 1 declared to be chargeable with a graduated estate duty, shall be deemed to include property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as to personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom.

Section 38 of the Customs and Inland Revenue Act, 1881, provides (*inter alia*): "(1) Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof; (2) The personal or moveable property to be included in an account shall be property of the following descriptions—viz., (a) Any property taken as a *donatio mortis causâ* made by any person dying on or after the 1st of June, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust, or otherwise which shall not have been *bonâ fide* made three months before the death of the deceased.

"(c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

Section 11 of the Customs and Inland Revenue Act, 1889, amends section 38 as follows: "The description of property marked (a) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

Sir Richard Webster, A.G. (*Sir Robert Finlay, S.G.*, and *Danckwerts* with him).—This property is chargeable with estate duty because (1) *bonâ fide* possession of it was not assumed by the fourth Earl Grey to the entire exclusion of the third earl; (2) there was an express reservation of an interest to the third earl; (3) an express power of revocation was reserved: *Attorney-General* v. *Worrall*, 43 W. R. 118, [1895] 1 Q. B. 99. The deed of the 26th of September, 1894, too late in any case, could not alter the effect of the deed of 1885.

Cozens-Hardy, Q.C., and *Bremner*, for the respondent.—Reservation of an interest does not render the whole of the property chargeable, but only renders it chargeable to the extent of the interest reserved. The scheme of the Acts was to impose duty on the actual benefit which accrued on the death of the deceased. This was in the present case £4,000 a year. The power of revocation was a limited one and not of the sort contemplated by section 38, which was a general power.

GRANTHAM, J. (whose judgment proceeded upon the terms of the deed), was of opinion that the property was not handed over to the present Earl Grey to the entire exclusion of the late earl and without reservation, and he was also of opinion that a power of revocation was reserved within the meaning of section 38 (2) (c) of the Act of 1881.

CHANNELL, J.—I am of the same opinion. I should be inclined myself to accede to most of the argument of Mr. Cozens-Hardy and Mr. Bremner if

I thought it was applicable to the particular case. It seems to me it is not. I think that you may probably separate the property where it is all given in one gift. Mr. Cozens-Hardy says that the fair reading of section 38 (2) (c) is that it applies to the extent to which a benefit is reserved. I am inclined to think that that is right so far as it means, to the extent of the property in which a benefit is reserved. Accordingly, taking Mr. Bremner's case of the twenty houses and an interest reserved in one, I should be inclined to think—it is not this case, and therefore I do not formally adjudicate upon it—I say, I should be inclined to think that in that case it would only be the one house upon which the duty would be payable; but it seems to me here that there is an interest reserved in the entirety of the property, and certainly there is a power of revocation reserved as to the entirety of the property, and although the power of revocation is conditional upon certain events happening, it is not the less a power of revocation within the meaning of the express words of the statute.

The point that Mr. Cozens-Hardy and Mr. Bremner made depends really upon the construction of section 38 (2) (c) of the Act of 1881. It says, "any property passing," and so on, "whereby an interest in such property" is reserved, and I think that that would be divisible. It would not be enough to have an interest in some part of the property. The words are "in such property," and I do not think it ought to be read as an interest in some part of the property.

Here the £4,000 was clearly reserved in the whole of the property, and certainly the power of revocation was. On these grounds it seems to me that the arguments of the learned counsel for the respondent are probably correct, but that they do not apply to the facts of the present case.

Solicitors, *Solicitor for Inland Revenue; Flux & Leadbitter.*

Prob. Div. & Adm. Div. } Nov. 8.
Admiralty. }

"THE CHIOGGIA." (a.)

Ship—Bottomry—Necessaries—Bond on ship, freight, and cargo paid out of proceeds of ship and freight in priority to necessaries.

The master of an Italian vessel obtained in 1896 *at an English port necessaries for the ship, and in* 1897, *being in distress for want of funds at a British Colonial port, there executed a valid bottomry bond on ship, freight, and cargo, binding himself personally by the bond. The vessel arrived in safety at her port of destination in England, but the bond not being paid, the assignees thereof instituted an action of bottomry against the vessel, her freight, and cargo, and an action of necessaries was on the same day instituted by the suppliers of the necessaries against the vessel and her freight in respect of the necessaries supplied as above mentioned. The proceeds of the ship and freight were insufficient to pay the wages of the crew, the master's wages, the bondholder's claim, and the claims in respect of necessaries.*

Held, that, after payment of the sums due for the wages of the crew and master, the bondholder had a right to exhaust the proceeds of the ship and freight in paying his claim in priority to the claims of the suppliers of the necessaries, and that the latter could not require the ship, freight, and cargo to be marshalled for their benefit.

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

This was a question of priorities.

During the months of January and April, 1896, the Goole Ropery and Ship Chandlery Co. (Limited) and Messrs. Leathanor, Pew, & Co., by the order of the master of the Italian barque *Chioggia*, supplied necessaries to that vessel when she was lying in the port of Goole to the amount of £245 17s. 7d. Subsequently *The Chioggia*, being on a voyage from Demerara to Liverpool, was compelled to put in distress into the port of St. George, Bermuda, and her master on the 9th of April, 1897, being without funds or credit, after communication with his owners and the owners of the cargo, borrowed at Hamilton, Bermuda, on bottomry of ship, freight, and cargo, the sum of £1,581 12s. 6d., at a maritime premium of 20 per cent., binding himself, his executors and administrators, for payment of the bond.

On the 1st of June, 1897, *The Chioggia*, having safely arrived at Liverpool and the bond not having been paid in due course, a bottomry action was instituted on behalf of the assignees of the bond—the Association for the Preservation of Commercial Interests as respects Wrecked and Damaged Property—the London Salvage Association—and Charles Augustus Crafer against *The Chioggia*, her freight and cargo, claiming the sum of £2,200 as the amount due to them under the bottomry bond and for costs. In this action the ship and a portion of her cargo were arrested and an undertaking was given by the owners of the cargo not arrested, who had appeared as defendants, to bring the freight into court and to pay such amount as they should be liable for.

On the same 1st of June, 1897, an action of necessaries was instituted on behalf of the Goole Ropery and Ship Chandlery Co. (Limited) and Messrs. Leathanor, Pew, & Co. in respect of the supply of the above-mentioned necessaries against *The Chioggia* and her freight, and in this action the plaintiffs claimed judgment for the sum of £245 17s. 7d. and costs.

On the 4th of June, 1897, it was ordered that certain amounts paid or to be paid by the owners of the cargo for pilotage, towage in docking, boatmen, reporting inwards, dock dues and light dues, and the cost of discharging, should be deducted from the freight before it was paid into court; and on the next day the balance of freight, less the costs of paying the same into court, amounting to £372 4s. 2d., was paid into court.

On the 15th of June, 1897, the solicitors for the bondholders delivered their statement of claim in the bottomry action praying that the court would pronounce for the validity of the bond, and that the sum of £1,897 1s. 9d. was still due on it; would condemn the defendants and *The Chioggia* and her freight in that amount with interest; and would also give the plaintiffs judgment against *The Chioggia*, her freight and her owners, for the sum of £106 8s. 8d. being the amount due to the crew of the vessel for wages, and which amount the plaintiffs, the bottomry bondholders, had paid under an order of the court allowing them to stand in the shoes of the persons to whom such wages were originally due.

On the 24th of June the Goole Ropery and Chandlery Co. and Augustus Crafer intervened in the action of bottomry and subsequently delivered a defence in which they alleged that they had reason to believe that the proceeds of *The Chioggia* and her freight would be insufficient to satisfy the claims of the plaintiff and the interveners, and therefore, if the plaintiffs should obtain judgment pronouncing for the validity of the bottomry bond, the interveners would at the trial ask the court to marshall the assets—viz., ship, cargo, and freight—and to order

that the interveners' claim be first paid out of the proceeds of the ship and freight, and that the plaintiffs' claim be paid out of the balance of such proceeds and out of the proceeds of the cargo.

No appearance was entered in either action for the owners of *The Chioggia* or in the bottomry action for the portion of cargo (certain sails) arrested in that suit, and as against the owners of the ship and the owners of the portion of the cargo so arrested the proceedings was carried on by default.

On the 12th of July, 1897, the action of bottomry was heard, and the court pronounced for the force and validity of the bottomry bond proceeded on in that action, together with interest at the rate of 4 per cent. per annum from the time the said bond became due until payment thereof with costs, and condemned the vessel *Chioggia*, the portion of cargo then under arrest, and also the defendants, the owners of the rest of the cargo now or lately laden on board the said vessel, and the freight remaining in court, in the sum of £1,897 19s. 6d., the amount due of the said bond and in the aforesaid interest and costs, but without prejudice to other claims against the said vessel; and also condemned the said ship and freight in the sum of £106 8s. 8d., the amount of wages paid by the plaintiffs to the crew of the said vessel. The court also reserved all questions of priority as to payment of such claims, and decreed the said cargo then under arrest to be appraised and sold.

In pursuance of this order *The Chioggia* and the portion of cargo under arrest was appraised and sold, and after deducting the expenses of sale the net proceeds were paid into court, the amount of the net proceeds of the ship so paid into court being £204 12s. The master of *The Chioggia* not having been paid his wages, also intervened as a defendant in the bottomry action.

October 26, 1897.—The action of necessaries (in which the plaintiffs in the bottomry action had intervened as defendants) came on for hearing before the judge, Barnes, J., together with a motion on behalf of the plaintiffs in the bottomry suit, that the sum of £576 16s. 10d. in court in that action, being the proceeds of the ship *Chioggia* and the freight, paid in under the order of court of the 4th of June, 1897, might be paid out to the solicitors of the bondholders: that thereout the bondholders might reimburse themselves the sum £106 8s. 8d. paid by them as wages to the crew as above-mentioned, and pay to the master of *The Chioggia* the sum of £101 in respect of his wages, &c., and to the Italian consul at Liverpool the sum of £10 0s. 3d. claimed by him as due to the Invalid Seamen Fund, and that the balance of the said amount in court after payment of the said amounts—viz., £359 6s. 6d., might be applied in part satisfaction of the amount due to the plaintiffs (bondholders) under the judgment herein for the amount of the bottomry bond with interests and costs in priority to the claim for necessaries, and that the costs of the motion be costs in the action.

Balloch, for the plaintiffs in the bottomry action, in support of the motion.—The amounts paid for the wages of the crew and the master must be admittedly first paid out of the proceeds in court (*The Edward Oliver*, L. R. 1 A. & E. 379, 15 W. R. Adm. Dig. 27; *The Daring*, L. R. 2 A. & E. 260, 16 W. R. Adm. Dig. 22) but after these claims are satisfied the remaining proceeds must be applied towards payment *pro tanto* of the bottomry bond interest and costs, and until this be done the bondholders have no right to claim anything from the defendants the owners of cargo: *The Constancia*, 2 Wm. Rob. 404, 460, 464; *The Gratitudine*, 3 C. Rob. 240; *The Prince Regent*, cited 2 Wm. Rob. pp. 84, 85; *The Priscilla*, Lush. 1, 8 W. R. Adm. Dig. 20.

Butler Aspinall, for the claimants for necessaries intervening in the bottomry action.—The claimants for necessaries are entitled to a judgment in default against *The Chioggia* and her freight,* and assuming them to have obtained this judgment, they, on the principles on which the cases of *The Edward Oliver*, *The Daring*, and *The Eugenie*, L. R. 4 A. & E. 123, were decided, are entitled to rank against the proceeds of *The Chioggia* and her freight in priority to the bondholders, who can resort to three funds—viz., *The Chioggia*, her freight, and her cargo.

He referred to Williams & Bruce Admiralty Practice, 68, 69; White & Tudor Leading Cases in Equity, notes to *Aldrich* v. *Cooper*.

Balloch, in reply.—This is not a case of marshalling as in *The Eugènie*, 21 W. R. 957, L. R. 4 A. & E. 123, and other cases cited. In the first place the necessaries' claimants have no maritime lien; and secondly, the cargo-owners are entirely strangers to the claims for necessaries, which were incurred before the cargo was loaded, and there can be no equity compelling them to have the assets marshalled and indirectly themselves pay these claims.

He referred to *Ex parte Kendall*, 17 Ves. 514; Snell's Principles of Equity, p. 292.

Cur. adv. vult.

Nov. 8.—BARNES, J.—This is a motion by bottomry bondholders for payment out of court to them of the net proceeds of the Italian ship *Chioggia* and her freight, and that they may be at liberty thereout to reimburse themselves the sum of £106 8s. 8d. paid by them to the crew for wages, and to pay the master £101, and the Italian consul £10 1s. 8d., and to apply the residue in part satisfaction of the judgment recovered by them in respect of their bond. The motion is supported by the owners of the cargo, but is opposed by the Goole Ropery and Ship Chandlery Co. (Limited) and others, who have supplied necessaries to the said vessel, and obtained judgment against the ship and freight in respect thereof. The bond was given on ship, freight, and cargo whilst the vessel was on a voyage from Demerara to Liverpool on the 9th of April, 1897. After the vessel arrived at Liverpool an action was instituted by the bondholders against the ship and freight and cargo, in which an order was made that the plaintiffs should be at liberty to pay the wages and the amounts legally due to the crew, and to take over their rights; and in pursuance of this order the plaintiffs have paid the crew's wages, amounting to £106 8s. 8d. Judgment was obtained on the 12th of July last in this action for £1,897 19s. 6d. against the ship and freight and the owners of the cargo, who had given an undertaking in respect of the cargo, but all questions of priorities were reserved. The necessaries above-mentioned were supplied at Goole in January and April, 1896, before the vessel sailed for Demerara. Judgment was obtained on the 26th of October last against the proceeds of the ship and freight for the sum of £245 17s. 7d., subject to questions as to priority. The ship has been sold by the marshal, and the net proceeds of the ship and freight, after deducting the marshal's expenses, are £576 16s. 10d. The cargo was of the value of £2,052 10s. 9d.

The suppliers of the necessaries have no maritime lien upon the ship and freight, but, having recovered judgment against these interests, they contend that they

* A decree to this effect, subject to priorities, was, at the end of the arguments, made by the court.

have a right to have the assets marshalled in their favour, as they have only the ship and freight to look to, whilst the bondholders have the security of ship, freight, and cargo. The value of the ship, freight, and cargo appears to me enough to meet all the claims and costs. The cargo-owners, in whose interests the case was argued by Mr. Balloch, contend, however, that the bondholders have a prior right to the proceeds of the ship and freight, as against the necessaries' men, and must exhaust these proceeds before coming on the cargo, and that if the assets are marshalled the effect will be to compel the cargo-owners to pay the claim of the necessaries' men, with which they have no concern. Several cases were cited by counsel, but they do not seem to have much bearing upon the present question.

It was not disputed that the claim of the bondholders has priority over that of the necessaries' men, nor that the cargo cannot be made subject to the payment of the bond until the proceeds of the ship and freight have been exhausted, but the contention of the necessaries' men, as above indicated, was that the bondholders, having two funds upon which they could claim—namely, the proceeds of the ship and freight on the one hand, and the cargo on the other, whilst the necessaries' men can only claim against the proceeds of the ship and freight, the latter ought, according to the doctrine of marshalling, to be paid out of the last-mentioned proceeds. But marshalling should not be permitted to the prejudice of third persons. According to equitable doctrines, in order to marshal, not only should there be two creditors of the same person, but one of them should have two funds belonging to the same person to which he can resort. In the present case the two funds belong to different persons—namely, the ship-owners and cargo-owners respectively, and in my opinion the necessaries' men have no right of marshalling. They have no equity to have the claims adjusted so as to compel the cargo-owner in fact to provide the means of discharging the claim for necessaries.

The case of *The Edward Oliver*, L. R. 1 A. & E. 379, 15 W. R. Adm. Dig. 27, which was principally relied on by the counsel for the necessaries' men, does not apply, although the effect of that decision was to compel the cargo-owners to pay a balance which was greater by the exact sum paid to the master out of the proceeds of ship and freight. The master had a maritime lien upon those proceeds for the amount of his claim, and it was merely decided that the rule that a master who has bound himself, as well as the ship and freight, for the payment of a bottomry bond, is not entitled to payment of his own claim in priority to that of the bondholders, cannot be invoked by the cargo-owners, and will not be acted upon where the bondholder will not be prejudiced by the master being paid before him. The net proceeds in court—£576 16s. 10d.—must, in my opinion, be paid out to the bondholders, and thereout they must be directed to repay themselves the said sum of £106 8s. 8d., and to pay to the master the said sum of £101, and to the Italian consul £10 1s. 8d. on proof to the registrar that these sums are due, and to apply the balance in discharge, *pro tanto*, of the amount due under their judgment on their bottomry claim.

Solicitors for the plaintiffs in the action of bottomry, *Walton, Johnson, Bubb, & Whatton.*

Solicitors for the defendants, owners of the cargo of *The Chioggia*, and for necessaries men intervening, *Thomas Cooper & Co.*

House of Lords.

From C. A. (England). Nov. 30.

BADISCHE ANILIN UND SODA FABRIK *v.* BASLE CHEMICAL WORKS, BINDSCHEDLER. (*a.*)

Patent — Infringement — Patent applicable to United Kingdom only—Infringing goods sent to England—Order from English purchaser.

A manufacturer of goods abroad which are an infringement of a patent applicable to the United Kingdom alone, who sends these goods by post to an English customer in compliance with his order to so send them, does not infringe the patent for the United Kingdom, for in such a case the sale and delivery take place outside this country.

Decision of the Court of Appeal (45 *W. R.* 481, [1897] 2 *Ch.* 322) *affirmed.*

This was an appeal by the plaintiffs in the action from an order of the Court of Appeal (Lindley and A. L. Smith, L.JJ.; Rigby, L.J., dissenting): 45 W. R. 481, [1897] 2 Ch. 322; reversing a decision of North, J.

The facts are set out in the report below, and shortly they are as follows:

The appellant company were the owners of a valid patent applicable only to the United Kingdom.

The respondent Bindschedler, a Swiss subject, who traded under the name of the "Basle Chemical Works, Bindschedler," was a chemical manufacturer at Basle in Switzerland, and in compliance with orders given him by post by Johnson & Co., drysalters in London, sent to them by post through forwarding agents in Basle certain goods which infringed the appellants' patent.

The appellant company took proceedings to restrain the respondent and Johnson & Co. from infringing the patent rights of the appellants; and Johnson & Co. submitted to an order, and eventually North, J., granted an injunction against the respondent which was reversed by the Court of Appeal.

The plaintiff company appealed.

Moulton, Q.C., Cripps, Q.C., and *Lawson,* for the appellants.

Asquith, Q.C., Upjohn, Q.C., and *Roskill,* for the respondents, were not called on.

Lord HALSBURY, C.—In this case it appears to me that the question which is raised admits of a very simple solution. The person against whom this process is asked for, is a Swiss subject living in Basle, and it cannot be doubted that unless he has done some act in this country no process could or ought to be issued against him.

The allegation upon which the process is sought is that he has used, vended, or exercised in this country a patented article. It is quite certain that he has not done so himself by his own hand; therefore the only question is whether he has been a party to it in any sense which makes his act one of the acts prohibited by our law in this country. The facts are very simple. A person wrote from this country to have a certain quantity of a patented article sent by post to him in London. I pass over the intermediate point between the maker and the vendor in Basle, and I will assume for the purpose of what I have to say that it was to be directly sent by post by the present defendant. The fact that the sale was com-

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

pleted by delivery cannot be doubted—these were goods sold and delivered. Shortly stated, the question is, where the delivery took place. I have stated all that in fact took place with reference to the correspondence and the agreement to purchase, and then, inasmuch as it is admitted that the defendant did not himself bring into this country the patented article, I do not understand how it can be possibly otherwise put than that he did it by someone else, according to the perfectly familiar legal maxim. That brings us to the question of who it was that did bring it into this country. It was ingeniously suggested that you have nothing to do with the relationship between the parties; the question is said to be: "Who caused it to be brought? You have nothing to do with what character the bringer filled." My answer to that is, that that is the whole question: "What character did the bringer fill; was he the agent of the seller to bring; or was he the agent of the buyer to bring the article to him?" The facts have all been stated, and it appears that the seller sent, in pursuance of the order from the buyer, to a particular carrier named—I say a particular carrier named, because the post-office is but a carrier after all; whatever municipal regulations there may be made about the carriage of letters, the post-office is simply a carrier of parcels like any other carrier. In this particular case, therefore, there is a named carrier who, by the direction of the buyer, receives the goods on behalf of the buyer. It is not necessary that the carrier should have been named. If, according to the ordinary course of delivery, the carrier would be the person who would receive it, that would be just as good, for the purpose of the argument, as if the carrier had been actually named; but we have not to consider that question here, because the carrier is named. Then for what reason am I to depart from the well-known and recognized principle of law that, under these circumstances, when goods are delivered by the order of the buyer to a named carrier, from that moment the goods vest in the buyer? It is said, "Oh, you have nothing to do with the question of whether a change of property takes place or not." Why not? You must look behind the rule of law and see the reason for it. The reason for it is that at that moment, according to the course of carriage, or here, according to the specific directions, that is a delivery to the buyer. That is the reason; and, therefore, if you once assume that the delivery in Basle was a delivery to the buyer, what pretence is there for saying that this was an act done in this country by the seller, when the whole thing—the purchase and the delivery—took place in Switzerland? It seems to me that that is decisive of the question. I am myself, I confess, not impressed by the reference either to *Reg.* v. *Coombes*, 1 Leach C. C. 388, or to the hypothetical cases put of the chute or the throwing of patented articles over the border between two places close to each other. With reference to *Coombes' case*, I think one may say that there is a confusion of thought between the technical rules of criminal venue and the question who is the person doing the act; but apart from such a comment as that, there is this obvious distinction between all those three cases and this—that the act is completed by the person who is assumed to be the author of the act in each of the cases so propounded, but here there is this difference, that an intelligent acting agent is interposed between the person who sells in Switzerland and the person who carries away from Switzerland to England. In order to make the analogy complete, you must have some person or another in *Coombes' case* to help the bullet on to its destination, or, in the other case, to suck it down as Smith, L.J., puts it, or to put it on some place where the natural course of gravitation would bring it down apart from any other act by anyone else. I think that these are rather fanciful suggestions because the real substantial question here is, What jurisdiction have we over an act which is done in Switzerland by a Swiss subject, and which, in all that is done, is (it cannot be doubted) an act within the jurisdiction of the Swiss courts, if there were any patent law applicable to it, but is not within our jurisdiction at all? With reference to the comments of North, J., who, in the first instance, granted the relief that was prayed, the fallacy which I cannot help thinking runs through the whole of his lordship's reasoning is this: He starts with the assumption that an illegal act is being done, and that, according to the familiar legal maxim, the defendants are parties to that illegal act, and that, therefore, if you catch them here, you may assail them by process. The answer is, that there was no illegal act done upon the hypothesis which I have adopted. It was perfectly lawful for this defendant to sell in Basle. It was perfectly lawful for this defendant to deliver in Basle; and, if I am right, the sale and delivery both took place outside of our jurisdiction. Of course, it is easy to represent, by various and lengthened links of causation, that the defendant, in one sense, caused it to be brought to this country. So he did. So did the man who manufactured the article in the factory at Basle, in that sense. But then, according to another equally familiar maxim of the law, it is the proximate and not the remote cause that is looked at for legal purposes.

Under these circumstances, it seems to me that there is no pretence for this action, and I entirely concur with Lindley and Smith, L.JJ., that if the facts had been properly ascertained at the time that this writ was allowed to be served out of the jurisdiction, it ought not to have been served; and that if the defendant had thought proper to make an application to set aside the service, that application ought to have been granted.

Under these circumstances I move your lordships that the judgment be affirmed, and the appeal dismissed with costs.

Lord Herschell.—I am entirely of the same opinion, and if it were not for the difference of opinion which there has been in the courts below, I should have said that this was a very clear case indeed. The appellants (the plaintiffs in this case) have to make out that the defendant made, used, exercised, or vended a patent article, or that which was patented, in this country. Our patent law does not extend beyond this country. Acts which here would be infringements of the patent, are no infringement if they are done in a country which is not within the ambit of the patent. In this case the only contention is that the defendant used the patented article in this country. It is admitted that it was sold and delivered in Switzerland; everything, therefore, that is necessary to the constitution of the vending took place there.

But it is said that, although sold abroad, it was transmitted from abroad after the sale to the purchaser in this country, and that, whilst being so conveyed in this country, there was a using of the patent in this country. Now, the defendant himself did not so convey it, nor did any agent on his behalf so convey it. The admitted facts establish that the post office authorities and the railway company, who, in fact, conveyed it, were acting in so conveying it, not on behalf of the defendant, but on behalf of the purchaser; and they were not even carrying the pro-

perty of the defendant, they were carrying the property of the purchaser.

Under these circumstances, it is impossible to say that anything that was done in this country was done either by the defendant or by an agent of the defendant. But Mr. Moulton says, "What a very slight difference. If the purchaser had not directed it to be sent by post and the post-office had been selected by the seller, the defendant, then the case would have been altogether different. What difference can there be if he put it in the post because the purchaser has selected the post, instead of himself selecting it? In each case it is equally carried by the impulse of the seller to this country and through this country." I think that the answer is a very simple one. In the one case you could show that the persons carrying it in this country and delivering it here were agents of the defendant, and that, therefore, he was responsible for their acts. In the other case you cannot show that the persons carrying it in this country and delivering it here were agents of the defendant, and that he is responsible for their acts. You may say that that is a very slight difference, but it is a vital difference, for in the one case you can establish agency, and in the other case you cannot. But in my opinion the difference goes deeper than that. If the sale had not been completed under the contract by delivery in Basle, but if the goods were according to the order to be delivered by the seller in England, the sale would not have been constituted and complete in Switzerland. Until the goods had been delivered in London there would have been no sale. The property in the goods would not have passed to the purchaser, they would still have been the vendor's goods, and the vendor could not have demanded the price of them from the purchaser because the sale was not complete. In that case I apprehend the vending would have been in England, and it would have been impossible for him to get out of the charge, whatever process you used against him, of vending in England, when there was no completed sale constituted except by reason of an act done by him through his agents in England. Therefore, in that case, I think that he would have brought himself within the charge of vending in England, but I do not think that it would have been because he was using the patented article in England by having it carried from one place to another. The truth would have been that, in that case, he was vending it in England because there was no complete sale until he had done that act in England. If that was so, there is a distinction, an absolutely vital distinction, between the case put and the present case. I only desire to add this: supposing that a case of vending could not be established, that no part of the sale was constituted in this country, and that the only charge possible were a charge of using, I do not intend to express any opinion, but I desire distinctly to reserve my opinion whether the mere transport from place to place in this country of a patented article would necessarily be a using in this country. There are some very pertinent observations on the subject by James, L.J., in *Nobel's Explosives Co.* v. *Jones*, 30 W. R. 294, 17 Ch. D. 721; in that case he pointed out that it might be that the warehouse-keeper who warehoused the goods could be said to use the patented article because the very object of the patent was to make the storing and carriage of that particular article safe (it was a form of dynamite), and therefore the warehouse-keeper who stored it might be said to be using the patent, not merely because he had got the patented article in his warehouse, but because he had got the advantage, having it in his warehouse, of storing there an article which he could not have stored safely but for its patented condition. That, according to James, L.J.'s, suggestion, might be using the patented article. In the same way there are other cases in which the article is, when applied in a particular way, of itself serving the purpose for which it is patented. Those are cases in which it may be that the mere possession, transport, or warehousing of the patented article may amount to a using of it, but it by no means follows that in a case where the person transporting it or warehousing it gets no advantage out of the patent—that is to say, where it can be no more easily and no more safely and no more advantageously carried, warehoused, or stored than if the article were not a patented one, but were an article entirely outside the patent—it by no means follows that the transporting from place to place, or otherwise dealing with the patented article in that sort of way would constitute a using. I do not desire to decide that point now, but I desire to draw attention to that distinction, because it was strongly urged—and, indeed, it seems to have been rather assumed in the court below—that although the sale was entirely outside the kingdom, if the act of transport within the United Kingdom could be brought home to the defendant, that would make out a use in the United Kingdom. If such a case should arise, I desire to reserve complete freedom of action with regard to that point.

I should like to add one word, that with all that the Lord Chancellor said about *Coombes' case* and its application to this case I entirely agree.

Lords MACNAGHTEN, MORRIS, and SHAND concurred.

Lord DAVEY.—I entirely concur in the conclusion your lordships have arrived at, and in the reasons for that conclusion which have been given by Smith, L.J., in the Court of Appeal and by your lordships. If the appellants could have made out that the goods were contracted to be, and were, delivered in London, I think, as at present advised, that that would have been a vending in this country within the meaning of the Patent Act. In my opinion, there was no delivery in London, and nothing was done by the respondent in this country. Like Lord Herschell, I desire to express no opinion upon the nice question which might have arisen under other circumstances, but in my opinion does not arise in the circumstances of this case.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *J. H. & J. Y. Johnson.*

Solicitors for the respondent, *Ward, Perks, & McKay.*

High Court of Justice.

Q. B. Div.
(Day and Lawrance, JJ.) } Jan. 21.

BRUNE *v.* JAMES. (*a.*)

County court—Practice—Appeal—Action where the debt or damage claimed does not exceed £20—Injunction—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

In an action for trespass brought in a county court, where the damage claimed did not exceed £20, the plain-

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

tiff recovered 6d. damages and was granted an injunction restraining the defendant from continuing the trespass.

Held, that an appeal lay from the injunction.

Appeal from a county court.

The action was brought for trespass. The plaintiff claimed £2 damages and an injunction restraining the defendant from continuing the trespass. The county court judge gave judgment for the plaintiff with 6d. damages, and granted the injunction. No leave to appeal was granted.

The County Courts Act, 1888, s. 120, provides: "If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity . . . the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court . . . provided always that there shall be no appeal in any action of contract or tort . . . where the debt or damages claimed does not exceed twenty pounds . . . unless the judge shall think it reasonable and proper that such appeal should be allowed, and grant leave to appeal."

Howland Roberts, for the respondent.—There is no appeal without the leave of the judge. The cause of action is tort, and, as the damages claimed are less than £20, it comes within the proviso of section 120. The injunction was not a separate cause of action. It was one of the remedies for the tort: *Martin* v. *Bannister*, 27 W. R. 421, 28 *Ib.* 143, 4 Q. B. D. 491.

Duke, for the appellant.—The injunction is an equitable matter. Section 120 gives a right of appeal in every case of a point of equity, and the proviso, which only deals with common law actions, does not apply in the case of points of equity. The injunction only is appealed against, the trespass and damages having been admitted.

DAY, J.—As you are only appealing against the injunction you may proceed.

LAWRANCE, J., concurred, and the appeal was proceeded with.

Solicitors, *Sayer & Hortin*, for *W. C. Vallance*, Ottery St. Mary; *Torr & Co.*, for *Every*, Honiton.

Q. B. Div.
(Day and Lawrance, JJ.) Jan. 20.

MILLARD v. WASTALL. (a.)

Public health—Nuisance—Black smoke—Notice—Public Health Act, 1875, *s.* 94.

A notice under section 94 *of the Public Health Act*, 1875, *requiring a person to abate a nuisance of black smoke, is good notwithstanding it omits to state what works and things are required to be executed and done in order to abate the nuisance.*

Cases stated by justices.

The respondent was summoned under section 95 of the Public Health Act, 1875, for non-compliance with a notice, served on him, requiring him to abate a nuisance caused by a chimney (not being the chimney of a private dwelling-house) sending forth black smoke.

The preliminary objection to the summons was taken that the notice did not state the works and things required to be executed and done in order to abate the nuisance.

The summons was thereupon dismissed.

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The Public Health Act, 1875, s. 94, provides: "On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act or default or sufferance the nuisance arises or continues . . . requiring him to abate the same within a time to be specified in the notice and to execute such works and do such things as may be necessary for that purpose. . . ."

F. Lowe, for the appellant.

The respondent did not appear.

DAY, J.—It is not necessary for the notice to state the works required to be done in such a case as the present. The local authority are not in all cases bound to invent works. In the present case black smoke, discharged from the respondent's chimney, caused a nuisance, all that was necessary was for him to use coal which did not give off black smoke or to treat the fire in such a way as to avoid committing the nuisance.

LAWRANCE, J.—I agree. It is clear that the passage in section 94 referring to works and things to be executed or done could not apply to all the instances of nuisances given in section 91; for example, to a nuisance caused by keeping animals. It is no more necessary to order works to be done when a chimney smokes than when a person keeps a pig so as to cause a nuisance.

Appeal dismissed.

Solicitors for the appellant, *Meredith & Co.*, for *Hubbard*, Ramsgate.

House of Lords.

From C. A. (England). Dec. 14.

ALLEN v. FLOOD AND ANOTHER. (a.)

Master and servant—Trades union—Procuring dismissal of servant—Intention to injure—Malice—Motive—Cause of action.

Outside the criminal law an act lawful in itself does not cease to be so, no matter how reprehensible the motive for doing it may be. The existence of a bad motive is therefore immaterial when considering whether an act is a civil wrong or not.

To induce employers, therefore, to dismiss their workmen, and not to employ them in future, in consequence of which the workmen suffer loss, is not, where no breach of contract is involved, a wrongful act, whatever the motive for doing it may be.

Decision of the Court of Appeal (43 *W. R.* 453, [1895] 2 *Q. B.* 21) *reversed* (Lord Halsbury, L.C., and Lords Ashbourne *and* Morris *dissenting*).

Keeble *v.* Hickeringill, 11 *East* 574*n*; Lumley *v.* Gye, 1 *W. R.* 432, 2 *E. & B.* 216; *and* Temperton *v.* Russell, 41 *W. R.* 565, [1893] 1 *Q. B.* 715, *considered.*

This was an appeal by Allen, one of the defendants in the action, from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.) reported under the name of *Flood* v. *Allen*, 43 W. R. 453, [1895] 2 Q. B. 21, refusing an application by the appellant for a new trial of an action tried before Kennedy, J., with a jury, or for judgment, and

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

affirming the decision of that judge on further consideration.

The facts and evidence will be found at some length in some of their lordships' judgments. Shortly the facts are as follows: The action was brought by two members of the Shipwrights' Union against three members of the United Society of Boilermakers and Iron Ship Builders. The plaintiffs Flood and Taylor (the present respondents) alleged that the defendant Allen, and the defendants Jackson and Knight, maliciously and wrongfully, and with intent to injure the plaintiffs, procured and induced the Glengall Iron Co. to dismiss the plaintiffs from their employment, and not to engage or employ them in future. The plaintiffs were workmen engaged by the day to do wood-work at the Glengall Iron Co.'s works, and were recognized as being men who had some time previously been doing ironwork in another yard. The boilermakers in the yard reported this, and finally Allen, the local delegate of their union and present appellant, went to the managing director of the Glengall Iron Co. and stated, in effect, that, unless the plaintiffs were discharged all the members of the Boilermakers' Union then being employed by the company would be called out and cease to work. The plaintiffs were therefore discharged by the company. At the trial of the action before Kennedy, J., and a jury, the latter, in answer to certain questions, found that Allen maliciously induced the company to discharge the plaintiffs, and also not to re-engage them, and they gave £20 damages to each plaintiff. Upon further consideration the learned judge gave judgment for the plaintiffs for £40 against Allen, and his judgment was sustained by the Court of Appeal.

Against these decisions Allen appealed.

The case was twice argued. On the further argument, which began towards the end of March, 1897, Lord Ashbourne and Lord James of Hereford were present. The judges were summoned, and after taking time to consider the question left to them, which was "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" delivered their opinions to the House in June, 1897. Hawkins, Cave, North, Wills, Grantham, and Lawrance, JJ., answered in the affirmative; Mathew and Wright, JJ., in the negative.

Cohen, Q.C., and *Robson, Q.C.* (*E. Morten* with them), for the appellant.

Lawson Walton, Q.C., and *Rufus Isaacs*, for the respondents.

The arguments and cases are dealt with in the judgments.

The House took time for consideration.

Dec. 14.—Lord HALSBURY, L.C.—In this case the two plaintiffs sued three persons as defendants for having maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced the employers, *videlicet*, a certain company called the Glengall Iron Co., to break contracts and not to enter into contracts with them, whereby the plaintiffs had suffered damage.

I have compendiously stated the cause of action, as I conceive it to be, in order to discuss by itself the main and important principle which is at stake in the determination of this appeal; but I shall return to the question of the pleadings and to the course of the trial before Kennedy, J., since it appears to me that some confusion has been created by not keeping separate, objections directed to those subordinate parts of the appeal, from the cause of action itself as I have stated it.

The two plaintiffs were shipwrights, and were working in their trade on board a vessel called *The Sam Weller*. The vessel was being repaired, and the two plaintiffs were engaged by the Glengall Iron Co. to work at their trade in the repair of the vessel.

I think there is much to be said for the doubt thrown out by Hawkins, J., in his elaborate and most able opinion, whether the assumption was accurate on which both parties conducted the case—namely, that there was no contractual relation between the employers and employed so as to bring into debate the question of whether there was any inducement offered to the Glengall Iron Co. to break contracts with the plaintiffs. But for the present I will assume that there was no contract by which the company were bound to keep the plaintiffs in their service till the repairs of the vessel were completed, while on the other hand there was no reasonable doubt that but for what was done by the defendant they would have been kept at work until the termination of the repairs.

I am not concerned to discuss minutely the evidence where the witnesses are in conflict, or where it may be contended that the witnesses relied on by the plaintiffs have exaggerated or misunderstood what was said by the defendant. Such questions were for the jury, and if there was any reasonable evidence for them it was for them, and not for me or for anyone else, to decide.

The plaintiffs gave evidence that while thus employed the defendant Allen came to the responsible manager of the Glengall Iron Co. and made certain communications (which I will deal with presently, because upon the character of those communications much depends), and that in consequence of those communications they were discharged from their employment. As to the one being the consequence of the other, although in a certain sense it is still a question of fact, I confess I am surprised in no small degree to hear a doubt suggested that it was not in consequence of the communications made by Allen that the plaintiffs were discharged. One of the officers of the defendant company, it is true, explains that it was for peace and quietness in the yard, but though his words are accompanied by such expressions as these I should have thought no one could have seriously doubted that what he meant (and, indeed, I think what he said), in the ordinary intelligible use of language, was that he discharged them because he could not have the work in his yard interrupted. I confess I am wholly unable to understand what is stated by some of your lordships, that the men were not discharged by reason of anything that Allen said, and that the boilermakers would have ceased working even if Allen had said nothing. This is not the evidence, and what is more important it is in the teeth of the express finding of the jury in answer to Kennedy, J.'s, question, as I will presently show.

And in truth if this were accurate there would be nothing to discuss since in that case Allen would have done nothing that caused any damage to anyone.

And now I will quote as nearly as I can the language which is alleged to have been used by Allen in his communications. I quote first what was stated by Mr. Halkett, who was the managing director of the Glengall Iron Co. Allen said: "He had received word from *some* of the boilermakers that were working in our yard that they wanted to see him, and he came round and had an interview with these men, and they told him that we had two shipwrights engaged in our employment who were known to have done ironwork before in Mills & Knight's yard, and that unless these two men were discharged from our

employment that day all the ironworkers belonging to his society would leave off work that day, and they gave as the only reason that these men were guilty of doing ironwork in Mills & Knight's yard. . . . The substance of what he said was that they were *really trying to put an end to this practice* of doing ironwork by the shipwrights, to stop shipwrights being engaged in ironwork. That it was not from any ill-feeling against ourselves nor against any men in particular—Flood and Taylor; but they—that is, the boilermakers—had made up their minds—or we have made up our minds—that wherever it is known that any shipwrights have been engaged doing ironwork, their workmen—that is, the boilermakers—would cease work on the same ship on the same employment."

Then a question was asked: "Did he say anything in regard to Flood and Taylor in respect of other yards besides yours?" and the answer was: "Not in a particular sense—in a general sense that these men would be followed—that these men were known—it was so difficult to get them known; that these men were known, and wherever these men were employed the same action would be taken there as had been taken in our place." He also said: "You have no option. If you continue to engage these men our men will leave. . . . It was in consequence of that that the men were discharged. It was the fear of the threat being carried out—of the men leaving—the boilermakers. If the boilermakers had left or had been called out it would seriously have impeded our business. . . . The threat to withdraw these ironworkers extended to every workman we had in our employment at whatever place." He goes on to say (after an embarrassing interruption) that "the threat was to withdraw the ironworkers in the employment of the Glengall Iron Co. from every ship or every job upon which the Glengall Iron Co. were engaged on which the men of their union were employed"

Mr. Edmonds, the foreman of the Glengall Iron Co., deposed as follows: "Mr. Allen has come here, and says that if those two men"—that is, Flood and Taylor—"are not discharged, all of the ironmen will knock off work or be called out. I will not be sure what term he used. I asked Mr. Allen the reason why. He said because those two men have been working at Messrs. Mills & Knight's on ironworks. I told him I thought it was very arbitrary on his part to do anything like that. I told him I thought it was not right that Messrs. Mills & Knight's sins should be visited upon us."

"*Q.*—Did anything else take place?

"*A.*—For the reason that we were not employing the shipwrights on ironwork, and never had done so—not at the Glengall. There was a lot of other conversation, but that is not material to this case. He says that was the case, and if these men were not discharged their men would be called out or 'knocked off.' I will not be sure what term he used. Me and Mr. Allen had a few words, but that is immaterial to this. I think that is all that is material to this case.

"*Q.*—Was anything said about other yards?

"*A.*—Yes. When I spoke about it not being right to visit Mills & Knight's sins on us, he said the men would be called out from any yard they went to—they would not be allowed to work anywhere in London river."

As I have said, in the face of this evidence, how anyone can doubt that it was the communication made by Allen that caused the dismissal of these two men I am not able to understand, and in what I have to say hereafter I shall assume, as proved—or, at all events, as established—by evidence proper to be submitted to a jury, that it was Allen who caused the dismissal of the plaintiffs.

The first objection made to the plaintiffs' right to recover for the loss which they thus undoubtedly suffered is that no right of the plaintiffs was infringed, and that the right contended for on their behalf is not a right recognized by law, or at all events only such a right as everyone else is entitled to, deprive them of if they stop short of physical violence or obstruction. I think the right to employ their labour as they will is a right both recognized by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong.

Very early authorities in the law have recognized the right, and in my view no authority can be found which questions or qualifies it. The schoolmaster who complained that his scholars were being assaulted and brought an action; the quarry-owner who complained that his servants were being menaced and molested, were both held to have a right of action. And it appears to me that the importance of those cases and the principle established by them has not been sufficiently considered. It is said that threats of violence or actual violence were unlawful means; the lawfulness of the means I will discuss hereafter. But the point on which these cases are important is the existence of the right. It was not the schoolmaster who was assaulted; it was not the quarry-owner who was assaulted or threatened; but nevertheless, the schoolmaster was held entitled to bring an action in respect of the loss of scholars attending his school, and the quarry-owner in respect of the loss of workmen to his quarry. They were third persons; no violence or threats were applied to them, and the cause of action, which they had a right to insist on, was the indirect effect upon themselves of violence and threats applied to others.

In my view there are binding authorities to show that the preliminary question—namely, whether there was any right of the plaintiffs to pursue their calling unmolested, must be answered in the affirmative. The question of what is the right invaded would seem to be reasonably answered, and the universality of the right to all her Majesty's subjects seems to me to be no argument against its existence. It is, indeed, part of that freedom from restraint, that liberty of action which, in my view, may be found running through the principles of our law.

As I have said, I will deal separately both with the remedy for the infringement of that right, if it has been infringed, and with the means.

Upon this part of the case I wish to quote and make my own the language of Bramwell, B., in *Ex v. Druitt and Others*, 10 Cox C. C. 592, at p. 600: "When the law gave, or rather acknowledged, a right, it provided a punishment or a remedy for the violation of that right. That was a cardinal rule and an obvious one. The old expression that 'there was no wrong without a remedy' might also be interpreted to mean that there was also no right without a remedy. Sometimes the remedy was by a criminal proceeding, sometimes by a civil action, sometimes by both. Having made those general remarks I would make another, which was also familiar to all Englishmen—namely, that there was no right in this country under our laws so sacred as the right of personal liberty. No right of property or capital about which there had been so much declamation was so sacred or so carefully guarded by the law of this land as that of personal liberty. They were quite aware of the pains taken by the common law, by the writ, as it was called, of *habeas corpus*, and supplemented by statute, to secure to every man his

personal freedom—that he should not be put in prison without lawful cause, and that if he was he should be brought before a competent magistrate within a given time and be set at liberty or undergo punishment. But that liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say he should bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body. Generally speaking, the way in which people had endeavoured to control the operation of the minds of men was by putting restraints on their bodies, and therefore we had not so many instances in which the liberty of the mind was vindicated as was that of the body. Still, if any set of men agreed among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence—namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves. He was referring to coercion or compulsion, something that was unpleasant and annoying to the mind operated upon, and he laid it down as clear and undoubted law that if two or more persons agreed that they would by such means co-operate together against that liberty they would be guilty of an indictable offence."

It is said indeed that an action for the infringement of such a right is a novelty, but I do not concur that it is, or that if it were, it would be a sufficient argument. The whole history of the action upon the case from the 13 Edward 1, c. 24, downwards, affirms the principle that where cases fall under the same right and require a like remedy new precedents should be created.

So in *Pasley* v. *Freeman*, 3 T. R. 51, at p. 63, per Ashurst, J., "another argument which has been made use of is that this is a new case, and that there is no precedent for such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in instance and the only question is upon the application of a principle recognized in the law of such new case, it will be just as competent to courts of justice to apply the principle in any case that may arise two centuries hence, as it was two centuries ago."

First it is said that the company were acting within their legal rights in discharging the plaintiffs. So they were, but does that affect the question of the responsibility of the person who caused them so to act by the means he used? The scholars who went away from the school were entitled to do so. The miners were entitled to cease working at the quarry. The natives were entitled to avoid running the risk of being shot. But the question is, What was the cause of their thus exercising their legal right?

The question must be whether what was done in fact, and what did in fact procure the dismissal of the plaintiff, was an actionable wrong or not. I have never heard that a man who was dismissed from his service by reason of some slander could not maintain an action against the slanderer because the master had a legal right to discharge him.

In treating the question I can desire no more apt exposition of the law than what is contained in Bowen, L.J.'s, admirably-reasoned judgment in the *Mogul case* in the Court of Appeal. "Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence: *Tarleton* v. *McGawley*, Peake N. P. C. 270; the obstruction of actors on the stage by preconcerted hissing: *Clifford* v. *Brandon*, 2 Camp. 358; *Gregory* v. *Brunswick*, 6 Man. & G. 205; the disturbance of wild fowl in decoys by the firing of guns: *Carrington* v. *Taylor*, 11 East 571; and *Keeble* v. *Hickeringill*, 11 East 574*n*; the impeding or threatening servants or workmen: *Garret* v. *Taylor*, Cro. Jac. 567; the inducing persons under personal contracts to break their contracts: *Bowen* v. *Hall*, 29 W. R. 367, 6 Q. B. D. 333; *Lumley* v. *Gye*, 1 W. R. 432, 2 Ell. and Bl. 216; all are instances of such forbidden acts."

It will be observed that in what Bowen, L.J., says, intimation, obstruction, or molestation, or intentional procurement of a violation of individual rights, contractual or other (always assuming that there is no just cause for it), are each of them, where damage has been caused, actionable wrongs. And so Sir William Erle in a passage quoted by the late Master of the Rolls (Lord Esher) points out that "every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition."

The Lord Justice was too keen a reasoner not to observe that the words "without just cause or excuse," which he had used, required exposition to render his reasoning complete, and accordingly he explains in another part of his judgment what his view was of malice. His lordship thus describes the state of mind which in his view would negative just cause or excuse: *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 37 W. R. 766, at p. 760, 23 Q. B. D. 598, at p. 613. "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong: see *Bromage* v. *Prosser*, 4 B. & C. 247; *Capital and Counties Bank* v. *Henty*, per Lord Blackburn, 31 W. R. 165, 7 App. Cas. 741, at p. 772."

I must, for my own part, disclaim the idea that you can get rid of observations such as these in the learned judge's judgment by saying that they are *obiter*. Of course, one is familiar with the observation that such-and-such an opinion expressed by a learned judge was not necessary for the decision of the case. But where a distinction is being drawn between what is lawful and what is not, and where, as in this case, the observations form part of the reasoning by which the conclusion is arrived at, it appears to me that, whichever way the decision may be, one part of the judgment is as much an authoritative exposition of the law as the other.

Now, it will be observed that Bowen, L.J., points out that not only contractual rights are comprehended within his view, but other rights, such as the right to carry on the business of an actor and the like.

In the same case, when appealed to this House, 40 W. R. 337, [1892] A. C. 25, it appears to me that the principle upon which that decision was arrived at is an important one, as excluding what is here

suggested to be lawful. I myself asked in that case: "What legal right is interfered with? What coercion of the mind or will or of the person is effected? All are free to trade upon what terms they will, and nothing has been done, except in rival trading, which can be supposed to interfere with the appellants' interests." Lord Watson pointed out that the withdrawal of agents at first appeared to him to be a matter attended with difficulty, but that, on consideration, he was satisfied that it could not be regarded as an illegal act. "In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and in the second place the respondents gave the agents the option of continuing to act for one or other of them in circumstances which placed the appellants at no disadvantage." And he added: "That it had not been proved, and not been suggested, that the respondents used either misrepresentation or compulsion for thep. urpose of obtaining the object of their combination" And Lord Bramwell begins his judgment by saying that the plaintiffs in that case "did not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them." Lord Morris expressed his intention to adopt entirely the principles laid down by Bowen, L.J.; and Lord Macnaghten read and adopted Lord Bramwell's judgment. Lord Field justifies his opinion, which he says may be supported upon the principles laid down in *Keeble* v. *Hickeringill*, as to which I shall have a word to say hereafter. But he goes on to say that "Everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was *bonâ fide* so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed inflictionof loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm." And Lord Hannen says "that he considered that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one—namely, to injure the plaintiff, whether they, the defendants, should be benefited or not." And he concluded his judgment by saying "that it appears to him that in that case there was nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade, by giving better terms to customers than their rivals, the plaintiffs, were willing to offer."

I have been careful to call attention to the opinions of the noble and learned lords, not only because I think a use has been made of the decision in that case which is not justified by anything in the opinions delivered, but rather because I think that upon the principles I have indicated before, these opinions form a very considerable body of authority, that if the elements which each noble lord in turn pointed out did not exist in that case had, in fact, existed, the decision would have been the other way.

I do not think that the case of *Keeble* v. *Hickeringill* stands alone, though if it did, considering who decided it, and that certainly in later years it has been much quoted and commented on, and never until now, so far as I am aware, criticised or questioned, I should be quite content to rely upon the authority of so profound a lawyer as Sir John Holt, and such an expositor as he was of the spirit of freedom which runs through the English law; but it will be also observed that in this House, Lords Bramwell and Field and, in the Court of Appeal, Bowen, L.J., assume it to be good law.

It is interesting to observe that that case has been recognized and acted upon in the American courts, where these questions of capital and labour have not infrequently arisen.

In *Walker* v. *Cronin*, 107 Mass. 555, it was held that an action of tort would lie upon a count alleging that the plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendant well knowing this, did unlawfully, and without justifiable cause, molest him in carrying on the said business with the unlawful purpose of preventing him from carrying it on, and wilfully induced many shoemakers who were in his employment, and others who were about to enter into it, to abandon it without his consent and against his will, and that thereby he lost their services and the profits, &c., to be derived therefrom, and was put to expense, &c. The second count alleges contracts between the plaintiff and the shoemakers to make stock into shoes, and that the defendant "well knowing this, with the unlawful purpose of preventing him (the plaintiff) from carrying on his business, induced them to return the stock unfinished to the factory, and to neglect and refuse to make it into shoes as they had agreed to do." The third count alleges the defendant enticed and procured a shoemaker in the plaintiff's service and employment who had agreed to make three cases of shoes to leave the plaintiff's service and employment. There was a demurrer to the declaration, and this demurrer was allowed in the superior court, whereupon the plaintiff appealed. Wells, J., after citing *Com. Dig. Action on the case A.*, "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages," goes on to review in order *Keeble* v. *Hickeringill*, 11 East 574n; *Tarleton* v. *McGawley*, Peake 270; *Green* v. *Button*, 2 C. M. & R. 707; *Gunter* v. *Astor*, 4 J. B. Moore 12; *Hart* v. *Aldridge*, Cowp. 54; *Shepherd* v. *Wakeman*, Sid. 79; *Winsmore* v. *Greenbank*, Willes 577; *Lumley* v. *Gye*, 2 En. & B. 216. He overruled the demurrer, and holding that the declaration sufficiently alleged (1) intentional and wilful acts; (2) calculated to cause damage to the plaintiff in his lawful business; (3) done with the unlawful purpose to cause such damage and loss without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) actual damage and loss resulting, held that each of the three counts disclosed a good cause of action. "This decision," continues the learned judge, "does not apply to a case of interference by way of friendly advice, honestly given; nor is it in denial of the right to free expression of opinion. We have no occasion now to consider what would constitute justifiable cause."

Benton v. *Pratt*, 2 Wend. 385, and *Rice* v. *Manley*, C. A., State of New York, 21 Sickels 82 (66 N. Y.), were both cases where the defendant, through false words, caused a third person who had entered into contracts of sale (in the first-named case of cheese, in the second of hogs) void by the Statute of Frauds, to break such contracts. An action was held to lie in each case.

In *Bixby* v. *Dunlap*, 22 Amer. Rep. 475, it was held that exemplary damages could be recovered from a defendant who knowingly procured a servant to leave

a master whom she had contracted to serve without ever being actually in his employment. *Lumley* v. *Gye* is here taken as having laid down the law on this subject.

In *Angle* v. *Chicago, &c., Co.*, 151 U. S. Rep. 6, it was alleged that the United States had granted lands in the State of Wisconsin in aid of the construction of railways. The State of Wisconsin had granted a portion of these lands to the defendant company for the purpose of constructing a particular railway. It had also granted other lands to another company, the Portage Co., to construct another and somewhat competing railway; this latter railway was to be completed within a certain time. This could not be done, and the State of Wisconsin enlarged the time for completion. The Portage Co. then employed the plaintiff to complete the line, and he was actively prosecuting the work when the defendant company, conspiring with certain officials of the Portage Co., induced the State of Wisconsin to revoke the concession to the Portage Co., whereby the plaintiff lost his employment. He accordingly brought his action. The court held, following *Lumley* v. *Gye* and *Bowen* v. *Hall*, that the defendant company were liable to the plaintiff.

I now revert to that part of the case which I admit has to be carefully considered: whether in what the defendant did in order to procure the dismissal of the plaintiffs he came within any of the rules which have been laid down in the cases quoted. Now, to my mind, he was guilty of intimidation and coercion through that intimidation. In using that word "intimidation" I am not using it in the technical sense which the statutes upon the subject have been construed to mean; I will explain in what sense I do understand the word, but in passing I must deprecate the language which has been used to minimize the effect of what Allen said. I observe it is described as "inconvenience." That is not how it is described by the witness. Edmonds, the foreman of the Glengall Co., thus describes what would have been the effect upon the business of the firm. He says: "They were rather busy just then with the boilermakers; that they employed three times as many boilermakers as shipwrights; and if the boilermakers had knocked off work or struck, it would have stopped the business of the company altogether—entirely—at that time, and that it was a very serious matter to the firm, and that the discharge of the men was in order to prevent their having to stop their business."

It seems to me very obvious to ask whether the threat to do that which will have such an effect as the witness described is a coercion of the will or not. The men were good workmen and of good character; they were working, even according to Allen's own view, at their own trade as shipwrights, but they had worked upon a former occasion for a different employer upon an iron ship.

I think the dissatisfaction among the boilermakers at these two men being employed has been greatly exaggerated. The man Elliott, who actually sent for Allen, gives this account of it: "We were having a talk together at breakfast-time, and some of them felt dissatisfied about it. Some of them said we had better leave our work. I said, 'Do not do anything of the kind.' . . . I sent a telegram to Allen. . . . When I met Mr. Allen at breakfast-time the next morning he said to me: 'Well, what is this here little bit of a trouble here?' 'Well,' I said, 'the chaps are dissatisfied about these here two plaintiffs, Flood and Taylor, being in the habit of working over at Mills & Knight's.' 'Well,' he said, 'what do they want?' 'Some of them are saying they are going to leave their work.' He says, 'The best thing you can do is to go in and tell them not to leave their work until things are settled; wait and see how things settle.' I said, 'Very good, I will tell them what you say now.'"

The cross-examination is important with reference to what took place afterwards, and as exhibiting the extent and degree to which even some of the men—for it goes no further—expressed their wishes. The learned counsel asks: "Their wishes were that these men, whose conduct they objected to at Mills & Knight's, should not be kept in the same employ with themselves. *A.*—Oh, no. *Q.*—That was the feeling, was it not. *A.*—No. *Q.*—Well, let me understand. *A.*—They did not say they should not be kept in the employ of the firm at all. *Q.*—They did not say they should not be kept on the job on which they were being employed. *A.*—They did not wish them among our midst. *Q.*—Working on the same ship. *A.*—Yes."

It will be observed how limited are the numbers in respect of which the allegation of discontent is put forward, and it will be observed that this witness entirely repudiated any wish to prevent these men being employed, but even that wish is limited to the desire that they should not be employed upon the same ship. But perhaps the most astonishing part of the case is to be found in Allen's own evidence.

Allen denies that he had ever said anything about the men being called out. He denies in terms that he said the same thing would happen in any yard where the two men were employed. He denies that he used that memorable language, "We have made up our minds that wherever it is known that there are any shipwrights who have been engaged doing ironwork the boilermakers will leave work in that yard." Being asked whether he wished the step to be taken of the two men being discharged, he said, "He had no such thought floating in his mind at the time." This is, of course, in direct conflict with the evidence given by the manager and the foreman of the Glengall Co., but, as I have said, the credibility of the witness was for the jury and not for me.

And now it is important to call attention to the exact question which was left to the jury. Kennedy, J., said: "The question that I want you to answer is that, *if you find he induced the Glengall Iron Co. by the threat which is suggested by the plaintiffs of calling out all the men on strike*, and he continued in that course of conduct if there was any attempt to employ them again, did he do that with the malicious intention which I have endeavoured to explain—that is, merely, not for the purpose of forwarding that which he believed to be his interest as a delegate of his union in the fair consideration of that interest, but for the purpose of injuring these plaintiffs, and preventing them doing that which they were each of them entitled to do." Observe the phrase used: "the threat suggested by the plaintiff of calling out all the men on strike," and that that induced the Glengall Iron Co. to discharge the plaintiff, and yet it is said that Allen's threat had nothing to do with the discharge of the plaintiffs. It will be observed that Kennedy, J., draws a distinction between the conduct which he assumes to be lawful on Allen's part to do what he did do if it were merely for the purpose of forwarding that which he believed to be his interest as a delegate of his union in fair consideration of that interest on the one hand, and on the other hand his conduct, if what he did was done for the purpose injuring these plaintiffs.

It appears to me that that is a direction of which the defendants cannot complain, since it puts what is to my mind an alternative more favourable to them. In my view his belief that what he was doing was for his interest as a delegate of his union would not justify

the doing of what he did do. It is alleged, and to my mind and to the mind of the jury proved, that the employers were compelled under pressure of the threats that he used to discharge the plaintiffs.

I have not used the word "intimidated" because I observe the learned judge says there was no intimidation in a legal sense. If what was meant by that was that there was no threat of violence to person or property, it is true, but the word "intimidation" is not always to be construed as it has been construed under 6 Geo. 4, c. 129. The construction of it in that statute flowed from the other words with which the word "intimidate" is associated; and if, without using the word "intimidate," that which was held out as the inducement to dismiss the plaintiffs was that such a stoppage of the works should be occasioned as that the business of the company would seriously suffer, I should think that would be a thing which would be likely to produce fear of the consequences of the company retaining them in their employment, and a company which abstained from doing so by reason of that fear would justly be described as "intimidated."

But the objection made by the defendants appears to be that the word "malicious" adds nothing, that if the thing was lawful it was lawful absolutely, if it was not lawful it was unlawful; the addition of the word "malicious" can make no difference. The fallacy appears to me to reside in the assumption that everything must be absolutely lawful or absolutely unlawful. There are many things which may become lawful or unlawful according to circumstances.

In a decision of this House (*Corporation of Bradford* v. *Pickles*, 44 W. R. 190, [1895] A. C. 587) it has undoubtedly been held that whatever a man's motives may be, he may dig into his own land and divert subterranean water which but for his so treating his own land might have reached his neighbour's land. But that is because the neighbour had no right to the flow of the subterranean water in that direction, and he had an absolute right to do what he would with his own property. But what analogy has such a case with the intentional inflicting of injury upon another person's property, reputation, or lawful occupation? To dig into one's own land under the circumstances stated requires no cause or excuse. He may act from mere caprice, but his right on his own land is absolute so long as he does not interfere with the rights of others.

But referring to Bowen, L.J.'s, observation, which to my mind is exactly accurate, "in order to justify the intentional doing of that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade" you must have some just cause or excuse.

Now the word "malicious" appears to me to negative just cause or excuse, and without attempting an exhaustive exposition of the word itself it appears to me that if I apply the language of Bowen, L.J., it is enough to show that this was, within the meaning of the law, "malicious."

It appears to me that no better illustration can be given of the distinction on which I am insisting between an act which can be legally done, and an act which cannot be so done because tainted with malice, than such a colloquy between the representative of the master and the representative of the men as might have been held on the occasion which has given rise to this action. If the representative of the men had in good faith and without indirect motive pointed out the inconvenience that might result from having two sets of men working together on the same ship whose views upon the particular question were so diverse that it would be inexpedient to bring them together, no one could have complained; but if his object was to punish the men belonging to another union because on some former occasion they had worked on an iron ship, it seems that the difference of motive may make the whole difference between the lawfulness or unlawfulness of what he did.

I see it is suggested by one of your lordships that the action for malicious prosecution is supposed to be an exception. I am not quite certain that I understand what is the proposition to which it is an exception. If it means that there is no other form of procedure known to the law wherein malice may make the distinction between a lawful and an unlawful act, I am unable to agree. Maliciously procuring a person to be made a bankrupt, maliciously and without reasonable or probable cause presenting a petition to wind up a company, or maliciously procuring an arrest, are equally cases wherein the state of mind of the person procuring the bankruptcy, the winding up, or the arrest may affect the question of the lawfulness or unlawfulness of the act done.

Again, in slander or libel the right to preserve one's character or business from attack appears to me quite as vague and general a right as it is suggested is the right to pursue one's occupation unmolested; and it cannot be denied that in both these cases the lawfulness or unlawfulness of what is said or written may depend upon the absence or presence of malice.

Doubtless there are cases in which the mere presence of malice in an act done will not necessarily give a right of action, since no damage may result, and in this case, however malicious Allen's intervention may have been, if the employers had defied Allen's threats instead of yielding to them, the plaintiffs could not have succeeded in an action, because they would not have been injured: see *Quartz Hill Co.* v. *Eyre*, 31 W. R. 668, 11 Q. B. D. 674; *Gibbs* v. *Pike*, 9 M. & W. 351; *Jennings* v. *Florence*, 2 C. B. N. S. 467, 6 W. R. Ch. Dig. 60.

On the same principle an action will not lie against a sheriff for a false return to a writ of execution if the plaintiff has not suffered actual damage in consequence of the false return: see *Wylie* v. *Birch*, 4 Q. B. 566.

I turn now to the course of the trial, which is important in more ways than one. It is manifest that both the form of the statement of claim and the evidence directed at the trial were intended to raise the question of the right of the Boilermakers' Union to use what I will call their union for combined action against the individual plaintiffs who belonged to another union.

The plaintiffs apparently proceeded upon the assumption that what was represented to them as having been said by Allen was said in his character of delegate of, and speaking with the authority of, the Boilermakers' Union, and accordingly the general secretary of this trades union and the chairman at the time of these transactions were both joined as defendants. Had they adopted or had been proved to authorize the course taken by Allen, a question would have arisen whether or not they were all three parties to a conspiracy. Whether that charge could have been maintained against them or not I at present desire to say nothing. Such a question may arise again, and I wish to keep myself free to consider that question when it arises. But the chairman and the secretary of the union absolutely disclaimed any general or specific authority on the part of Allen either to threaten the employers or to withdraw the men. As to specific authority the chairman proved that he had never heard of the dispute until he was served with the writ in the action. He says in terms that he never gave any authority to Mr. Allen to threaten employers to withdraw men from the work, and to do any such thing he regarded as a very serious

matter for any delegate to take upon himself; and so far was he from adopting what Allen is sworn to have said—namely, that the union would hunt the men out of every employment where they were known to be because they had once worked in an iron ship, he emphatically denies the right of his union to do anything of the sort; he says in terms, "providing that the shipwright, after being at the ironwork, started in some other place, for instance, then I would say we have no right whatever to interfere with him unless he were then beginning ironwork again. If he started at woodwork we would not interfere with him in any other place."

The learned counsel then put a question to him (I think somewhat under a misapprehension as to what the learned judge himself meant by a question he put), "You say that may depend on circumstances?" and his answer is, "I do not say they would in that instance, because in no instance have I ever known men interfering with him when he went to some other works and started his own particular work."

I think it is only just to the Boilermakers' Union to point out how emphatically and distinctly their authorized officers (chairman and general secretary) disclaimed any such practice or principle as that which Allen is sworn to have attributed to them, and accordingly no imputation or liability could properly be attributed to the Boilermakers' Union or their authorized officers; but does that relieve Allen from the consequences of what he did?

If concerted collective action to enforce, by ruining the men's employment, the will of a large number of men upon a minority, whether the minority consists of a small or of a large number, be a cause of action where the actual damage is produced, it would seem to be a very singular result that an individual who falsely assumes the character of representing a large body uses the name of that large body to give force and support to the threat which he utters, and so produces the injury to the individual or to the minority, could shield himself from responsibility by proving that the body whose power and influence he had falsely invoked as his supporters had given him no authority for his threats—so that, if they in truth authorized him, he and they might all have been responsible; while the false statement that he made, though acting upon the employer by the same pressure because it was believed, and producing the same mischief to the person against whom it was directed, could establish no cause of action against himself because it was false.

I now come to the question raised upon the pleadings—that the falsehood of Allen's allegations is not set out. I venture to think that this objection is founded upon an erroneous assumption that the action must be brought for false representations, and that accordingly the false representations must be set out in the statement of claim. As I say, I think this is an erroneous assumption; that the action is what it is; that the defendant maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced the Glengall Iron Co. not to enter into contracts with the plaintiffs, whereby the plaintiffs have suffered damage.

The objection may be treated as one of form, or as one of substance. Treating it as one of form only, I do not think that it ever was necessary in the pleadings, where an unlawful procuring something to be done was the cause of action, to set out the means by which that something was procured. It is not necessary, says Willes, C.J., in one of the cases quoted, "to set forth all the facts to show how a thing which is charged to be unlawfully done has been done; that would make the pleadings intolerable, and would increase the length and expense unnecessarily, and even in an indictment for conspiracy it is not necessary to state the means employed": see *Rex* v. *Sterling*, 1 Levinz 125: *Rex* v. *Kinnersley and Another*, 1 Strange 193; see also *Sydserff* v. *The Queen*, 11 Q. B. 245.

So also upon an indictment under 37 Geo. 3, c. 70, the preamble of which states that "Whereas divers wicked and evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, have of late industriously endeavoured to seduce persons serving in His Majesty's forces by sea and land from their duty and allegiance to His Majesty, and to incite them to mutiny and disobedience," it was enacted "that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in His Majesty's forces by sea or land from his or their duty and allegiance to His Majesty, or to incite or stir up any such person or persons to commit an act of mutiny," &c., should be guilty of felony. It was held that it was unnecessary in the indictment to do more than charge the defendants with having endeavoured to seduce persons from their allegiance, without setting forth any of the words or writings by which that endeavour was made: *Rex* v. *Fuller*, 1 B. & P. 180.

If treating it as matter of substance, the objection would be that without giving notice to the defendant and without any such specified objection being submitted to the jury it was being imputed to him that he had said what was false, it is almost impossible to suggest that here there could be any such objection of substance. What he said and did by way of inducement, threat, or coercion, was in truth the whole question in the case. He gave evidence denying what was imputed to him, and so far from setting up the right on behalf of his union to exercise their right of withdrawing their men if the demand for the discharge of the two plaintiffs were not complied with, he absolutely denied that he had ever done so; and the proper authorities of his union, as I have pointed out already, negatived any authority to make such representations as the other witnesses proved that he did make, or that they had been parties, or would consent to be parties to the most offensive of his threats—namely, the hunting down of the two shipwrights because they had once worked upon iron ships. This question was before the jury, and the jury could not have answered the question as they did if they had not disbelieved Allen's statement.

It seems to me, therefore, that neither in substance nor in form can any objection be made to the topic (for it is but the topic and not the substance of the cause of action) that he was guilty of false representations as fortifying the threats that he was making. It can scarcely be contended that because he had not that authority behind him which he represented, because he was not truly representing either the wishes or the commands of his union, that could furnish him with any excuse. As well might it be contended that the highwayman was not responsible for the coercion he exercised towards his victim if he put a pistol to his head, because it should afterwards turn out that the pistol was unloaded.

I regret that I am compelled to differ so widely with some of your lordships, but my difference is founded on the belief that in denying these plaintiffs a remedy we are departing from the principles which have hitherto guided our courts in the preservation of individual liberty to all. I am encouraged, however, by the consideration that the adverse views appear to me to overrule the views of most distinguished judges, going back now for certainly 200 years, and that up to the period when this case reached your lordships' House there was an unanimous consensus of opinion; and that of eight

judges who have given us the benefit of their opinions, six have concurred in the judgments which your lordships are now asked to overrule.

Lord WATSON.—This appeal, in which the litigants are members of two rival associations of working men, registered under the Trades Unions Act, 1871, raises some important questions upon which there appears to be room for considerable difference of opinion. The appellant is a member, and the London delegate, of the Boilermakers' Society, an association which restricts the labour of its members to ironwork; whilst the two respondents belong to the Society of Shipwrights, whose members are permitted to work either in wood or iron, an alternative which, whether rightly or wrongly, is not regarded with favour by the boilermakers.

In the month of April, 1894, about forty men of the Boilermakers' Society were engaged at the Regent Dock, Millwall, in repairing an iron ship, in the employment of the Glengall Iron Co. The respondents were at the same time employed by the company to execute repairs upon the woodwork of the vessel. The boilermakers having learned that the respondents, although they were at that time engaged in carpenter-work had on previous occasions undertaken and executed ironwork in other shipyards, resolved that they would not continue at the same job with workmen who wrought in iron as well as wood, and they were accordingly prepared to leave the Regent Dock in a body as soon as their engagement with the Glengall Iron Co., which was merely from day to day, expired. Being apprehensive, however, that they might not be allowed strike pay by their union if they left their work without the approval of some of its office-bearers, they, on the 12th of April, telegraphed for the appellant, who, in compliance with their request, went to the yard on the morning of the day following. He was there met by one of the workmen who had sent for him, who, on their behalf, informed him that they objected to the respondents, who had done ironwork elsewhere, working among them, and that they intended in consequence to leave the work on that day after the dinner-hour. The appellant intimated that in his opinion the men would not be justified in striking work as they contemplated until an attempt had been made to settle the matter otherwise. He then had an interview with the managing director of the Glengall Iron Co., at which the foreman of the yard was present, the result being that on the afternoon of the same day the services of the respondents were dispensed with by the company, and the boilermen continued at their work.

The present action was brought against the appellant in the beginning of July, 1894, and on the 12th of February, 1895, it was tried before Kennedy, J., and a jury, who returned affirmative answers to these two questions: "1. Did the defendant Allen maliciously induce the Glengall Iron Co. to discharge the plaintiffs, or either of them, from their employment? 2. Did the defendant Allen maliciously induce the Glengall Iron Co. not to engage the plaintiffs, or either of them?" and assessed damages to each of the respondents at £20.

The appellant contends that judgment ought to be entered in his favour, inasmuch as the findings of the jury, when rightly interpreted, do not disclose any cause of action against him, and, alternatively, that these findings being against the weight of evidence, the case ought to be sent back for new trial. I have not found it necessary to consider the second of these propositions, having arrived at the conclusion that the first of them is well founded.

The substance of the verdict may be resolved into these three findings: First, that the Glengall Iron Co. discharged the respondents from their employment, and did not re-engage them; secondly, that the company were induced to do so by the appellant; and, thirdly, that the appellant maliciously induced the action of the company. There is no expression in the verdict which can be held, either directly or by implication, to impeach the legality of the company's conduct in discharging the respondents. The mere fact of an employer discharging or refusing to engage a workman, does not imply or even suggest the absence of his legal right to do either, as he may choose. It is true that the company is not a party to this suit; but it is also obvious that the character of the act induced, whether legal or illegal, may have a bearing upon the liability in law of the person who procured it. The whole pith of the verdict, in so far as it directly concerns the appellant, is contained in the word "maliciously," a word which is susceptible of many different meanings. The expression "maliciously induce," as it occurs upon the face of the verdict, is ambiguous; it is capable of signifying that the appellant knowingly induced an act which of itself constituted a civil wrong, or it may simply mean that the appellant procured, with intent to injure the respondents, an act which, apart from motive would not have amounted to a civil wrong; and it is, in my opinion, material to ascertain in which of these senses it was used by the jury.

Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account, motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. A wrongful act, done knowingly, and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of civil wrong; but in these cases the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration in certain exceptional circumstances, from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considerations consists in this, that he may with immunity commit an act which is a legal wrong, and, but for his privilege, would afford a good cause of action against him; all that is required in order to raise the privilege and entitle him to protection being, that he shall act honestly in the discharge of some duty which the law recognizes, and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly, in a suit brought by that person, it is usual for him to allege, and necessary for him to prove an intent to injure in order to destroy the privilege of the defendant. But none of these cases tend to establish that an act which does not amount to a legal wrong, and therefore needs no protection, can have privilege attached to it, and still less that an act in itself lawful is converted into a legal wrong, if it was done from a bad motive.

Lord Bowen (at that time Lord Justice Bowen) in the case of the *Mogul Steamship Co.* v. *McGregor*, laid

it down that in order to constitute legal malice the act done must, apart from bad motive, amount to a violation of law. The learned judge, with his accustomed accuracy and felicity, said (23 Q. B. D. 612): "We were invited by the plaintiffs' counsel to accept the position from which their argument started, that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure,' are words which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an attempt to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its term the infringement of some right." The words which I have quoted are in substantial agreement with the language used by Bayley, J., in *Bromage* v. *Prosser* to the effect that "malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." According to the learned judge, in order to constitute legal malice, the act done must be wrongful, which plainly means an illegal act subjecting the doer in responsibility for its consequences, and the intentional doing of that wrongful act will make it a malicious wrong in the sense of law. Whilst it is true that no act in itself lawful requires an excuse, it is equally true that some acts in themselves illegal admit of a legal excuse, and it is to these that Bayley, J., obviously refers.

The root of the principle is that, in any legal question, malice depends, not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed. In my opinion it is alike consistent with reason and common sense that when the act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive.

It does not appear to me to admit of doubt that the jury, in finding the action of the company to have been maliciously induced by the appellant, simply meant to affirm that the appellant was influenced by a bad motive—namely, an intention to injure the respondents in their trade or calling of shipwrights. At the trial, the case for the plaintiffs was conducted, and was submitted to the jury by the learned judge who presided, upon the lines laid down by the Master of the Rolls and Lopes and Smith, L.JJ., in *Temperton* v. *Russell*, 41 W. R. 565, [1893] 1 Q. B. 715. When the present case was before the Appeal Court the same doctrine was repeated by the Master of the Rolls and Lopes, L.J., and was expounded at great length by Lord Esher. Rigby, L.J., deferred to, but did not express his concurrence in, the authority of *Temperton* v. *Russell*, which he accepted as binding upon him. The doctrine is thus stated by the Master of the Rolls (43 W. R. 453, at p. 455, 1895, 2 Q. B. 21, at p. 37): "Now it is clear that merely to persuade a person who has contracted, to break his contract gives no cause of action at all. But, if it is done maliciously, for the purpose of injuring the person to whom the advice is given, or for the purpose of injuring someone else, the person against whom the malice is directed and carried out has a cause of action, not on the ground of the persuasion to break the contract, but on the ground of the malice directed against him. To my mind, the result is the same, whether the persuasion is to break a contract or not to make a contract. One person has a perfect right to advise another not to make a particular contract, and that other is at perfect liberty to follow that advice. But, if the person uses that persuasion with intent to injure the other, or to injure the other with whom he is going to make the contract, then the act is malicious, and the malice makes that unlawful which would otherwise be lawful." In that state of the law as expounded in the Appeal Court, it is not surprising to find that Kennedy, J., whilst he did not suggest to the jury that the action of the appellant, apart from its motive, constituted a legal wrong, directed them to consider whether the appellant acted "maliciously," and explained that by that word he meant "with the intention and for the purpose of doing an injury to the plaintiffs in their business."

I do not dispute that the law laid down in this case by the presiding judge and upheld by the Court of Appeal would justify the verdict of the jury. It simply comes to this, that to induce another person to commit an act which is within his legal right does not in itself afford a cause of action; but that the person who procures his action is guilty of a legal wrong if he was actuated by an intent to injure, and is liable in reparation to those against whom his evil intent was directed. The words which I have already quoted clearly disclose the doctrine which runs through Lord Esher's judgment. Whether mere "persuasion" or mere "advice" entails liability on the person using them appears to me to be a speculation which it would be unprofitable to discuss, and I shall therefore assume that the words refer to the means used by a person who, in the sense of law, "procures" the act of another. A breach of contract is in itself a legal wrong, and in *Lumley* v. *Gye* it was said by Erle, J. (afterwards Chief Justice): "It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong." In the same case it was held by the majority of the learned judges that the defendant was liable in damages upon the express ground that, in knowingly procuring an illegal act, he had committed a wrong which the law regards as malicious. They regarded malice as signifying in law, not that the defendant had been actuated by a bad motive, but he had procured the commission of an act which he knew to be illegal.

There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for the consequences. In the first place he will incur liability if he knowingly, and for his own ends, induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is, therefore, not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye*, the inducer may be held liable, if he can be shown to have procured his object by the use of illegal means directed against that third party.

The question submitted by the House, for the opinion of the learned judges who have favoured us with their assistance, was: "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left the jury?" The terms in which the query is framed afford an opportunity, of which some of the learned judges have not been slow to avail themselves, of referring to the evidence of the respondents' witness in quest of some fact which might impart a legal and not a conventional meaning to malice as found by the jury. But according to my

apprehension, it was not intended, nor would it be legitimate, in pursuing that investigation, to disregard the pleadings of the respondents, or the course which was followed by their counsel, at the trial of the cause. To deal with the case on any other terms would be to start issues which the respondents themselves never raised until they came to the bar of this House, and to apply to these issues evidence which was directed, not to these, but to other points. I therefore find it necessary to express an opinion upon various questions which were canvassed in the course of the argument addressed to us.

First of all, although the statement of claim set forth that the appellant induced the Glengall Iron Co. to "break and refuse to perform their contract" with the respondents, the allegation is not borne out by their own evidence.

Assuming that the Glengall Iron Co., in dispensing with the further services of the respondents, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it, if he employed unlawful means of inducement, directed against them. According to the decision of the majority in *Lumley* v. *Gye*, already referred to, a person who, by illegal means—that is, means which in themselves are in the nature of civil wrongs—produces the lawful act of another, which act is calculated to injure, and does injure, a third party, commits a wrong for which he may be made answerable. So long as the word "means" is understood in its natural and proper sense, that rule appears to me to be intelligible; but I am altogether unable to appreciate the loose logic which confounds internal feelings with outward acts and treats the motive of the actor as one of the means employed by him.

It has been maintained, and some of the learned judges who lent their assistance to the House have favoured the argument, that the appellant used coercion as a means of compelling the Glengall Iron Co. to terminate their connection with the respondents, but that conclusion does not appear to me to be the fair result of the evidence. If coercion, in the only legal sense of the term, was employed, it was a wrong done as much to the Glengall Iron Co., who are the parties said to have been coerced, as to the respondents. Its result might be prejudicial to the respondents, but its efficacy wholly depended upon its being directed against and operating upon the company. It must be kept in view that the question of what amounts to wrongful coercion in a legal sense involves the same considerations which I have discussed in relation to the elements of a civil wrong, as committed by the immediate actor. According to my opinion, coercion, whatever be its nature, must, in order to infer the legal liability of the person who employs it, be intrinsically, and irrespectively of its motive, a wrongful act. According to the doctrine ventilated in *Temperton* v. *Russell* and the present case, it need not amount to a wrong, but will become wrongful if it was prompted by a bad motive.

It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree or continue to work. It may be deplorable that feelings of rivalry between different associations of working men should ever run so high as to make members of one union seriously object to continue their labour in company with members of another trade union; but so long as they commit no legal wrong, and use no means which are illegal, they are at perfect liberty to act upon their own views. That the boilermakers who were employed at the Regent Dock, Millwall, did seriously resent the presence among them of the respondents very plainly appears from the evidence of the respondents themselves; and that they would certainly have left the dock had the respondents continued to be employed appears to me to be an undoubted fact in the case. They were not under any continuing engagement to their employers, and if they had left their work and gone out on strike they would have been acting within their rights, whatever might be thought of the propriety of the proceeding. Not only so, they were, in my opinion, entitled to inform the Glengall Iron Co. of the step which they contemplated as well as of the reasons by which they were influenced, and that either by their own mouth or, as they preferred, by the appellant as their representative. If the workmen had made the communication themselves, and had been influenced by bad motives towards the respondents, then, according to the law which has been generally accepted by the courts below, they would each and all of them have incurred responsibility to the respondents. But it was clearly for the benefit of the employers that they should know what would be the result of their retaining in their service men to whom the majority of their workmen objected; and the giving of such information did not, in my opinion, amount to coercion of the employers, who were in no proper sense coerced, but merely followed the course which they thought would be most conducive to their own interests.

I think it right to observe that if the evidence had, in my opinion, contained statements sufficient to support a charge of coercion I should have declined, in the circumstances of the present case, to give effect to it. I entertain little doubt as to the incompetency, but none as to the inexpediency, of this House entertaining and deciding an issue of fact which, if not formally abandoned, was not brought forward at the trial or submitted to the jury, and that upon evidence which was not directed to it, for the purpose of patching up a verdict which is impeached in point of law.

The doctrine laid down by the Court of Appeal, in this case, and in *Temperton* v. *Russell*, with regard to the efficacy of evil motives in making—to use the words of Lord Esher—"that unlawful which would otherwise be lawful," is stated in wide and comprehensive terms; but the majority of the consulted judges who approve of the doctrine have only dealt with it as applying to cases of interference with a man's trade or employment. Even in that more limited application, it would lead, in some cases, to singular results. One who committed an act not in itself illegal, but attended with consequences detrimental to several other persons, would incur liability to those of them whom it was proved that he intended to injure, and the rest of them would have no remedy. A master who dismissed a servant engaged from day to day, or whose contract of service had expired, and declined to give him further employment because he disliked the man, and desired to punish him, would be liable in an action for tort. And *ex pari ratione*, a servant would be liable in damages to a master whom he disliked, if he left his situation at the expiry of his engagement and declined to be re-engaged, in the knowledge and with the intent that the master would be put to considerable inconvenience, expense, and loss before he could provide a substitute. If that be the state of the law it is somewhat remarkable that there is no case to be found in the books of any such action having been sustained. The authority which is mainly relied on as supporting the doctrine of the recent cases is *Keeble* v. *Hickeringill*, which was decided by the Court of King's Bench about two centuries ago. I am very far from suggesting that the antiquity of a

decision furnishes a good objection to its weight; but it is a circumstance which certainly invites and requires careful consideration, unless the decision is directly in point, and its principle has since been recognized and acted upon.

In *Keeble* v. *Hickeringill* the plaintiff sued for the disturbance of a decoy upon his property, which he used for the purpose of capturing wild fowl and sending them to market. The defendant, who was an adjoining owner, had fired guns upon his own land, not with a view of killing game or wild fowl, but with the sole object of frightening the birds, and either driving them out of his neighbour's decoy-pond or preventing them from entering it. The act complained of was, in substance, the making of a noise so close to the lands of the plaintiff as to be a nuisance to him. Upon that aspect of the case I do not find it necessary to express any opinion as to the conduct of the defendant; but this much is clear, that no proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition he commits a legal wrong, and, if he does so intentionally, he is guilty of a malicious wrong, in its strict legal sense. Holt, C.J., who delivered the opinion of the court, treated the case as one of interference with the plaintiff's trade, consisting in the capture and sale of wild fowl. He distinguishes it from the case of invading a franchise, which, I apprehend, would in itself amount to a legal wrong, and thus states the law applicable to it: "When a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, then an action lies in all cases." I see no reason to doubt that by a "violent act" the learned chief justice had in view an act of violence done in such circumstances as to make it amount to a legal wrong; and I see as little reason why, in speaking of a "malicious act," he should not be understood as using the word "malicious" in its proper legal sense, and as referring to other wrongs, not accompanied by violence, but done intentionally, and therefore in the eye of the law maliciously. The object of an act—that is, the results which will necessarily or naturally follow from the circumstances in which it is committed—may give it a wrongful character, but it ought not to be confounded with the motive of the actor. To discharge a loaded gun is, in many circumstances, a perfectly harmless proceeding; to fire it on the highway, in front of a restive horse, might be a very different matter. The learned chief justice proceeds to give various illustrations of the general rule which he had formulated. He first notices a case in which it had been held that a schoolmaster had no cause of action against a defendant, who had attracted his pupils and injured his school by setting up a rival establishment, a proceeding which was obviously in the ordinary course of competition, and then adds: "But suppose Mr. Hickeringill should lie in the way with his gun, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars." From that observation I see no reason to differ, because, in my opinion, frightening a child with a gun, so that it cannot get to school, is in itself a violent and unlawful act, directed both against the child and its schoolmaster. The learned Chief Justice then refers to three instances in which the defendant would be liable in an action upon the case: (1) where he obstructs a person in charge of a horse, who is taking it to a market for sale, and prevents his reaching the market, thereby depriving the market-owner of his dues; (2) where, to the detriment of a proprietor, he by threat frightens away his tenants at will; and (3) when he beats the servant of a tacksman, and so hinders him from taking his master's tolls. It must be observed that, apart from any question of motive, all these cases involve the use of means in themselves illegal—obstruction, coercion by means of threats, and personal assault.

But assuming, what to my mind is by no means clear, that *Keeble* v. *Hickeringill* was meant to decide that an evil motive will render unlawful an act which otherwise would be lawful, it is necessary to consider how far that anomalous principle has been recognized in subsequent decisions. Laying aside the recent decisions which are under review in this appeal, only one case has been cited to us in which the court professed that they were guided by the reasoning of Holt, C.J. That instance is to be found in *Carrington* v. *Taylor*, 11 East 571, a decision which I venture to think that no English court would, at this day, care to repeat. The facts of the case resembled those which occurred in *Keeble* v. *Hickeringill* in this single respect, that the plaintiff was the owner of a decoy for wild fowl. The defendant was the owner of a boat, in which he rowed along the coast, and earned a livelihood by shooting wild fowl for the market, which he was lawfully entitled to do. But some of the shots fired by him in the pursuit of that occupation had the effect of scaring birds which otherwise would or might have entered the plaintiff's decoy; and, in respect of that disturbance he was held liable in damages to the plaintiff. Whatever construction might be put upon the judgment of Holt, C.J., it does not appear to me to contain a single expression which would justify that result. I am not surprised to find that an eminent judge, with whose opinion as a whole I am unable to concur, has had the courage to express his dissent from the judgment in *Carrington* v. *Taylor*, as he failed "to see what wrong the defendant in that case had done." To my mind the case is of considerable importance, because it shows that in the year 1809 the Court of King's Bench did not regard *Keeble* v. *Hickeringill* as establishing the doctrine that a lawful act, done with intent to injure, will afford a cause of action. In *Carrington* v. *Taylor* there was no allegation and no evidence of any intent to injure the plaintiff's decoy. The sole motive of the defendant in firing his gun was to earn his livelihood by killing wild fowl for the market. I cannot avoid the conclusion that the learned judges accepted *Keeble* v. *Hickeringill* as an authority to the effect that, apart from any question of motive, the disturbance of a lawful decoy is an illegal invasion of the private right of its proprietor.

A variety of well-known cases, including even *Lumley* v. *Gye*, 2 E. & B. 216, were relied on by the respondents as showing that the so-called principle of *Keeble* v. *Hickeringill* has been from time to time applied by the English courts since the date of that judgment. Except in the case of *Carrington* v. *Taylor*, which I have already noticed, I have been unable to discover in these authorities, which I do not consider it necessary to examine in detail, any trace of the doctrine for which the respondents contend until recent years, when it is first dimly foreshadowed in a *dictum* which occurs in *Bowen* v. *Hall*, 29 W. R. 367, 6 Q. B. D. 333, and is subsequently developed in *Temperton* v. *Russell* and in the present case. The authorities antecedent to *Bowen* v. *Hall*, as well as that decision itself, are all cases belonging to one or other of these three classes—(1) cases of privilege, where the perpetrator of an act which *per se* constituted a legal wrong was protected from its usual consequences in the event of its being proved that he was actuated by an honest desire to fulfil a public or private duty;

(2) cases in which the act complained of was in itself a plain violation of private right; and (3) cases in which an act detrimental to others, but affording no remedy against the immediate actor, had been procured by illegal means.

The early case of *Garret* v. *Taylor*, Cro. Jac. 567, furnishes an apt illustration of the third class. According to the report, which is very brief, the plaintiff, a quarryman, complained that the defendant had, by threats to "mayhem" and annoy them with litigation, induced or coerced some of his customers to discontinue buying stones from his quarry. Decree passed in absence, and the case was reheard on an appeal brought by the defendant in arrest of judgment upon the ground that the declaration did not disclose any cause of action. The declaration (1 Bac. Ab. 53, 54) discloses facts which, if true, as they were necessarily assumed to be, did amount to illegal means used in order to influence the action of the plaintiff's customers. One learned judge has assumed that the judgment went on the principle that every man "has a right to carry on his trade without disturbance," a proposition not involved in the case but one to which I should not demur if he meant "illegal" disturbance. The decision really went upon the terms of the declaration, which appear to me to disclose a clear case of the employment of unlawful means. I am not at present prepared to hold that threats of vexatious litigation, which might cause anxious apprehension in the minds of many, will in no circumstances amount to unlawful influence; but I entertain no doubt that these, when coupled with serious threats of personal violence, going the length of mutilation or demembration, do, when the party threatened is overcome by and yields to them, constitute legal coercion.

Tarleton v. *McGawley*, Peake N. P. C. 270, is a case of the same complexion. Two British ships, *The Othello* and *The Bannister*, were lying near to each other off the Calabar coast, both engaged in the same kind of adventure, that of bartering their cargoes for palm oil and other West African produce. A canoe, manned by natives desiring to trade, was approaching *The Bannister* for that purpose, when the master of *The Othello* directed against it and fired a cannon loaded with gunpowder and shot, and killed one of its crew, an outrage which occasioned such a panic amongst the native tribes that the season's trade of *The Bannister* was lost. The master of *The Othello* was held to be responsible for that result, which was the direct and natural consequence of his wrongful and criminal act. The case was just the same as if some person had persisted in firing bullets at all and sundry who were about to enter a particular shop, with the effect of driving away its customers and ruining the shopkeeper's business. Such an act could not be reasonably described as lawful, but for the motive by which it was dictated.

In my opinion no light is thrown upon the decision of the present question by *Pitt* v. *Donovan*, 1 M. & S. 639, and other cases of that class. The defendant had, in that case, represented, contrary to the fact, that the plaintiff was insane at the time when he executed a particular deed. The communication was made to a person to whom the defendant was under a legal duty to make the disclosure if it had been true; and the defendant was in law absolved from the ordinary consequences of his having circulated a libel which was false and injurious, if he honestly believed it to be true. The law applicable in cases of that description is, I apprehend, beyond all doubt; but the rule by which the law, in certain exceptional cases excuses the perpetration of a wrong, by reason of the absence of evil motive, is insufficient to establish or to support the converse and very different proposition, that the presence of an evil motive will convert a legal act into a legal wrong. *Lumley* v. *Gye* is a weighty authority in this branch of the law, but it does not lend any aid to the respondent's argument. It was an action of damages against a defendant who had induced a professional singer to break her engagement with the plaintiff, to his detriment, and it was resisted mainly upon the ground that the engagement broken did not constitute the relationship of master and servant between the contracting parties. That plea was overruled and the defendant found liable. The principle of the decision (from which Coleridge, J., alone dissented) was clearly explained by Erle, J., whose opinion is in complete accordance with the views expressed by the other learned judges who constituted the majority of the court. He said: "The authorities are numerous and uniform that an action will lie against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present, for there the right of action in the matter arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed, and the present case is the same." The learned judge went on to say, in language to which I have already referred: "It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong." These statements embody an intelligible and a salutary principle, and they contain a full explanation of the law upon which the case was decided. He who wilfully induces another to do an unlawful act, which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured. None of the learned judges made any reference to the case of *Keeble* v. *Hickeringill*, and not a single expression is to be found in their opinions, tending to suggest that an injurious motive can impart a wrongful character either to a lawful act or to its procurement by means which are not in themselves illegal.

In *Bowen* v. *Hall* the wrong complained of was the intentional inducing of a breach of contract to the detriment of the plaintiff, who was obviously entitled to succeed if *Lumley* v. *Gye* had been well decided. According to the opinion expressed by Erle, J., and the other judges of the majority in that case, the defendant in *Bowen* v. *Hall* had been guilty of a wrong which was in the sense of law malicious, because he had knowingly procured the commission of an illegal act. The judgment in *Lumley* v. *Gye* was followed by the Earl of Selborne, C., and Brett, L.J., whilst Lord Coleridge, C.J., adhered to the opposite view, which had been taken by Coleridge, J. Brett, L.J., in delivering the judgment of the Earl of Selborne and himself, substantially affirms the reasoning of the majority in *Lumley* v. *Gye*, but there are one or two sentences in his judgment relating to points with which the learned judges who decided that case did not deal, and which were not raised by the facts either of *Lumley* v. *Gye* or of the case before him. His lordship said, "Merely to persuade a man to break his contract may not be wrongful in law or fact, as in the second case put by Coleridge, J. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law or in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact." These words are obviously susceptible of two very

different constructions, according as they are understood to refer to the procurement of an act which is in violation of the law, and therefore a legal wrong, or to the procurement of a lawful act. *Primâ facie* they would have appeared to me to refer to the procuring of an illegal act, because the assumption upon which the whole passage is framed is that there has been successful persuasion to break a contract, which is an undoubted violation of the law; and in that case there would be a malicious wrong as it is defined in *Lumley* v. *Gye*. But the words have now been explained by their author to mean, not merely that the procuring of an unlawful act with intent to injure is a malicious wrong, giving a good cause of action, but that the presence of injurious intent in the mind of the procurer gives a good cause of action, although the act procured is in itself lawful. In that aspect of them the words can only be regarded as *obiter dicta*, because no such question was raised by the circumstances of the case.

I do not think it necessary to notice at length *Temperton* v. *Russell*, 41 W. R. 565, [1893] 1 Q. B. 715, in which substantially the same reasons were assigned by Lord Esher, M.R., and Lopes, L.J., as in the present case. It is, to my mind, very doubtful whether, in that case, there was any question before the court with regard to the effect of the animus of the actor in making that unlawful which would otherwise have been lawful. The only findings of the jury which the court had to consider were, first, that the defendants had maliciously induced certain persons to break their contracts with the plaintiffs; and, second, that the defendants had maliciously conspired to induce, and had thereby induced, certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in *Lumley* v. *Gye*. According to the second finding, the persons induced merely refused to make contracts, which was not a legal wrong on their part; but the defendants who induced were found to have accomplished their object, to the injury of the plaintiffs, by means of unlawful conspiracy—a clear ground of liability according to *Lumley* v. *Gye*, if, as the court held, there was evidence to prove it.

I am quite alive to the fact that the question which we have to decide is one of importance, and also that it has never been previously considered by this House. Having come to the conclusion, with the majority of your lordships who have heard the appeal, that the doctrine advanced by the respondents is neither sound in principle nor supported by authority, I move that the orders appealed from be reversed and judgment entered for the appellant, and that the appellant have his costs of this appeal, and costs in both courts below, including the costs of the trial.

Lord ASHBOURNE.—The controversy in this case is between the plaintiffs, who are shipwrights and members of the Shipwrights' Provident Union, and the defendant Allen, a member and the London delegate of the Independent Society of Boilermakers and Iron and Steel Shipbuilders. It is not a dispute between employers and employed, between capital and labour, but rather one between the members of one trades union and of another trades union; and in the facts of the case there is little real difference. His lordship went through the facts and evidence, and continued:] Was this evidence fit to be submitted to the jury of coercion by the defendant on the Glengall Co. to terminate their employment of the plaintiffs? Was there evidence that the defendant intimidated and coerced the Glengall Co. not to enter into new contracts with the plaintiffs? Was there evidence that the defendant maliciously induced the company not to engage the plaintiffs? I am unable myself to see room for doubt that there was ample evidence of such conduct on the part of the defendant, and there is no question that it damaged the plaintiffs. I would infer even from the evidence of the defendant himself that the rules of the Boilermakers' Society, as was clearly testified by their general secretary and chairman, would not support punishing the plaintiffs for their past action by procuring their dismissal from an employment where they were working blamelessly. I would also gather from his evidence that the defendant himself on consideration would not say that such conduct was right. He was asked: "Were the men right or wrong according to your opinion in declining to act with Flood and Taylor because of something they had done in the past?" and his reply was: "That would be wrong, of course, according to the rules of our society if they left their work, but they did not take such an action." But the question here is not on the rules of the society, or on the opinions of the defendant on reflection, but whether there was evidence of his alleged conduct for the jury. The question is, Have the plaintiffs a remedy for their loss, found to have been caused by the defendant?

The plaintiffs had, in my opinion, a clear right to pursue their lawful calling—to have the full benefit of their employment—and the right to enjoy the legitimate, reasonable and probable expectations of a continuance of their employment. It would be, I think, an unsatisfactory state of the law, if it allowed the wilful invader of such a right without lawful cause or justification to escape from the consequences of his action; if it would not hold him liable for maliciously inducing men being denied their accustomed employment, and would not afford to those he had injured legal grounds of action.

The law is stated with precision and vigour by Sir William Erle in his work on trades unions: "Every person has a right under the law as between him and his fellow subjects to full freedom in disposing of his own labour and his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition, and the violation of this prohibition by a single person is a wrong to be remedied either by action or by indictment, as the case may be."

In my opinion this is a clear statement of the law, and I have heard no satisfactory attempt to answer or explain it away. It is supported not only by good sense and by those considerations of justice and fair play one would expect to find in any legal system, but by a mass of powerful authority. Holt, C.J., in *Keeble* v. *Hickeringill*, 11 East 574*n*, laid it down with clearness and certainty that "he that hinders another in his trade or livelihood is liable to an action for so doing." In no subsequent decision of any court has doubt been thrown upon the effect of that authority, or a suggestion made that the weighty conclusions of Holt, C.J., could with advantage to our law be received or pushed aside. The reason it has not been questioned is because, as I conceive, it rested firmly on the great common law principle that every man has a right to carry on his trade without disturbance. The case of

Tarleton v. *McGawley*, Peake N. P. C. 270, decided in 1794, strongly supports the view that such a right was the settled law of this country, for it was then held that an action lay against the master of a vessel for purposely firing a cannon at negroes and thereby preventing them from trading with the plaintiff, and it was pointed out that "the defendant had expressed an intention not to permit any to trade until a debt due from the natives to himself was satisfied."

I need not go in detail through the case of *Lumley* v. *Gye*, which for nearly half a century has passed into the regular current of legal authority; and was followed by Lord Selborne, C., and Lord Esher (then Brett, L.J.) in *Bowen* v. *Hall*.

In the *Mogul case* it was apparently accepted as undoubted law that a trader has a right to carry on his business without disturbance, except in the way of fair competition. Bowen, L.J., there says: "No man, whether trader or not, can justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden: so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence, the obstruction of actors on the stage by preconcerted hissing, the disturbance of wild fowl in decoys by the firing of guns, the impeding or threatening servants or workmen, the inducing persons under personal contracts to break their contracts; all are instances of such forbidden acts." It is worthy of note that this great judge refers expressly to the case of *Keeble* v. *Hickeringill* as clear and accepted law; as did Lord Bramwell and Lord Field in this House.

The fact that the plaintiffs could make no claim against the Glengall Co., and that what the company did was, as between them and the plaintiffs, not unlawful, cannot, I think, exonerate the defendant from liability for his own wrongful conduct. On the question of the evidence of "malice" in the defendant I do not think I could with advantage add anything to what has been so well and so fully said by the Lord Chancellor.

The last case I desire to refer to is *Temperton* v. *Russell*, tried before Collins, J., whose direction was confirmed by the Court of Appeal, where Lord Esher, M.R., gave it as his opinion that there was no real distinction between a malicious inducement to break a contract and a malicious inducement not to enter into new contracts of service. The consequences to a workman so treated are alike disastrous; he depends for his bread upon his existing and future contracts. To intimidate an employer into breaking a contract with a particular workman, and to coerce or maliciously induce an otherwise willing employer not to give him future employment, alike does that workman serious damage in his trade and prevents him from earning his wages. The object of the wrongdoer is the same in each case. Here the motive of the defendant was founded on the determination to inflict punishment on the plaintiffs for their past action, by driving them out of their employment.

In my opinion there was evidence that the defendant acted without legal excuse or justification in invading the right of the plaintiffs to exercise their calling without hindrance; and there was evidence to go to the jury that the defendant intimidated and coerced or maliciously induced the Glengall Iron Co. not to enter into new contracts with the plaintiffs.

I entirely concur in the conclusion of the Lord Chancellor, and think that the appeal should be dismissed.

Lord HERSCHELL.—In this case the respondents, who were the plaintiffs in the action, were members of the Shipwrights' Union. The appellant is an official—the delegate of the London district—of the United Society of Boilermakers and Iron Ship Builders. It appears that before the time of the occurrences which gave rise to this action, a controversy had existed between these unions and the members of whom they were respectively composed. The Boilermakers' Union insisted that it was not a legitimate part of the work of a shipwright to execute ironwork upon ships, and that they ought to confine themselves to the woodwork. On the other hand, the Shipwrights' Union contended that ironwork as well as woodwork fell properly within their craft. In April, 1894, the respondents were engaged to do certain piecework upon a ship called *The Sam Weller*, in the Regent Dock, Millwall, for the Glengall Iron Co. They were employed only upon woodwork. Just before this engagement they had been doing iron shipbuilding work for another firm. This was known to the boilermakers and ironworkers engaged upon *The Sam Weller*, who were much annoyed at the presence in their midst of men who they considered had been unfairly trenching upon their trade or calling. It is clear that they were indisposed to work in company with them. In consequence of the feeling which had been excited, one of the ironworkers telegraphed to the appellant to come to the ship. On his arrival he learned that the ironworkers, or some of them, had determined to throw down their tools and leave at once. He told the ironworker who had telegraphed to him to inform them that if they did so he should use his influence with the executive council of the union to deprive them of any benefit from that society. He then proceeded to an interview with the manager and foreman of the Glengall Co. There is some conflict of evidence as to what passed at that interview; whether the appellant intimated that the boilermakers engaged on the ship would be called out if the respondents were allowed to continue to work on board her, or whether he merely represented that the men belonging to his union would cease to work for the company if the employment of the respondents continued. I shall return to this point presently. It is, at all events, clear that the manager of the Glengall Co. came to the conclusion that if he continued to employ the respondents, the boilermakers would cease to work for him. In view of this, he determined that the company would not continue the employment of the respondents. It is said that they were "discharged" in consequence of the defendant's action. This is true in the sense that they were no longer employed; it is untrue if intended to imply that any right, by contract or otherwise, was violated by their discharge.

In consequence of the step taken by the Glengall Co. this action was brought. Besides the appellant, Jackson and Knight, the chairman and secretary of the union, were made defendants. Kennedy, J., before whom the case was tried, left to the jury the following questions: 1. Did the defendant Allen maliciously induce the Glengall Iron Co. to discharge the plaintiffs from their employment? 2. Did he maliciously induce the Glengall Iron Co. not to engage the plaintiffs, or either of them? The jury answered both questions in the affirmative, and assessed the damages at £20 for each plaintiff. They also found that the other defendants did not authorise the defendant Allen in acting as he did, and that the settlement of the dispute was a matter within the discretion of Allen. Upon these findings the learned judge entered judgment for the plaintiffs against the appellant, but entered judgment for the other defendants.

This judgment was affirmed by the Court of Appeal. Rigby, L.J., however, only concurred in the judgment because he regarded the question as practically settled by the judgment in *Temperton* v. *Russell*.

It was argued at the bar for the respondents that the jury must be taken to have adopted the view that the evidence for the plaintiffs was correct, and that the respondent did intimate that he would call the boilermakers out if the company continued to employ the respondents. In my opinion it is not material whether the account of the conversation given by the appellant or by the manager of the ironworks is the correct one; but I cannot concur in the contention of the respondents that the jury must be taken to have adopted the latter account.

The learned judge, no doubt, indicated an opinion, which I am not able to share, that it would have a bearing on the question whether the appellant induced the company to decline to employ the respondents, and also, on the question of malice, whether the one account of the conversation or the other was the correct one. But he did not lay this down as a matter of law, he left it for the jury to decide. Under these circumstances, I do not think the case can properly be dealt with on the assumption that the finding of the jury involves a finding that the version of what passed given by the plaintiffs' witnesses is the correct one. I have said that I do not share the opinion entertained by the learned judge that the point upon which there was a conflict of testimony had a bearing upon the question whether the company were induced by the appellant to cease to employ or decline employing the respondents. What induced them to do so is plain; it was their belief that if they employed the respondents the ironworkers would cease to work for them, and a sense of the inconvenience which this would cause. It is certain that this belief was engendered by the statement which the appellant made to them. They would be equally induced to take the action, and induced in precisely the same sense whether the representation was that the ironworkers would cease working or that they would be called out. Nor was the motive different, whichever representation was made. In my judgment there can be no difference in the legal effect of these two representations. If the one would give a cause of action, the other, in my opinion, would equally do so.

The question is whether the findings of the jury entitled the plaintiffs to judgment. After a careful and prolonged consideration of the arguments addressed to your lordships when the case was first presented at the bar of this House, I arrived at the conclusion that the question must be answered in the negative. The reasons for this conclusion, which I then prepared, are in substance those to which I now invite your lordships' attention. I have since carefully reconsidered the matter in view of the opinions which have been expressed by the learned judges who were summoned on the occasion of the second argument at the bar, but I have seen no ground for changing the opinion at which I had previously arrived. I have, however, added some observations upon the views presented by the learned judges.

It is to be observed, in the first place, that the company, in declining to employ the plaintiffs, were violating no contract, they were doing nothing wrongful in the eye of the law. The course which they took was dictated by self-interest; they were anxious to avoid the inconvenience to their business which would ensue from a cessation of work on behalf of the ironworkers. It was not contended at the bar that merely to induce them to take this course would constitute a legal wrong, but it was said to do so, because the person inducing them acted maliciously. The Master of the Rolls declined in the present case to define what was meant by "maliciously"; he considered this a question to be determined by a jury. But if acts are, or are not, unlawful and actionable, according as this element of malice be present or absent, I think it is essential to determine what is meant by it. I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose, without any legal definition of the term, to say that they are malicious. No one would know what his rights were. The result would be to put all our actions at the mercy of a particular tribunal whose view of their propriety may differ from our own. However malice may be defined, if motive be an ingredient of it, my sense of the danger would not be diminished.

The danger is, I think, emphasized by the opinions of some of the learned judges. In a case to which I shall allude immediately, the Master of the Rolls included within his definition of malicious acts persuasion used for the purpose "of benefiting the defendant at the expense of the plaintiff." Wills, J., thinks this "going a great deal too far," and that, whether the act complained of was malicious, depends upon whether the defendant has, in pursuing his own interests, "done so by such means and with such a disregard of his neighbour as no honest and fair-minded man ought to resort to." Here it will be seen that malice is not made dependent on motive. The assumed motive is a legitimate one, the pursuit of one's own interest. The malice depends on the means used and the disregard of one's neighbour, and the test of its existence is whether these are such as no honest and fair-minded man ought to resort to. There is here room for infinite differences of opinion. Some, I daresay, applying this test would consider that a strike by workmen at a time damaging to the employer, or a "lock out" by an employer at a time of special hardship to the workmen, were such means, and exhibited such a disregard of his neighbour as an honest and fair-minded man ought not to resort to. Others would be of the contrary opinion. The truth is, this suggested test makes men's responsibility for their actions depend on the fluctuating opinions of the tribunal before whom the case may chance to come as to what a right-minded man ought or ought not to do in pursuing his own interests. Again, the late Cave, J. (whom I cannot name without deploring his loss), expressed the view that the action of the appellant might have been justified on the principles of trade competition if it had been confined to the time when the men were doing ironwork, but that it "was without just cause or excuse, and consequently malicious," inasmuch as the respondents were not at the time engaged upon ironwork. On the other hand it is evident, from the reasoning of some of the learned judges who think the respondents entitled to succeed, that they would not be prepared to adopt this distinction, and would regard the act as "malicious" in either case.

The present case was treated in the court below as governed practically by the previous decisions of the same court in *Bowen* v. *Hall*, 6 Q. B. D. 333, and *Temperton* v. *Russell*, [1893] 1 Q. B. 715. The former of these cases was an action brought against the defendant for maliciously inducing a person who had entered into a contract of service with the plaintiff to break that contract. It raised, for the first time in the Court of Appeal, the question whether *Lumley* v. *Gye* was rightly decided. Brett, L.J., delivered the judgment of the court, in which the late Lord Selborne concurred, the late Lord Chief Justice dissenting. The law was thus laid down in the judgment of the majority of the

court: "Merely to persuade a person to break his contract may not be wrongful in law or fact as in the second case put by Coleridge, J. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact."

This case was followed, and the view of the law thus expressed was re-asserted by Lord Esher, M.R. (formerly Brett, L.J.), in *Temperton* v. *Russell*. It will be seen that "malicious" is here defined as the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff. It is said that a malicious act thus defined is, in law and in fact, a wrong act, and *therefore* a wrongful act. I am not sure that I quite understand what is meant by saying that it is "in fact" a wrong act, as distinguished from its being so in "in law," and that because so wrong it is therefore wrongful. I can only understand it as meaning that it is an act morally wrong. The law certainly does not profess to treat as a legal wrong every act which may be disapproved of in point of morality; but, further, I cannot agree that all persuasion where the object is to benefit the person who uses the persuasion at the expense of another is morally wrong. Numberless instances might be put in which such persuasion, which is of constant occurrence in the affairs of life, would not be regarded by anyone as reprehensible. The judgment is grounded almost wholly upon the presence of this element, that the purpose of the inducement is to injure the plaintiff or to benefit the defendant at his expense. The fact that the act which is induced by the persuasion is the breach of a contract with the plaintiff is treated as a subordinate matter which, without this element, would not be a wrong act, or an act wrongful, and therefore actionable. The motive of the person who did the act complained of was thus treated as the gist of the action. In *Temperton* v. *Russell* the further step was taken by the majority of the court—A. L. Smith, L.J., reserving his opinion on the point—of asserting that it was immaterial that the act induced was not the breach of a contract, but only the not entering into a contract, provided that the motive of desiring to injure the plaintiff or to benefit the defendant at the expense of the plaintiff, was present. It seems to have been regarded as only a small step from the one decision to the other, and it was said that there seemed to be no good reason why, if an action lay for maliciously inducing a breach of contract, it should not equally lie for maliciously inducing a person not to enter into a contract. So far from thinking it a small step from the one decision to the other, I think there is a chasm between them. The reason for a distinction between the two cases appears to me to be this—that, in the one case, the act procured was the violation of a legal right, for which the person doing the act which injured the plaintiff could be sued as well as the person who procured it; whilst, in the other case, no legal right was violated by the person who did the act from which the plaintiff suffered: he would not be liable to be sued in respect of the act done, whilst the person who induced him to do the act would be liable to an action.

I think this was an entirely new departure. A study of the case of *Lumley* v. *Gye* has satisfied me that in that case the majority of the court regarded the circumstance that what the defendant procured was a breach of contract as the essence of the cause of action. It is true that the word "maliciously" was to be found in the declaration the validity of which was then under consideration, but I do not think the learned judges regarded the allegation as involving the necessity of proving an evil motive on the part of the defendant, but merely as implying that the defendant had wilfully and knowingly procured a breach of contract. Indeed Crompton, J., appears to me to indicate this in express terms. He says: "It must now be considered clear law that a person who wrongfully and maliciously, *or, which is the same thing, with notice*, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law." He then proceeds to consider whether the same law is applicable to a contract for future service in the case of a theatrical singer. Erle, J., said: "The authorities are numerous and uniform that an action will lie by a master against a person who procures that a servant shall wilfully leave his service. The principle involved in these cases comprises the present, for there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed." Not a word, be it observed, is said about the motive as constituting an element in the wrongful act. This is made, if possible, clearer by the answer which the learned judge gives to the objection that this class of actions for procuring the breach of a contract of hiring rested upon no principle, and ought not to be extended beyond the cases theretofore decided relating to trade, manufacture, or household service. "The answer," said the learned judge, "appears to me to be that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that when this principle is applied to a violation of a right arising upon a contract of hiring the nature of the service contracted for is immaterial."

I think the view of Wightman, J., was substantially the same. He relies much upon the case of *Winsmore* v. *Greenbank*. In relation to that case he says: "It was *primâ facie* an unlawful act of the wife to live apart from her husband, and it was unlawful, and therefore, tortious in the defendant to procure and persuade her to do an unlawful act, and as damage to the plaintiff was thereby occasioned an action on the case was held maintainable. This case appears to me to be an exceedingly strong authority in the plaintiff's favour. It was undoubtedly, *primâ facie* an unlawful act on the part of Mrs. Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so."

It is true the learned judge here uses the word "maliciously," but I think he means no more by this than "wilfully and knowing that he was procuring an unlawful act." The essence of the tort was manifestly regarded by the learned judge as the procuring one person to do an unlawful act to the injury of another. In *Winsmore* v. *Greenbank*, upon which the learned judge relied as a strong authority in support of the plaintiff's case, there was not even an allegation of malice. The allegation was that the defendant "unlawfully and unjustly" procured a wife not to return to her husband, whereby he was damnified. Willes, C.J., in his judgment, said in answer to objections that were taken to the pleadings: "It must be an unlawful procuring, and it need not be shown on the pleadings how it is unlawful. It was said that it was necessary for the

plaintiff to add 'by false insinuations,' but it is not material to add whether they were true or false. If they were true, and by means of them the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant."

Upon a review, then, of the judgments in *Lumley* v. *Gye*, I am satisfied that the procuring what was described as an unlawful act—namely, a breach of contract, was regarded as the gist of the action. I think the judgment would have been precisely the same, if, instead of the word "maliciously," the words "wilfully and with notice of the contract" had been found in the declaration. Every word of the reasoning of the three learned judges would have been equally applicable to that case. I am not concerned now to inquire whether the decision in *Lumley* v. *Gye* was right. I admit the force of the reasons given by the learned judges for holding that an action lies not only against a person who breaks a contract, but against anyone procuring a breach of contract to the detriment of the plaintiff. There are, however, arguments the other way, and I must not be understood as expressing an opinion one way or the other, whether such an action can be maintained.

It is certainly a general rule of our law that an act *primâ facie* lawful is not unlawful and actionable on account of the motive which dictated it. I put aside the case of conspiracy, which is anomalous in more than one respect.

It has recently been held in this House in the case of *The Mayor of Bradford* v. *Pickles* that acts done by the defendant upon his own land were not actionable when they were within his legal rights, even though his motive were to prejudice his neighbour. The language of the noble and learned lords was distinct. Lord Halsbury, C., said: "This is not a case where the state of mind of the person doing the act can affect the right. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good the motive might be, he would have no right to do it." The statement was confined to the class of cases then before the House, but I apprehend that what was said is not applicable only to rights of property, but is equally applicable to the exercise by an individual of his other rights.

The common law on the subject was emphatically expressed by Parke, B., in delivering the judgment of the court in *Stevenson* v. *Newnham*, 13 C. B. 285. In that case the question was whether a declaration was good which averred that the defendant "maliciously" distrained for more rent than was due. It was held that the allegation of malice did not make it good. Parke, B., said, "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

More than one of the learned judges who were summoned refers with approval to the definition of malice by Bayley, J., in the case of *Bromage* v. *Prosser*, 4 B. & C. 247, "Malice in common acceptation of the term means, ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." It will be observed that this definition eliminates motive altogether. It includes only "wrongful" acts intentionally done. I may remark in passing that I am quite unable to see how the definition assists the respondents. It seems to me to tell the other way. In the present case the intention is that the malicious motive makes "wrongful" an act that otherwise would not be so.

It may be convenient here to refer to *Green* v. *The London General Omnibus Co.*, 8 W. R. 88, 7 C. B. N. S. 290, which was relied on as showing that a malicious motive may make actionable acts otherwise innocent. In my opinion it affords no support to such a proposition. Acts were charged in the declaration which manifestly interfered with the plaintiff in the free use of the highway to which he was entitled. The declaration averred that he was obstructed in the use of it. It was demurred to on the ground that a corporation could not be guilty of malice, and that this was of the essence of the cause of action. The decision was only that the declaration was good. It was not held that a malicious motive was essential. Erle, C.J., in delivering the judgment of the court, stated as the ground of the demurrer, that the declaration charged "a wilful and intentional wrong," and that the defendants, being a corporation, could not be guilty of such a wrong. He obviously gave the averment of malice the meaning attributed to it by Bayley, J., in the case just referred to—namely, that the wrongful acts were done intentionally.

Great stress was laid at the bar on the circumstance that in an action for maliciously and without reasonable and probable cause putting in motion legal process, an evil motive is an essential ingredient. I have always understood, and I think it has been the general understanding, that this was an exceptional case. The person against whom proceedings have been initiated without reasonable and probable cause is *primâ facie* wronged. It might well have been held that an action always lay for thus putting the law in motion, but I apprehend that the person taking proceedings was saved from liability if he acted in good faith, because it was thought that men might otherwise be too much deterred from enforcing the law, and that this would be disadvantageous to the public. Some of the learned judges cite actions of libel and slander as instances in which the legal liability depends on the presence or absence of malice. I think this a mistake. The man who defames another by false allegations is liable to an action, however good his motive, and however honestly he believed in the statement he made. It is true that in a limited class of cases the law under certain circumstances regards the occasion as privileged, and exonerates the person who has made false defamatory statements from liability if he has made them in good faith. But if there be not that duty or interest which in law creates the privilege, then, though the person making the statements may have acted from the best of motives, and felt it his duty to make them, he is none the less liable. The gist of the action is that the statement was false and defamatory. Because in a strictly limited class of cases the law allows the defence that the statements were made in good faith, it seems to me with all deference, illogical to to affirm that malice constitutes one of the elements of the torts known to the law as libel and slander. But even if it could be established that in cases falling within certain well-defined categories it is settled law that an evil motive renders actionable acts otherwise innocent, that is surely far from showing that such a motive always makes actionable acts prejudicial to another which are otherwise lawful, or that it does so in cases like the present utterly dissimilar from those within the categories referred to.

The question raised by the decision under appeal is one of vast importance and wide-reaching consequences. In *Temperton* v. *Russell* it was held that the principle of *Lumley* v *Gye* and *Bowen* v. *Hall* was not confined to breaches of contract of service, but applied to breaches of any contract. The law laid down in *Bowen* v. *Hall* in terms applies to all contracts, and I quite agree that the nature of the contract can make no difference.

If the judgment under appeal is to stand, and the fact that the act procured was unlawful as being a breach of contract be immaterial, it follows that

every person who persuades another not to enter into any contract with a third person may be sued by that third person if the object were to benefit himself at the expense of such person. Such a case is within the very words employed in *Bowen* v. *Hall* as applied in the present judgment. I do not think it possible to maintain such a proposition. It would obviously apply where one trader induced another not to contract with a third person with whom he was in negotiation, but to make the contract with himself instead, a proceeding which occurs every day, and the legitimacy of which no one would question. Yet it is within the very language used in *Bowen* v. *Hall*. He induced a person not to enter into a contract with a third person, and his object is to benefit himself at the expense of the person who would otherwise have obtained the contract, and thus necessarily to injure him by depriving him of it. It was said at the bar that there was an exception in favour of trade competition. I know of no ground for saying that such an exercise of individual right is treated with exceptional favour by the law. But it is possible to give many illustrations to which no such answer would apply. I give one: a landowner persuades another to sell him a piece of land for which a neighbour is negotiating. It is so situated that it will improve the value of the property of whichever of them obtains it. His motive is to benefit himself at his neighbour's expense; he induces the owner of the land not to contract with his neighbour. The case is within the terms of the judgment in *Bowen* v. *Hall*. Would it be possible to contend that an action lay in such a case? If the fact be that malice is the gist of the action for inducing or procuring an act to be done to the prejudice of another, and not that the act induced or procured is an unlawful one as being a breach of contract or otherwise, I can see no possible ground for confining the action to cases in which the thing induced is the not entering into a contract. It seems to me that it must equally lie in the case of every lawful act which one man induces another to do where his purpose is to injure his neighbour or to benefit himself at his expense. I cannot hold that such a proposition is tenable in principle, and no authority is to be found for it. I should be the last to suggest that the fact that there was no precedent was in all cases conclusive against the right to maintain an action. It is the function of the courts to apply established legal principles to the changing circumstances and conditions of human life. But the motive of injuring one's neighbour or of benefiting oneself at his expense is as old as human nature. It must for centuries have moved men in countless instances to persuade others to do or to refrain from doing particular acts. The fact that under such circumstances no authority for an action founded on these elements has been discovered does go far to show that such an action cannot be maintained. I think these considerations (subject to a point which I will presently discuss) sufficient to show that the present action cannot be maintained.

It is said that the statement that the defendant would call the men out, if made, was a threat. It is this aspect of the case which has obviously greatly influenced some of the learned judges. Hawkins, J., says that the defendant, without excuse or justification "wilfully, unlawfully, unjustly, and tyrannically invaded the plaintiffs' right by intimidating and coercing their employers to deprive them of their present and future employment," and that the plaintiffs are therefore entitled to maintain this action. But "excuse or justification" is only needed where an act is *primâ facie* wrongful. Whether the defendant's act was so is the matter to be determined. To say that the defendant acted "unlawfully" is, with all respect, to beg the question, which is, whether he did so or not? To describe his acts as unjust and tyrannical proves nothing, for these epithets may be and are, in popular language, constantly applied to acts which are within a man's rights and unquestionably lawful. In my opinion these epithets do not advance us a step towards the answer to the question which has to be solved. The proposition is therefore reduced to this, that the appellant invaded the plaintiffs' right by intimidating and coercing their employers. In another passage, in his opinion, the learned judge says that there is no authority for the proposition that to render threats, menaces, intimidation, or coercion available as elements in a cause of action, they must be of such a character as to create fear of personal violence. I quite agree with this. The threat of violence to property is equally a threat in the eye of the law. And many other instances might be given. On the other hand, it is undeniable that the terms "threat," "coercion," and even "intimidation" are often applied in popular language to utterances which are quite lawful and give rise to no liability, either civil or criminal. They mean no more than this, that the so-called threat puts pressure, and, perhaps, extreme pressure, on the person to whom it is addressed to take a particular course. Of this, again, numberless instances might be given. Even then, if it can be said without abuse of language that the employers were "intimidated and coerced" by the appellant, even if this be in a certain sense true, it by no means follows that he committed a wrong or is under any legal liability for his act. Everything depends on the nature of the representation or statement by which the pressure was exercised. The law cannot regard the act differently because you choose to call it a threat or coercion instead of an intimidation or warning.

I understood it to be admitted at the bar, and it was indeed stated by one of the learned judges in the Court of Appeal, that it would have been perfectly lawful for all the ironworkers to leave their employment and not to accept a subsequent engagement to work in the company of the plaintiffs. At all events I cannot doubt that this would have been so. I cannot doubt, either, that the appellant or the authorities of the union would equally have acted within his or their rights if he or they had "called the men out." They were members of the union. It was for them to determine whether they would become so or not, and whether they would follow or not follow the instructions of its authorities, though, no doubt, if they had refused to obey any instructions which under the rules of the union it was competent for the authorities to give, they might have lost the benefits they derived from membership. It is not for your lordships to express any opinion on the policy of trade unions, membership of which may undoubtedly influence the action of those who have joined them. They are now recognized by law; there are combinations of employers as well as of employed. The members of these unions, of whichever class they are composed, act in the interest of their class. If they resort to unlawful acts they may be indicted or sued. If they do not resort to unlawful acts they are entitled to further their interests in the manner which seems to them best and most likely to be effectual.

If, then, the men had ceased to work for the company, either of their own motion or because they were "called out," and the company in order to secure their return had thought it expedient no longer to employ the plaintiffs they could certainly have maintained no action. Yet the damage to them

would have been just the same. The employers would have been subjected to precisely the same "coercion" and "intimidation," save that it was by act and not by prospect of the act; they would have yielded in precisely the same way to the pressure put upon them, and been actuated by the same motive, and the aim of those who exercised the pressure would have been precisely the same. The only difference would have been the additional result that the company also might have suffered loss. I am quite unable to conceive how the plaintiffs can have a cause of action, because, instead of the ironworkers leaving, either of their own motion or because they were called out, there was an intimation beforehand that either the one or the other of these courses could be pursued. The ironworkers were employed on the terms that they might leave at the close of any day, and that, on the other hand, the employers might, if they saw fit, then discharge them. The company had employed the men knowing that they were members of the union, and they had on one occasion, at least, dealt with the appellant as its delegate. They had no ground for complaint if the men left, as they were by contract entitled to do, whether the men left of their own motion or followed the instruction of their union leaders. It is said that the company were in the power of the men because of the business loss to which the withdrawal of the men would subject them. But to what was this due if not to the act of the company themselves in employing these men under a contract which either party might any day determine? Under such circumstances to compare the act of the company to that of the traveller who, on a pistol being presented to his head, hands his purse to the highwayman appears to me grotesque.

The object which the appellant and the ironworkers had in view was that they should be freed from the presence of men with whom they dislike working, or to prevent what they deemed an unfair interference with their rights by men who did not belong to their craft doing the work to which they had been trained. Whether we approve or disapprove of such attempted trade restrictions, it was entirely within the right of the ironworkers to take any steps, not unlawful, to prevent any of the work which they regarded as legitimately theirs being entrusted to other hands.

Some stress was laid in the court below upon the fact that the plaintiffs were not at the time in question engaged upon ironwork, although immediately before that time they had been so employed elsewhere. This, it was said, showed that the motive of the defendant and the ironworkers was the "punishment" of the plaintiffs for what they had previously done. I think that the use of the word "punishment" has proved misleading. That word does not necessarily imply that vengeance is being wreaked for an act already done, though no doubt it is sometimes used in that sense. When a court of justice, for example, awards punishment for a breach of the law the object is not vengeance. The purpose is to deter the person who has broken the law from a repetition of his act, and to deter other persons also from committing similar breaches of the law.

In the present case it was admitted that the defendant had no personal spite against the plaintiffs. His object was, at the utmost, to prevent them in the future from doing work which he thought was not within their province, but within that of the ironworkers. If he had acted in exactly the same manner as he did, at a time when the plaintiffs were engaged upon ironwork, his motive would have been precisely the same as it was in the present case, and the result to the plaintiffs would have been in nowise different. I am unable to see, then, that there is any difference either in point of ethics or law between the two cases. The ironworkers were no more bound to work with those whose presence was disagreeable to them than the plaintiffs were bound to refuse to work because they found that this was the case. The object which the defendant, and those whom he represented, had in view throughout was what they believed to be the interest of the class to which they belonged; the steps taken was a means to that end. The act which caused the damage to the plaintiffs was that of the Iron Co. in refusing to employ them. The company would not subordinate their own interests to the plaintiffs. It is conceded that they could take this course with impunity. Why, then, should the defendant be liable because he did not subordinate the interests of those he represented to the plaintiffs? Self-interest dictated alike the act of those who caused the damage, and the act which is found to have induced them to cause it.

I have been dealing so far with the ground upon which the judgment in the court below proceeded. The learned counsel for the respondents, however, rested their arguments mainly upon a different ground, which has found favour with the learned judges who think the plaintiffs entitled to judgment.

It was contended that the defendant, by the course he took, had interfered with the plaintiffs in their trade or calling, and that this of itself was an actionable wrong. In support of this very broad proposition reliance was mainly placed on the case of *Keeble* v. *Hickeringill*. The declaration charged the defendant with firing a gun with design to damnify the plaintiff and frighten the wild fowl from his decoy. In the report 11 East 574*n* it is stated that the plaintiff was lord of a manor, and had a decoy, and the plaintiff had also made a decoy upon his own ground, which was next adjoining the defendant's ground, and there the plaintiff had decoy and other ducks of which he made profit. It was held that the action lay. In the report in 11 Mod. 75 this observation is attributed to Lord Holt: "Suppose defendant had shot on his own ground, if he had occasion to shoot, it would be one thing, but to shoot on purpose to damage the plaintiff is another thing, and a wrong." In another report Lord Holt is reported as saying: "The action lies for—first, using or making a decoy is lawful; secondly, this employment of his ground for that use is profitable to the plaintiff, as is the skill and management of that employment." It is argued that this decision rests upon the principle that intentional interference with the trade of another is wrongful. If it was intended by the decision to draw a distinction between firing by the defendant on his own land, when the decoy was kept by the plaintiff for purposes of trade profit, and doing the same act when the decoy was kept for purposes of pleasure only, I can see no ground for such a distinction. The defendant, in firing upon his own land in such a way as to frighten the birds from the plaintiff's land, was either acting within his own rights or not. If he was not he would surely be liable, whether the plaintiff was using his land for pleasure or profit. If he was within his rights he would not be liable in either case, and I do not see how his rights could depend on the circumstance that the plaintiff traded in ducks and did not merely use his decoy for purposes of sport, or that he sold them, and did not merely use them for consumption by his household. I cannot think that the right of action depended on the circumstance that the plaintiff traded in ducks; and that there would have been no right of action, all other circumstances being the same, if he had not done so. The case may be supported, and the observation of Lord Holt, which

has been quoted, explained by the circumstance that if the defendant merely fired on his own land in the ordinary use of it, his neighbour could make no complaint; whilst, if he was not firing for any legitimate purpose connected with the ordinary use of land, he might be held to commit a nuisance. In this view of it *Keeble* v. *Hickeringill* has, of course, no bearing on the present case.

It is, however, treated in their opinions by the majority of the learned judges as establishing the wide and far-reaching proposition that every man has a right to pursue his trade or calling without molestation or obstruction, and that anyone who, by any act, though it be not otherwise unlawful, molests or obstructs him, is guilty of a wrong, unless he can show lawful justification or excuse for so doing.

The case of *Keeble* v. *Hickeringill* was decided about two centuries ago, but I cannot find that it has ever been treated, unless it be quite recently, as establishing the broad general proposition alleged. No such proposition is to be found stated, so far as I am aware, as the ground of any decision, or in any standard text-book of the English law. In Smith's Leading Cases, which were selected, and the notes on them written, by one of the most eminent lawyers of his day, the case of *Keeble* v. *Hickeringill* is not even referred to. And the first editors of the work after Mr. J. W. Smith's death, Willes and Keating, JJ., lawyers on whose eminence it is unnecessary to dilate, equally passed it by without notice. If the view taken by the majority of the learned judges whose opinions were given at the bar be correct, *Keeble* v. *Hickeringill* ought to have been itself treated as a leading case.

It has not, as I believe, been an authority on which subsequent decisions have been based, except in cases relating to the disturbance of decoys of wild birds. It is, nevertheless, suggested by the learned judges that it embodies the principle on which many subsequent cases have been decided, though it was not referred to, and the judges who pronounced the judgments were apparently unconscious of the authority they are said to have followed.

It is remarkable that amongst these cases are *Lumley* v. *Gye* and *Bowen* v. *Hall*, which I have already discussed. They are said by several of the judges to rest on the principle established in *Keeble* v. *Hickeringill*. Some of the judges, indeed, criticize adversely the grounds upon which these cases were decided, and intimate that they can only be supported on the ground taken by Lord Holt in *Keeble* v. *Hickeringill*. That case, however, was not even cited by the counsel who argued *Lumley* v. *Gye* or *Bowen* v. *Hall*, or by any of the judges who decided them. If it establishes the proposition contended for, it is astonishing that those very learned and distinguished judges were unaware of any such legal proposition, and instead of taking this short cut to their decision, based it upon elaborate reasoning entirely unconnected with it.

Great reliance was placed by the respondents on certain *dicta* of Holt, C.J., in *Keeble* v. *Hickeringill*. That learned judge is reported to have said that if a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, an action lies in all cases; and he gives the following illustrations: "If H. should lie in the way with guns and fright boys from going to school, and their parents would not let them go thither, that schoolmaster would have an action for loss of his scholars. A man hath a market to which he hath toll of horses sold; a man is bringing his horse to market to sell, a stranger hinders and obstructs him from going to the market—an action lies, because it imports damages. Again, an action on the case lies against one that by threats frightens away his tenants-at-will." In all these cases I think the Chief Justice was referring to acts in themselves wrongful. Firing guns in such a manner as to terrify persons lawfully passing along the highway would, I take it, be an offence. And the other illustrations given import, I think, that the obstruction and frightening were of such a character as to be unlawful, quite independently of the motives which led to them.

The case of *Carrington* v. *Taylor*, 11 East 571, was also relied on by the respondents. It is, I believe, the only case which has been expressly based on *Keeble* v. *Hickeringill*. The plaintiff there possessed an ancient decoy, and the defendant sought his livelihood by shooting wild fowl from a boat on the water, for which boat, with small arms, he had a licence from the Admiralty for fishing and coasting along the shores of Essex. The decoy was near a salt creek where the tide ebbs and flows. The only proof of disturbance of the decoy by the defendant was that, being in his boat shooting wild fowl in a part of the open creek, he had fired his fowling-piece, first within a quarter of a mile of the decoy and afterwards within 200 yards of it, and had killed several widgeons. The judge left these facts to the jury as evidence of a wilful disturbance of the plaintiff's decoy by the defendant. The jury returned a verdict of 40s. damages, and the court, on a motion for a new trial, refused to disturb the verdict. They gave no reason for their judgment. Unless a decoy possesses some peculiar privileges in the eye of the law, I confess myself quite unable to understand why the defendant was liable to an action or was not within his rights in shooting the wild fowl at the place he did for the purpose of gaining a livelihood, which is stated to have been his object. In any case the decision affords no support to the contention now under consideration. For there was no allegation that the plaintiff traded in wild fowl; "great profits and advantages," in pleader's language, might well have accrued to him without his doing so. And there was no proof that he did so. Although some of the learned judges who support the judgment below rely on this case, one at least thinks it bad law. The case is important as showing, as I think it clearly does, that the judges of the Court of King's Bench in 1809 did not regard the judgment in *Keeble* v. *Hickeringill* as founded on interference with trade or dependent on the presence of malice.

I turn now to the other cases relied on by the learned judges in support of the proposition on which they found their conclusion in favour of the respondents, which are said to have been decided upon the principle embodied in *Keeble* v. *Hickeringill*. Amongst the earliest of these is *Garrett* v. *Taylor*, Cro. Jac. 567. The declaration alleged that the plaintiff was a mason and used to sell stones, and employed workmen in his stone pit. "*Al queux*"—I quote from the fuller statement of the pleading in Rolle's Reports, 162—"*le defendant tantas et frequentas minas de vita et de mutilatione membrorum suorum et bonorum devastatione per diversas sectas legis dedit*," whereby the plaintiff's workmen left, and he was unable to obtain others. After judgment this declaration was held to disclose a cause of action. It is suggested that it is difficult to explain this decision except on the ground that the law recognizes in every man a right to carry on his trade without disturbance. I am unable to see the difficulty or to think that the decision rests on any principle specially relating to trade. If the plaintiff had not been a tradesman, but the owner of a house, and the same menaces had been uttered to those who came from

time to time to visit him, I cannot but think that he would equally have had a cause of action. He would have been affected prejudicially in the occupation and enjoyment of his property by acts in themselves wrongful. Again, in *Tarleton* v. *McGawley*, a gun was fired at a canoe coming to the plaintiff's ship, whereby one of the natives in it was killed, and so natives were deterred by fright from approaching it for the purpose of trading. It is said that the essence of the wrong in this case was that the plaintiff was disturbed in his trade. I do not think so. Can it be doubted that if the ship-owner had desired the presence of persons on board his ship for any other purpose, and the same wrongful act had deterred them from approaching the ship, the ship-owner might have maintained a similar action to recover damages for any loss or inconvenience to which he had been put owing to the wrongful act of the defendant?

I will not trouble your lordships by going through all the cases referred to. Speaking generally, I believe these actions would equally have been maintainable if a similar wrongful act had caused damage to, or had affected the legal rights of, a person wholly unconnected with trade. In all of them the act complained of was in its nature wrongful, violence, menaces of violence, false statements. In none of them was the proposition now contended for laid down or hinted at, and they can be supported without resort to any such principle. No doubt in some of the cases referred to the wrong was of such a nature that it is difficult to imagine circumstances in which precisely the same wrong could have caused damage to a person not in trade, but the act was not wrongful merely because it affected the man in his trade, though it was this circumstance which occasioned him loss. Among the authorities relied on were those relating to slander of a man in the way of his trade. This action again was traced to the principle that a man's trade must not be interfered with. It is true that slander of a man in the way of his trade is actionable without proof of special damage, but whatever the slander, the wrong is precisely the same—that defamatory words have been uttered. And slander of a man in the way of his office, if it be an office of profit or even of dignity, where it is one from which the holder may be removed, is actionable without proof of special damage in precisely the same way as slander of a man in the way of his trade.

I now proceed to consider on principle the proposition advanced by the respondents, the alleged authorities for which I have been discussing. I do not doubt that everyone has right to pursue his trade or employment without "molestation" or "obstruction" if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition—namely, that every one has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition, in my opinion, has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling or to determine when or where or with whom he will work is in law a right of precisely the same nature and entitled to just the same protection as a man's right to trade or work. They are but examples of that wider right of which I have already spoken. That wider right embraces also the right of free speech. A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shown to have abused his right, why is he to be called upon to excuse or justify himself because his words may interfere with someone else in his calling?

In the course of the argument one of your lordships asked the learned counsel for the respondents whether, if a butler on account of a quarrel with the cook told his master that he would quit his service if the cook remained in it, and the master preferring to keep the butler terminated his contract with the cook, the latter could maintain an action against the butler? One of the learned judges answers this question without hesitation in the affirmative. As, in his opinion, the present action would lie, I think he was logical in giving this answer. But why, I ask, was not the butler in the supposed case entitled to make his continuing in the employment conditional on the cook ceasing to be employed? And if so, why was he not entitled to state the terms on which alone he would remain, and thus give the employer his choice? Suppose after the quarrel each of the servants made the termination of the contract with the other, a condition of remaining in the master's service, and he chose to retain one of them, would this choice of his give the one parted with a good cause of action against the other? In my opinion, a man cannot be called upon to justify either act or word merely because it interferes with another's trade or calling; any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shown to be in its nature wrongful, and thus to require justification.

The notion that there may be a difference in this respect between acts affecting trade or employment and other acts seems to be largely founded on certain *dicta* of Bowen, L.J., in the case of *The Mogul Steamship Co.* It must be remembered that these were *obiter dicta*, for the decision was that the defendants were not liable. The passage, perhaps, chiefly relied upon is the following: "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong." It will be noted that the learned judge here makes no distinction between acts which interfere with property and those which interfere with trade. For the purpose then in hand the statement of the law may be accurate enough, but if it means that a man is bound in law to justify or excuse every wilful act which may damage another in his property or trade, then I say, with all respect, the proposition is far too wide; everything depends on the nature of the act, and whether it is wrongful or not.

Whatever may be the effect of the *dicta* of some of the judges in the case of *The Mogul Steamship Co.* v. *McGregor*, I regard it as an authority supporting the appellant's case. Certain owners of ships formed an association with the object of securing to themselves exclusively a particular carrying trade. They allowed a rebate on the freights to all shippers who shipped only with members of the association. They also sent ships to ports where the plaintiffs were endeavouring to obtain cargoes, to carry at unremunerative rates, in order to secure the trade to themselves. A circular was sent by an agent of the defendants reminding shippers at a particular port that shipments for London by any of the plaintiffs' steamers at any of the ports in China would exclude the firm making the shipment from participation in the returns of freight during the whole six-monthly period in

which they had been made, even though the firm elsewhere might have given exclusive support to the steamers of the combination. It was held by this House that the plaintiffs had no cause of action. This, too, be it observed, though the action was in respect of a conspiracy, what was done being in pursuance of a common course of action concerted by several shipowners. In that case the very object of the defendants was to induce shippers to contract with them, and not to contract with the plaintiffs, and thus to benefit themselves at the expense of the plaintiffs, and to injure them by preventing them from getting a share of the carrying trade. Its express object was to molest and interfere with the plaintiffs in the exercise of their trade. It was said that this was held lawful because the law sanctions acts which are done in furtherance of trade competition. I do not think the decision rests on so narrow a basis, but rather on this, that the acts by which the competition was pursued were all lawful acts, that they were acts not in themselves wrongful, but a mere exercise of the right to contract with whom, and when, and under what circumstances and upon what conditions they pleased. I am aware of no ground for saying that competition is regarded with special favour by the law; at all events, I see no reason why it should be so regarded. It may often press as hardly on individuals as the defendant's acts are alleged to have done in the present case. But if the alleged exception could be established, why is not the present case within it? What was the object of the defendant and the workmen he represented but to assist themselves in their competition with the shipwrights? A man is entitled to take steps to compete to the best advantage in the employment of his labour, and to shut out, if he can, what he regards as unfair competition, just as much as if he was carrying on the business of a shipowner. The inducement the appellant used to further his end was the prospect that the members of his union would not work in company with what they deemed unfair rivals in their calling. What is the difference between this case and that of a union of shipowners who induce merchants not to enter into contracts with the plaintiff by the prospect that if at any time they employ the plaintiff's ships they will suffer the penalty of being made to pay higher charges than their neighbours at the time when the defendants' ships alone visit the ports? In my opinion there is no difference in principle between the two cases.

A further point to which I have not yet alluded was raised by the junior counsel for the respondents on the first argument at the bar. It was strenuously insisted upon by both learned counsel on the occasion of the second argument. It was said that the appellant had been guilty of misrepresentation, which had induced the company to take the course they did. No such point is to be found suggested in the pleadings, no such point was raised at the trial or in the Court of First Instance, or until the junior counsel for the respondents addressed your lordships. The jury were not asked whether there had been a misrepresentation, and have not found that this was the case. It is certainly not admitted by the appellant. Under these circumstances it would, in my opinion, be without justification and contrary to precedent for your lordships to attach any weight to the point now. But I think it right to add that it does not seem to me to have been made good as a matter of fact. It is contended, as I understand, that the appellant represented that all the ironworkers in the union would leave if the plaintiffs continued to be employed, whereas some only had said that they would do so. I think the contention rests on a misapprehension. It is true that some only appear to have said that they would leave at once, but I think that this referred to an immediate departure without waiting till the end of the day, or, at all events, without awaiting the result of the interview between the appellant and the employers. The witness Elliot, whose evidence is relied on, himself says that "the chaps" were dissatisfied, and that there was only one way of settling it, and that was in accordance with the wishes of their men, these wishes being that the plaintiffs should not be continued upon work in the same ship. Even if a misrepresentation by the appellant to the Glengall Co. would be sufficient in any circumstances to afford a right of action to the plaintiffs, I think it could scarcely be contended that it could do so, unless the misrepresentation were wilful and intentional. Of this there is, in my opinion, not a tittle of evidence. The appellant may well have believed from the statements made to him, that, if the plaintiffs continued to work in the ship, all the ironworkers would cease to work. On the evidence I should come without hesitation to the conclusion that they would have done so.

For the reasons I have given I think the judgment should be reversed, and judgment entered in the action for the defendant with costs.

I have only very recently had the opportunity of knowing the views entertained by my noble and learned friend on the Woolsack with regard to this case. In consequence of them, I think it right to add the following observations:

I am not behind my noble and learned friend in the desire to preserve individual liberty. But I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful.

I am unable to regard as altogether accurate the statement of my noble and learned friend that up to the period when this case reached your lordships' House there was a unanimous consensus of opinion. I think he has overlooked the following facts: When the Court of Appeal in *Bowen* v. *Hall* held that an action lay for maliciously inducing another to break his contract, the late Lord Chief Justice, differing from his two colleagues, was of opinion that, even in such a case, an action could not be maintained. When, in *Temperton* v. *Russell*, Lord Esher, M.R., and Lopes, L.J., carried the doctrine further, and held that an action would lie for maliciously inducing another not to enter into a contract, A. L. Smith, L.J., notwithstanding the strong expression of opinion by those learned judges, significantly reserved his own opinion on the point. And when, in the present case, Lord Esher, M.R., and Lopes, L.J., reaffirmed the opinions they had previously pronounced, Rigby, L.J., only concurred in the judgment under appeal in deference to the opinions expressed in the previous case.

In my opinion the conclusion at which I have arrived is not in conflict with any decision or even with the pronounced opinions of any judges except those enunciated in the recent cases now under review. On the contrary, I believe, with all deference to my noble and learned friend on the woolsack, that any other conclusion would run counter to principles of the common law which have been long well established.

I regret to have trespassed so long on your lordships' time. My excuse must be that I regard the decision under appeal as one absolutely novel, and which can only be supported by affirming propositions far-reaching in their consequences and, in my opinion, dangerous and unsound.

Lord MACNAGHTEN.—I am sorry to say that I must begin by recapitulating the facts of the case. For the findings of the jury, taken by themselves, do not convey to my mind any definite meaning. The jury have found that the appellant Allen "maliciously induced" the Glengall Iron Co. to discharge the respondents from their service, and they have awarded damages in consequence. I do not know what the jury meant by the word "induced"; I am not sure that I know what they meant by the word "maliciously." Sometimes, indeed, I rather doubt whether I quite understand that unhappy expression myself. I am therefore compelled to turn for help to the evidence at the trial, accepting, as I suppose the jury must have accepted, the account given by the respondents in preference to that offered by the appellant wherever there may be any shadow of difference between them. [His lordship went through the evidence, and continued:] On their dismissal Flood and Taylor brought this action against Allen. Each party had the financial support of their union. The plaintiffs joined as co-defendants Jackson and Knight, the chairman and secretary of the Boilermakers' Union. Jackson and Knight had no more to do with the matter than any of your lordships. The jury found that they did not authorize Allen in acting as he did. On further consideration the action was dismissed against them, and the dismissal was affirmed on appeal. It is not necessary for me to say anything about this part of the case, except that I cannot help thinking that the fact of the judge leaving any question to the jury as regards the chairman and secretary of the union must have rather tended to confuse the issue as between the plaintiffs and Allen. Although he pointed out that there was no evidence of conspiracy, it must, I should think, have given some colour to the suggestion of oppressive combination as an element to be considered, whereas in the course of the trial the case was in fact, as it seems to me, reduced to a claim against Allen for what he did in his individual capacity.

Now before I proceed to consider the legal grounds on which Kennedy, J., and the Court of Appeal decided the case against Allen, I should like to ask what there was wrong in Allen's conduct. He had nothing to do with the origin of the ill-feeling against Flood and Taylor. He did nothing to increase it. He went to the dock simply because he was sent for by one of the men of his union. It seems to be considered the duty of a district delegate to listen to the grievances of the members of his union within his district, and to settle the difficulty if possible. The jury found that the settlement of this dispute was a matter within Allen's discretion. The only way in which he could settle it was going and seeing the manager. There was surely nothing wrong in that. There was nothing wrong in his telling the manager that the iron-men would leave their work unless the two shipwrights against whom they had a grudge were dismissed, if he really believed that that was what his men intended to do. As far as their employers were concerned the iron-men were perfectly free to leave their work for any reason, or for no reason, or even for a bad reason; any one of them might have gone singly to the manager, or they might have gone to him all together (if they went quietly and peaceably), and told him they would not stay any longer with Flood and Taylor at work among them.

If so, it is difficult to see why fault should be found with Allen for going in their place and on their behalf and saying what they would have said themselves. Then, did Allen say or do anything in the course of his interview with Mr. Halkett which, in the events which have happened, gives Flood and Taylor a right of action against him? That brings me to the case presented to the jury.

In the statement of claim there were serious allegations for which, as it turned out, there was no foundation whatever in fact. It was alleged that Allen and his co-defendants had induced the company to break contracts with the plaintiffs. That was a mistake; there was no contract to break. It was alleged that Allen and his co-defendants had conspired against the plaintiffs. That was a mistake too; there was not, as the learned judge said, "a shred of evidence of any conspiracy at all." Then there was a charge of intimidation and coercion. That charge vanished too. The only reference the judge made to it was to say "There is no evidence here, of course, of anything amounting to intimidation or coercion in any legal sense of the term." The case as launched broke down.

The judge, however, saved two questions from the wreck and put them to the jury. They were these: 1. Did Allen maliciously induce the company to discharge the plaintiffs? 2. Did Allen maliciously induce the company not to engage the plaintiffs? In putting these questions he explained that the word maliciously was a term of art in law—a proposition, at any rate, not universally true. "It means," he said, "connected with the word 'induce,' this—that it was not for the mere purpose of forwarding fairly Allen's own interests, but from the indirect motive of doing a mischief to the plaintiffs in their lawful business." That comes near the ordinary meaning of "malice," if "deliberate mischief" be taken as its ordinary meaning. And it is to be observed that in the cases professedly founded on *Lumley* v. *Gye*—I refer particularly to *Bowen* v. *Hall*, *Temperton* v. *Russell*, and the present case in the Court of Appeal—the word "malice" seems to be used in a sense not far removed from its ordinary and popular signification.

As regards the meaning of the word "induce," I do not think the jury got much assistance. I rather gather from the summing up that the jury were given to understand that if they thought that Allen merely represented the state of things as it was—and the feeling of the iron-men at the Regent Dock—they would be at liberty to answer the questions put to them about Allen in the negative. But the answer must be the other way if they thought that Allen went further, and assumed to represent the union and to speak as if he had the power of the union at his back; that would be a threat, and would amount to "inducing." I do not think it can be said that Allen did "induce" the company to discharge the plaintiffs. Certainly it cannot be truly said that he procured them to be discharged. It was not his act that prevented the company from continuing to employ them. If the whole story had been a fiction and an invention on his part, I could have understood the finding of the jury. But I do not think there was any misrepresentation on Allen's part. I do not think there was any exaggeration. Nor, indeed, was any such point made at the trial. The evidence of the plaintiffs themselves proves that the iron-men were in a very nasty temper. They believed the iron-men meant mischief. Allen evidently thought they were bent on striking. Edmonds, the foreman, indeed, says he thought Allen "had only just to hold up his hand and the whole of the men would go off." But he gathered this from Allen's manner, not from what he said.

But after all, whatever he may have gathered from Allen's manner, it was not Edmonds who discharged the plaintiffs. It was Mr. Halkett, and he did it without consulting Edmonds. Mr. Halkett says nothing to show that he was afraid of Allen. He

must have known too much about trade unions to have supposed for a moment that a subordinate officer in Allen's position could have taken upon himself to call the men out. It is quite plain what it was that induced Mr. Halkett to discharge the plaintiffs. It was nothing that originated with Allen. It was no misrepresentation on his part. It was not fear of his personal influence. It was simply a very natural desire for peace and quiet. Mr. Halkett did not want the yard upset. He did not want a row between two sets of workmen which was pretty sure to end in a strike.

So we see now, I think, what the findings of the jury come to if they are to be treated as being in accordance with the evidence. They must mean that Allen induced the company to discharge the plaintiffs by representing to the manager, not otherwise than in accordance with the truth, the state of feeling in the yard, and the intentions of the workmen, and that he did so "maliciously," because he must have known what the issue of his communication to the manager would be, and naturally perhaps he was not sorry to see an example made of persons obnoxious to his union. But is his conduct actionable? It would be very singular if it were. No action would lie against the company for discharging the two shipwrights. No action would lie against the iron-men for striking against them. No action would lie against the officers of the union for sanctioning such a strike. But if the respondents are right the person to answer in damages is the man who happened to be the medium of communication between the iron-men and the company, the most innocent of the three parties concerned, for he neither set the "agitation" on foot, nor did he do anything to increase it, nor was his the order that put an end to the connection between employer and employed. It seems to me that the result would have been just the same if Edmonds had told Mr. Halkett what was going on in the yard, or if Mr. Halkett had learned it from Flood and Taylor themselves.

Even if I am wrong in my view of the evidence and the verdict, if the verdict amounts to a finding that Allen's conduct was malicious in every sense of of the word, and that he procured the dismissal of Flood and Taylor—that is, that it was his act and conduct, and his act and conduct alone, which caused their dismissal, and if such a verdict were warranted by the evidence, I should still be of opinion that judgment was wrongly entered for the respondents. I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who by persuasion or some other means not in itself unlawful has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct, if it could be inquired into, was without justification or excuse.

The case may be different where the act itself to which the loss is traceable involves some breach of contract or some breach of duty, and amounts to an interference with legal rights. There the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary in the present case to express any opinion on that point.

But if the immediate agent cannot be made liable, though he knows what he is about and what the consequences of his action will be, it is difficult to see on what principle a person less directly connected with the affair can be made responsible unless malice has the effect of converting an act not in itself illegal or improper into an actionable wrong. But if that is the effect of malice, why is the immediate agent to escape? Above all, why is he to escape when there is no one else to blame and no one else answerable? And yet many cases may be put of harm done out of malice without any remedy being available at law. Suppose a man takes a transfer of a debt with which he has no concern for the purpose of ruining the debtor, and then makes him bankrupt out of spite, and so intentionally causes him to lose some benefit under a will or settlement; suppose a man declines to give a servant a character because he is offended with the servant for leaving; suppose a person of position takes away his custom from a country tradesman in a small village merely to injure him on account of some fancied grievance not connected with their dealings in the way of buying and selling; no one, I think, would suggest that there could be any remedy at law in any of those cases. But suppose a customer, not content with taking away his own custom, says something, not slanderous or otherwise actionable or even improper in itself, to induce a friend of his not to employ the tradesman any more. Neither the one nor the other is liable for taking away his own custom. Is it possible that the one can be made liable for inducing the other not to employ the person against whom he has a grudge? If so, a fashionable dressmaker might now and then, I fancy, be plaintiff in a very interesting suit. The truth is that questions of this sort belong to the province of morals rather than to the province of law. Against spite and malice the best safeguards are to be found in self-interest and public opinion. Much more harm than good would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character, and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would, I think, be intolerable, to say nothing of the probability of injustice being done by juries in a class of cases in which there would be ample room for speculation and wide scope for prejudice.

In order to prevent any possible misconstruction of the language I have used I should like to add that in my opinion the decision of this case can have no bearing on any case which involves the element of oppressive combination. The vice of that form of terrorism commonly known by the name of "boycotting," and other examples of oppressive combination, seems to me to depend on considerations which are, I think, in the present case conspicuously absent.

As regards authority there is, I think, very little to be said. It is hardly necessary to go further back than *Lumley* v. *Gye*, in 1853. There is not much help to be found in the earlier cases that were cited at the bar, not even, I think, in the great case about frightening ducks in a decoy, whatever the true explanation of that decision may be. In *Lumley* v. *Gye* it was held that an action would lie for procuring a person to break a contract for personal service. The subsequent cases of *Bowen* v. *Hall* and *Temperton* v. *Russell* are authorities for the proposition that the principle is not confined to contracts for personal service. There is, no doubt, much to be said for that proposition. But the judgment under appeal does not depend on *Lumley* v. *Gye* or on any decision before or after that case. It rests only on certain *dicta* to be found first in *Bowen* v. *Hall* and afterwards repeated in *Temperton* v. *Russell*. Those *dicta* are of great weight, owing to the eminence of the judge by whom they were pronounced, but they certainly

were not necessary for the decision in either case. *Lumley* v. *Gye* was heard on demurrer. The counts which were demurred to alleged that the defendant knew "the premises"—that is, the existence of the contract stated in the declaration; and was "maliciously intending to injure the plaintiff." Mr. Willes, for the defendant, in reply, pointing out that malice was never averred in actions for seducing servants, argued that "the averment of malice can make no difference"; and that seems to have been the opinion of the majority of the court who thought the action would lie. Crompton, J., treats the allegation of malice as meaning nothing more than the allegation of notice, and Erle, J., indicates that the principle on which the action is to be rested is that "the procurement of the violation of the right"—that is, the plaintiff's right under the contract—"is a cause of action." If so, it would seem to follow that, provided the violation is committed knowingly, it cannot matter whether the thing is done maliciously or not. And therefore, with all deference to the opinion of Blackburn, J., who, if I rightly understand his words in *Cattle* v. *Stockton Waterworks*, 10 L. R. Q. B. D. 453, 23 W. R. Dig. 238, seems to say that "malicious intention" was the gist of the action, I should be disposed to hold that if a right has been knowingly violated, an allegation of malice is superfluous, and that if there has been no violation of any right, malice by itself is not a cause of action. I cannot, therefore, agree with the late Master of the Rolls (Lord Esher) in thinking that the act complained of was "wrongful" because it was "malicious," and that if there be a malicious act, and loss resulting from that act, it does not matter whether there has been a violation of right or not.

I am of opinion that judgment should be entered for the appellant.

Lord MORRIS.—If this was an ordinary case I should be satisfied by merely expressing my concurrence in the able and exhaustive judgment of the Lord Chancellor, which deals so fully both with the law and the facts of the case; but as the judgment of this House, about to be pronounced, overturns, as I consider, the overwhelming judicial opinion of England, I feel bound to state shortly my views without reiterating the common facts of the case, or going into the evidence in detail, as both have already been so often repeated.

The first question that would arise is: Was there not *de facto* contractual relation between the Glengall Iron Co., the employers, and the plaintiffs, the employees, which would have continued but for the malicious interference of the defendant? The plaintiffs were only day labourers, but with a certainty of their employment being continued *de die in diem* for a considerable time. In my opinion it is actionable to disturb a man in his business by procuring the determination of a contract at will, or by even preventing the formation of a contract, when the motive is malicious and damage ensues.

The question of actual contractual relations in this case was not dealt with, as during the course of the trial it was assumed that there was no contractual relation existing between the Glengall Iron Co. and the plaintiffs which was determined by the action of the defendant. I desire, however, to deal with the case on the finding of the jury—namely, "that the defendant did maliciously induce the Glengall Iron Co. to discharge the plaintiffs from their employment."

At common law a workman had a right to work with any person who was willing to employ him. Both had a right to trade in labour as in any other commodity, and as they thought fit. This was part of the personal liberty enjoyed by every man, and, like personal liberty, was the subject of peculiar safeguards; notably, it was a right which, like that of personal liberty, could not be bartered away. A contract restraining one's right to trade, with certain exceptions not material here, was, like a contract to become a slave, null and void. One right as well as the other was inalienable.

The existence of this right to trade was established at least as far back as the reign of Queen Anne. In *Keeble* v. *Hickeringill* it was held that an action on the case lay for discharging guns near the decoy pond of another with a design to damnify the owner by frightening away the wild fowl resorting thereto, by which the wild fowl were frightened away and the owner damnified. It is to be observed that the act of discharging the gun was *per se* lawful. The ground of Holt, C.J.'s, judgment was as follows: "Then, when a man useth his art or skill to take them, to sell or dispose of for his profit, this is his trade, and he that hinders another in his trade or livelihood is liable to an action for so hindering him." Then, later on, he says: "Now, there are two sorts of acts for doing damage to a man's employment for which an action lies. The one is in respect of a man's privilege or in respect of his property; the other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood. There an action lies in all cases. But if a man doth him damage by using the said employment as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie." Why? "Because he had as much liberty to make and use a decoy as the plaintiff."

These words, in my opinion, draw the distinction between an act *in se* legal, which is rendered unlawful when done maliciously, and the same act which remains lawful although it does harm to another because it was done in the exercise of the owner's right to trade, and that harm resulted from trade competition.

Sir W. Erle, in his work upon Trade Unions, p. 12, lays down the proposition thus: [His lordship read the passage cited by Lord Ashbourne, *supra*.]

To what extent have these opinions and the judgment in *Keeble* v. *Hickeringill* been dissented from or approved of in subsequent judicial proceedings? I am not aware of any judicial expression of dissent from them, whilst the judgments of several of the judges in *The Mogul case*, in the Appeal Court and in this House, largely support them. In the admirably logical and scientific judgment of Bowen, L.J., at p. 613 of 23 Q. B. D., he says: [His lordship read the passages cited by the Lord Chancellor and Lord Ashbourne, *supra*.] Amongst several cases he cites is that of *Keeble* v. *Hickeringill*. He proceeds to decide in favour of the defendant, upon the ground that there was a just cause or excuse for them. At p. 618 he adds: "Such legal justification would not exist when the act was merely done with the intention of causing temporal harm without reference to one's own lawful gain or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell."

In this House, in the judgment of Lord Bramwell, which was read in his absence by Lord Macnaghten, who expressed his agreement, it is stated: "The plaintiffs do not complain of any act the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them," and he refers generally, without giving its name, to *Keeble* v. *Hickeringill*. Lord Field, in his judgment, says: "I think that this appeal may be decided upon the principles laid

down by Holt, C.J., in *Keeble* v. *Hickeringill*." After pointing out that "acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action," he proceeds thus: "Of course, it is otherwise—as pointed out by Holt, C.J.—if the acts complained of, although done in the way or under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, and not in the pursuit of lawful rights."

In this House opinions were expressed by seven of their lordships. Not one expressed any disapproval or adverse criticism of the case of *Keeble* v. *Hickeringill*.

If the principle of *Keeble* v. *Hickeringill* is applicable to this case, as in my opinion it is, I fail to see how Kennedy, J., could have withdrawn the case from the jury. In his charge he put Allen's case, as it seems to me, most favourably to the jury. He says (I merely summarize it): "Now, bearing in mind how Allen came, you have to consider whether the plaintiffs have proved to you not merely that he represented to the employers what the men working in that yard would be likely to do unless they could come to some settlement, and left to the employers . . . the choice of action—and I do not think in that case you would say that was an inducement . . . that he felt himself in this position, 'I am a district delegate; in the interest alike of the doing of the employers' work as well as of the men, it is better that I should go and tell the employers what the facts are, after telling the men that they are to take no hurried action'—to let the matter either be settled peaceably by the employers, or if it cannot be settled by them, be brought in due course before the executive of the union."

The charge of the learned judge seems to me to put the case favourably for Allen; but it appears to me that some of your lordships have put yourselves in the place of the jury by coming to the conclusion that Allen had gone to the employers merely to intimate, as has been said, or represent to them the feelings and views of the men, to be their messenger or mouthpiece, that being the very case that was negatived by the jury. Indeed, Lord James, in his judgment, which I have had the advantage of reading, has gone further, for he says, "for him (Allen) to communicate such intention to the company did injure the respondents." If this was correct there was no necessity to go any further. The plaintiffs would not have suffered damage by the act of the defendant. In my opinion it was for the jury, the constituted tribunal in such cases, and not for your lordships, to say whether Allen went to the employers as peacemaker, intimator, representer, messenger, or mouthpiece, as was stated by him, or rather for him by some of your lordships, or whether he went with the purpose of having the plaintiffs punished for past alleged offences by getting them discharged at once from their employment.

The defendant gave a complete denial to the substance of Mr. Halkett's evidence. The defendant did not take in his evidence the position which is now taken up for him by some of your lordships of being a messenger or an intimator of what had occurred. He was conscious he had done wrong, and accordingly to try to save himself he denied altogether what Mr. Halkett had proved. The jury disbelieved him. His untruthful evidence gave colour to his conduct and action which, in my opinion, amounted to this. He was an outsider, though he was telegraphed for by Elliott. He proceeded to threaten the employers with the withdrawal of the boilermakers, which would be most injurious to the employers, unless the plaintiffs were dismissed at once. His object was to injure the plaintiffs and to punish them, and he had the intention of further persecuting them by not allowing them to work anywhere, which was not the wish of the men or their union. His conduct was unauthorized, and he misrepresented to the employers both the wishes of the men and their objects, and acted outside the scope of his authority as a district delegate of the union.

I therefore conclude by adopting as my own the last paragraph of Hawkins, J.'s, opinion on the questions propounded to the judges by your lordships: [His lordship read the passage as set out above.]

I am, therefore, of opinion that the considered judgment of Kennedy, J., which was unanimously affirmed by the Court of Appeal should be affirmed by this House.

Lord SHAND.—I am of opinion that the judgment complained of should be reversed, and judgment entered for the defendant with costs.

Certain facts have, with reference to the evidence and the verdict of the jury, been clearly established. In the first place it is clear that the plaintiffs had no contract with their employers, the Glengall Iron Co., entitling them to continuous employment. They were engaged to work by the day, entitled to leave the employment at the end of each day; and on the other hand, subject to the risk that their employers might at any time cease to employ them further. While this was so, it is, however, to be observed that it is matter of clear inference, and, indeed, of some direct evidence, that the employment would have gone on for some time longer than it did if the employers had not been induced to discontinue it.

It is, in my opinion, further clear that the employment was discontinued by the employers, the Glengall Iron Co., because of the representations made to them by the defendant Allen. This has, I think, been proved, and indeed has been expressly affirmed by the verdict of the jury.

There is no real controversy as to the statement or representation made by the defendant which induced the employers to dispense with the plaintiffs' services. The defendant, in effect, stated that if the plaintiffs were continued as workers, even at woodwork only, on the vessel then in the course of being repaired, the boilermakers then engaged at the ironwork on the ship would cease work, and so put a stop to the completion of the repairs. [After examining the evidence, his lordship continued:] The learned judge was probably bound to lay down the law in the terms he used, having regard to the judgments delivered in the Court of Appeal in the case of *Temperton* v. *Russell*, which, in the view of Rigby, L.J., governed the decision of this case.

I confess that, even if the direction given were sound in law, as I think it was not, the facts of the case were such as I should have thought should have precluded such a verdict being given, if these, with the assistance of the learned judge, had received the weight to which they were entitled at the hands of the jury. If anything is clear on the evidence, it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those he represented in all he did, that this was his motive of action and not a desire to use the words of the learned judge, "to do mischief to the plaintiffs in their lawful calling."

The case was one of competition in labour, which, in my opinion, is in all essentials analogous to competition in trade, and the same principles must apply to it; and I ask myself what would be thought

of the application of the word "malicious" to the conduct of a tradesman who induces the customer of another tradesman to cease making purchases from one with whom he had long dealt and instead to deal with him, a rival in trade. The case before the jury was, in my view, in no way different, except that in the one case there was competition in labour, in the other there would be competition in trade.

Some of the learned consulted judges speak of Allen's conduct as having been caused by a desire to inflict "punishment" on the shipwrights for past acts, and indicate that, if the shipwrights had been actually working at ironwork on the vessel at the time the case would have been different. I cannot agree in any such view. "Punishment" in a wide and popular sense may possibly be used, though incorrectly, to describe the boilermakers' action, but it is quite clear that what they were resolved to do, and really did, was, while marking their sense of the injury which they thought (rightly or wrongly is not the question) the shipwrights were doing to them in trenching on their proper line of business, to take a practical measure in their own defence. Their object was to benefit themselves in their own business as working boilermakers, and to prevent a recurrence in the future of what they considered an improper invasion on their special department of work. How this could possibly be regarded as "malicious," even in any secondary sense that can reasonably be attributed to that term, I cannot see.

Again, the expression was repeatedly used in the argument, and has been also adopted by some of the learned judges, that the men, or rather their representative, Allen, had used "threats" in his communications with the employers, which were represented as improper, and which afforded evidence to support the view that their action was malicious. What were these threats? Simply this, that if the plaintiffs were continued in the employment they, the boilermakers, would leave. Threats may, like false or fraudulent representations, be of such a nature, if used, as to amount to improper and unlawful means used to induce action which may be injurious to others, causing them loss and damage, and I should not for a moment say that damages might not in cases of such threats be recoverable. But this can only apply to threats of violence, intimidation, obstruction, or the like, threats which may be described as menace which properly affects freedom of action in the person who is induced to act or to refrain from acting. The boilermakers were quite entitled to resolve that they would not then or at any future time work at the same vessel or even in the same yard with the plaintiffs. No one can dispute their right so to resolve. They were quite entitled, having formed that resolution, to inform their employers that they had done so; indeed, I should say that the defendant Allen was only doing what was right and proper in intimating this resolution to the employers, in place of allowing the men to leave, without notice to the employers of what would certainly cause them great inconvenience and loss. There was no threat of the nature of menace so as to amount to the use of illegal means to induce the employers to act, no threat to do anything beyond the exercise of their legal right. A master who warns his servant that a repetition of certain faults will result in dismission, may be said to use a threat, but he is not only acting lawfully but in most cases is to be commended for so doing in place of giving an instant dismissal.

Cave, J., has expressed the opinion that if a butler who, for some reason or another, has made up his mind that he will no longer continue in service with the cook, with whom he has been in the same employment, should intimate his resolution to the employer, and the services of the cook should thereupon be dispensed with, the cook would have in law a claim of damages against the butler. If this view were sound then the plaintiffs in this case might be entitled to succeed. Indeed, I have always thought throughout the course of the argument that the case put by the learned judge is perhaps the simplest form in which the very question now under discussion could be raised. But with great deference to the opinion of the learned judge, no such claim could arise in such circumstances, because it cannot be truly said that on the part of the butler there was either an unlawful act, or unlawful means used in the doing of a lawful act. A servant is surely entitled, for any reason sufficient in his judgment, or even from caprice I should say, to resolve that he will no longer continue, after the expiration of a current engagement, in service with another servant in the same employment. This being unquestionable, the only limitation on his right to act is that he must not use unlawful means to induce his employer to dispense with the services of his fellow-servant. His action being lawful, and no unlawful means being used in carrying it out, the motive, even if it be personal illwill to another, would not, in my opinion, create liability to a claim of damages.

Coming now directly to the merits of the question in controversy in the case, the argument of the plaintiffs and the reasons for the opinions of the majority of the consulted judges seem to me to fail, because, although it is, no doubt, true that the plaintiffs were entitled to pursue their trade as workmen "without hindrance," their right to do so was qualified by an equal right, and, indeed, the same right, on the part of other workmen. The hindrance must not be of an unlawful character. It must not be by unlawful action. Amongst the rights of all workmen is the right of competition. In the like manner, and to the same extent as, a workman has a right to pursue his work or labour without hindrance a trader has a right to trade without hindrance. That right is subject to the right of others to trade also, and to subject him to competition—competition which is in itself lawful, and which cannot be complained of where no unlawful means (in the sense I have already explained) have been employed. The matter has been settled, in so far as competition in trade is concerned, by the judgment of this House in the case of *The Mogul Steamship Co.* v. *McGregor*. I can see no reason for saying that a different principle should apply to competition in labour. In the course of such competition, and with a view to secure an advantage to himself, I can find no reason for saying that a workman is not within his legal rights in resolving that he will decline to work in the same employment with certain other persons and in intimating that resolution to his employers.

It is further to be observed, distinguishing the case from one in which a contract might have subsisted between the plaintiffs and their employers for a definite period, or for the work, it might be, on a particular ship until the whole was completed (in which case the refusal to continue to give the work would be a breach of contract on the employer's part), that there was here no such breach of contract. The employers' act in dispensing with the services of the plaintiffs at the end of any day was a lawful act on their part. The defendant induced them only to do what they were entitled to do, and in the absence of any fraud or other unlawful means used to bring this about, the action fails.

As already fully explained, there was no case of malice in the ordinary sense of the term, as meaning personal ill-will, presented to the jury; but I agree

with those of your lordships who hold that, even if such a motive had existed in the mind of the defendant, this would not have created liability in damages. On the grounds already stated, I think the defendant only exercised a legal right in intimating that the boilermakers would leave work if the plaintiffs were continued. He used no fraud or illegal means in the assertion of that right; and the exercise by a person of a legal right does not become illegal because the motive of action is improper or malicious: *Mayor of Bradford* v. *Pickles* and *The Mogul Steamship Co.*, already cited. In the former of these cases Lord Watson said: "No use of property which would be legal, if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious." It seems to me, with reference also to the judgment in the latter case bearing on the rights of competitors in trade, that, on the same principle, it may be affirmed that the exercise of any legal right in the course of competition in labour or in trade does not become illegal because it is prompted by a motive which is improper or even malicious.

Lord Herschell and Lord Macnaghten have reserved their opinions as to the law applicable to a case in which the ground of action is that the defendant had induced an employer to commit a breach of contract, as in the cases of *Lumley* v. *Gye*, *Bowen* v. *Hall*, and the first branch of *Temperton* v. *Russell*. I desire also to reserve my opinion as to that case. The person who has committed a breach of contract is, of course, liable in damages in consequence. If it has not yet been decided by this House that a third party who had, without the use of fraud or other unlawful means, induced the contracting party to break his contract himself thereby incurs liability in damages, the question seems to me worthy of full discussion and consideration. The proper and usual application of the maxim, *Qui facit per alium facit per se*, in cases in which a wrongful act has been performed is to hold the person who has committed the wrong—*i.e.*, in the case supposed the person who has broken his contract—liable although his act has been done through another acting for him, and it is at least open to consideration whether the maxim would apply to one who is not himself the wrongdoer committing a breach of contract, but only persuades or induces another to do so.

The case was not presented by the learned judge to the jury as one of conspiracy, and does not raise any question of that kind. Combination of different persons in pursuit of a legitimate trade object occurred in the case of *The Mogul Steamship Co.*, and was there held to be lawful. Combination for no such object but in pursuit really of a malicious purpose to ruin or injure another would, I should say, be clearly unlawful, but this case raises no such question.

As to the older authorities referred to in the argument, I agree in the views of Lord Herschell and Lord Watson, and I agree in thinking with them and with Lord Macnaghten that *Lumley* v. *Gye* was not decided on any question of malice.

It was urged by the counsel for the respondent that a disapproval of the law laid down in *Temperton* v. *Russell*, and repeated in this case, will be attended with dangerous consequences, as extending the power of trades unions or combinations beyond limits which these cases laid down, and I am not insensible to the truth of the observation that a certain amount of restraint which these cases introduced will be removed. But if that measure of restraint was not founded, as I believe it was not, on sound legal principle, it is only right that by legal decision in this court of last resort it should be removed. And if the force of combination should be harshly or oppressively used, if it should be used in circumstances in which right-minded men would deplore its use, it must be observed that those against whom combination is so employed have precisely the same liberty of action for resisting oppressive measures and for causing those who use them to desist from that course of action.

Lord DAVEY.—In this case the jury have found (1) that the defendant Allen maliciously induced the Glengall Iron Co. to discharge the plaintiffs from their employment; (2) that the defendant Allen maliciously induced the company not to engage the plaintiffs; and (3) that damages to the extent of £20 to each plaintiff was thereby suffered by the plaintiffs.

The learned judge directed the jury that there was no evidence of any breach of contract involved in the plaintiffs being discharged by the company; that there was not a shred of evidence of any conspiracy at all; and that there was no evidence of anything amounting to intimidation or coercion in any legal sense of the term. No exception has been taken, or, in my opinion, could be taken, to these directions. We must, therefore, take the finding of the jury to mean that the company were "induced" by the persuasion and representations of Allen to discharge the plaintiffs—*i.e.*, not to continue to employ them. The sense in which "maliciously" was intended to be used in the verdict is shown by the passage in the summing up which has already been read and commented on by your lordships, to be the popular sense of intending to do a mischief to the respondents. The main question which has been argued before your lordships was whether the plaintiffs were entitled to judgment on the findings of the jury.

The learned judge in his judgment, on further consideration after verdict, followed the decision of the Court of Appeal in *Temperton* v. *Russell*, and gave judgment for the plaintiffs. The Court of Appeal affirmed that decision. The Master of the Rolls considered that *Temperton* v. *Russell* was an authority binding on that court, that a thing which you may lawfully do to the injury of another if you do it without malice, is made unlawful and gives him a right of action if you do it with malice. The learned lord gave additional reasons for his decision, in the course of which he laid down that whether the advice is to break a contract or not to make a contract, it has just the same effect, and that if you give advice to one not to make a contract with intent of doing an injury to the person who is going to make the contract with him, then the malice is the thing which makes that thing which would have been a lawful thing without malice, unlawful. Lopes, L.J., also said that he could see no distinction between inducing a party to a contract to break it and inducing a party to discharge a servant, as in the present case. Rigby, L.J., simply followed *Temperton* v. *Russell*.

I have stated the views expressed by the Court of Appeal at some length, because they exactly express the points on which I am constrained to differ from them. The proposition of those learned judges, when analysed, seems to me to amount to this: that *damnum absque injuria*, if accompanied by malicious intent, will give a right of action, or that a malicious motive *per se* amounts, or may in certain circumstances amount, to *injuria*. I am unable to assent to either of these propositions. "Malice, in common acceptation," says Bayley, J., in the well-known case of *Bromage* v. *Prosser*, 4 B. & C. 247, "means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse." If so, it seems to be an argument in a circle to say that an act not otherwise wrongful becomes so if malicious. Nor can I agree that there is no legal

difference between persuasion to break a contract and persuasion not to enter into a contract. In the former case, if the persuasion is successful the other party is deprived of the benefit of having his contract completed. In the latter case he loses nothing to which he has a legal right, and he has no legal ground of complaint against the person who refuses to contract with him. In the one case there is a violation of right; in the other case there is not.

I accept for the present purpose without comment the doctrine laid down in *Lumley* v. *Gye* and *Bowen* v. *Hall*, that to maliciously induce one to break a contract of exclusive personal service with an employer to the injury of that employer is actionable. But a perusal of the judgments delivered by the learned judges in *Lumley* v. *Gye* shows that in their opinion at any rate it was vital to the plaintiffs' case that there was a subsisting contract of service. [His lordship read the passages cited by Lord Herschell, *supra*.]

An employer may discharge a workman (with whom he has no contract), or may refuse to employ one from the most mistaken, capricious, malicious, or morally reprehensible motives that can be conceived, but the workman has no right of action against him. It seems to me strange to say that the principal who does the act is under no liability, but the accessory who has advised him to do so without any wrongful act is under liability.

To persuade a person to do or abstain from doing what that person is entitled, at his own will to do or abstain from doing is lawful and in some cases meritorious, although the result of the advice may be damage to another. This is not a case of conspiracy. I do not say whether, if it were, it would or would not make an essential difference. But I do say that I am not aware of any authority binding on this House for holding, and it humbly appears to me to be against sound principle to hold, that the additional ingredient of malice should give a right of action against an individual for an act which if done without malice would not be wrongful although it results in damage to a third person. The case of libel on a privileged occasion is, of course, altogether different. A libel is held to be excused if the words complained of were used on a privileged occasion. But that excuse may be rebutted by proof of express malice and abuse of the privilege.

In my opinion the somewhat anomalous action for malicious prosecution is based on the same principle. From motives of public policy the law gives protection to persons prosecuting, even where there is no reasonable or probable cause for the prosecution. But if the person abuses his privilege for the indulgence of his personal spite he loses the protection, and is liable to an action, not for the malice but for the wrong done in subjecting another to the annoyance and expense of a causeless prosecution.

It was, however, argued that the act of the appellant in the present case was a violation of the right which every man has to pursue a lawful trade and calling, and that the violation of this right is actionable. I remark in passing that if this be so the right of action must be independent of the question of malice, except in the legal sense. The right which a man has to pursue his trade or calling is qualified by the equal right of others to do the same, and compete with him though to his damage. And it is obvious that a general abstract right of this character stands on a different footing from such a private particular right as the right to performance of a contract into which one has entered. A man has no right to be employed by any particular employer, and has no right to any particular employment if it depends on the will of another.

But is there any such general cause of action irrespective of the means employed or mode of interference? I think it unnecessary to comment on all the cases which have been cited by counsel and are referred to by the learned judges. I have read them carefully and I am satisfied that in no one of them was anything decided which is an authority for the abstract proposition maintained. In every one of them you find there was either violence or the threat of violence, obstruction of the highway or the access to the plaintiff's premises, nuisance, or other unlawful acts done to the damage of the plaintiff. Nor does it appear to me that the gist of the action in those cases was that the plaintiff was a trader or exercised a profitable calling. That circumstance no doubt afforded evidence of the damage; but I suppose that if a person obstructed the access to my house or to my vessel by molesting and firing guns at persons resorting thither on their lawful occasions, I may have my action against him though I do not keep a school or I am not a trader, but sailing in my yacht for my own pleasure. Or if a person obstructs my free use of the highway, and I suffer damage thereby, I have a right of action though my carriage does not ply for hire, but is used only for my own purposes. It is strange that if there be any such right of action for interference with trade, there is not to be found some clear authority in the law books in its favour. And as remarked by one of the learned judges, if those who argued and those who decided *Lumley* v. *Gye* had been aware of any such general doctrine, it would have disposed of that case without the elaborate consideration to be found in the judgments. I do not think that the well-known action for slander of a trader's goods supports the larger proposition attempted to be founded on it. Blackstone treats that action as a particular example of slanderous words. And it appears to me an obvious fallacy to argue from the existence of some recognized and well known cause of action to a larger and wider legal proposition of which the cause of action in question might be treated as a particular case if the larger proposition had been generally recognized.

The authority most relied on in support of the the proposition maintained by the respondents is the well-known case of *Keeble* v. *Hickeringill*, or more properly the *dicta* of Lord Holt as reported in 11 East 574*n*. That case was an action by the owner of a decoy pond, against the defendant for driving away his wild fowl by firing guns with intent to damnify the plaintiff. It appears to have been twice argued, and there are four separate reports of it which do not altogether agree as to the grounds of the judgment. But I think it was decided on the ground that the act of the defendant was a wilful disturbance of the enjoyment by the plaintiff of his own land for a lawful and profitable purpose, and what is called in law a nuisance. The reported cases in which the case has been followed: *Carrington* v. *Taylor*, 11 East 571, and *Ibbotson* v. *Peat*, 13 W. R. 691, 3 H. & C. 644, support this view. If this be a correct view of the decision, it is no authority for the larger proposition founded on it by the respondents; and the *dicta* of Lord Holt, however much entitled to respect, are inadequate to support the weight which it is sought to place upon them.

Another point was made at your lordships' bar. It was contended that Allen was guilty of wilful misrepresentation in what he told Halkett, that the men never really intended to strike; and that Allen knowingly exceeded his instructions or what the men had authorized him to say, when he said that they would do so. This is a question of fact to be determined on the evidence, and it might and should have been submitted to the jury. In my view such a state of facts amounting to a charge of fraud

would have constituted a legal wrong and have been of the essence of the action. The point should therefore, in my opinion, have been pleaded. But it is not to be found in the pleadings, and I cannot find a trace of its having been taken at the trial. No reference to such a question is to be found in the very full summing up of the learned judge. So far as I can understand, the contention of counsel for the respondents at the trial was the exact contrary, as they were then endeavouring to recover against the other defendants, the representatives of the union. It is not the practice of your lordships where there has been a trial by jury to allow a new issue or question to be raised at the bar which might and ought to have been, but was not, submitted to the jury for their consideration on the evidence. To do so would be to usurp the function of the jury. I do not therefore find it necessary to express any opinion on the point.

I am of opinion that the judgment of the Court of Appeal should be reversed, and the action dismissed with the usual consequences.

Lord JAMES OF HEREFORD.—[His lordship stated the facts, and continued:] Upon this state of facts the respondents brought their action against the appellant and others, the cause of action in the fifth paragraph of the claim being thus alleged: "The defendant has maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced the Glengall Co. to break their contracts with the plaintiffs to the plaintiffs' damage, and has further intimidated and coerced the Glengall Co. and others not to enter into new contracts with the plaintiffs whereby the plaintiffs have suffered damage."

It was admitted during the trial that the first head of this claim could not be supported, for, as I have said, the Glengall Co. broke no contract. The question, therefore, is confined within the second alleged cause of action. Thus your lordships have to determine whether there was sufficient evidence given at the trial to support the allegation that the appellant "intimidated and coerced the Glengall Co." not to employ the respondents; and, secondly, it is advisable to consider whether in any view of the appellant's conduct there was evidence to support a cause of action.

Looking at the facts, I come to the conclusion that the appellant cannot be said to have intimidated or coerced (within the legal meaning to be given to those words) the Glengall Co. It is true he informed the company's representative of the existing intention of the boilermakers; but that intention to discontinue work if the respondents were further employed was not formed in consequence of any words or act of the appellant. He had learnt that that intention was formed by the boilermakers before his arrival at the ship. For him to communicate such intention to the company did not injure the respondents. The boilermakers would have acted upon it whether the company knew or were ignorant of their resolution. For they were about to desert their work when the appellant by his threat prevented them from doing so, and prevailed upon them to give him an opportunity of communicating with the representatives of the company.

For myself I believe that the appellant communicated only the boilermakers' preformed intention, but even if he said that the union would call out the boilermakers if the respondents were further employed, I presume he was only communicating that which he knew would be the fact, and he was therefore warning the company's representatives not to pursue a course which would be detrimental to the company's interest.

The appellant doubtless desired that the boilermakers' view of their claim that they alone should execute ironwork should prevail, and, therefore, that steps should be taken to secure to them the success of that claim, and so naturally he would use solicitation and persuasion to the company's representatives with the intention of procuring the non-employment of the respondents. Thus it appears to me that the question for your lordships' decision is thus resolved: Is it actionable for A. to solicit and persuade B. not to enter into contract with C.?

Before dealing with the answer that ought to be given to this question, it is worthy of observation that there were three actors in the events leading to the non-employment of the respondents: (1) The boilermakers, who refused to work with them; (2) the appellant, who communicated that refusal to the Glengall Co.; and (3) the representatives of the company, who, in consequence of the expressed intention of the boilermakers, determined not further to employ the respondents.

In all substance the injury inflicted upon the respondents proceeded, in the first degree, from the action of the boilermakers, and, in the second, from the action of the company in yielding to the demand of the boilermakers. That the appellant took part in the transaction is true, but he played but a very minor part, and if he had never appeared on the scene at all the injury to the respondents would have been the same; for the company would equally have exercised their option, and would have refused to employ the respondents in order to secure the services of the boilermakers. Under these circumstances it seems strange that it is not alleged that any action lies against the boilermakers, and that it should be distinctly admitted that no cause of action can be maintained against the company.

If the principles laid down in the judgment of Lord Esher, M.R., in the case of *Bowen* v. *Hall* and in the case of *Temperton* v. *Russell* were applied to the ordinary affairs of life great inconvenience as well as injustice would ensue. Every competitor for a contract who alleged that he was the best person to fulfil it would be liable to an action. Take the case of an architect who seeks to be employed to the exclusion of his rivals. He says: "My plans are the best, and following them will produce the best house at the least cost. Therefore employ me, and not A. or B." If he be so employed the architect would, according to the *dicta* in *Bowen* v. *Hall*, be liable to an action at the suit of his rivals. For he has induced a person not to enter into a contract with a third person, and his object clearly was to benefit himself at the expense of such third person. Indeed, if the opinion delivered by Cave, J., that it is actionable for a cook to say to her master, "Discharge the butler or I will leave you," is correct, in that case the ingredient of "being desirous to benefit herself at the expense of a third person" is wanting. For the objection of the cook might well proceed from a motive which would not represent any gain to herself.

But I am aware that it was urged at the bar that, even if the views which I have expressed to your lordships be correct, there is an exception from general principles in favour of those whose trade or employment has been interfered with. I do not assent to this view. Before discussing the question it is necessary that some definition of the words "interfered with" in their legal sense should be given. Every man's business is liable to be "interfered with" by the action of another, and yet no action lies for such interference. Competition represents "interference," and yet it is in the interest of the community that it should exist. A new invention utterly ousting an old trade would certainly "interfere with"

it. If, too, this loose language is to be held to represent a legal definition of liability, very grave consequences would follow. Of course, the conduct of the boilermakers in the case before your lordships amounted to an interference with the plaintiff's business, and yet, as has been pointed out, it is not said that an action lies against them. Every organizer of a strike, in order to obtain higher wages, "interferes with" the employer carrying on his business; also every member of an employers' federation who persuades his co-employer to lock out his workmen must "interfere with" those workmen. Yet I do not think it will be argued that an action can be maintained in either case on account of such interference. But whatever meaning may be attached to the words "interfere with," I see no ground for saying that any different rule should be applied to cases of interference with a man when carrying on his trade or business or when he is engaged in any other pursuit. In the case of *The Mogul Steamship Co.* there was an extreme case of interference with the plaintiff's business by methods which directly injured the plaintiffs in their trade for the express purpose of benefiting the defendants. The admitted interference was carried on by several defendants in a combination which in one sense amounted to a conspiracy, yet it was held by this House that no action could be maintained, for the acts done were not unlawful and the combination was not a criminal conspiracy.

I abstain from passing in review the older cases which refer to the interference with trade or business, for they have already been very fully reviewed and dealt with. I content myself with saying that I do not think that they establish more than that the interference which is in itself unlawful constitutes a cause of action. It seems somewhat contrary to common sense that an interference which is rightful when applied to general subjects becomes wrongful when a trade or business is subjected to it.

For these reasons I have, after some hesitation, come to the conclusion that inasmuch as the appellant has used no unlawful means to produce a result, and that as the result produced represents nothing that is unlawful, this action cannot be maintained.

I therefore think that the decision of the Court of Appeal should be reversed, and that judgment should be entered for the appellant.

Order appealed from reversed, and judgment entered for the appellant with costs here and below, including the costs of the trial.

Solicitors for the appellant, *Shaen, Roscoe, Massey, & Co.*

Solicitors for the respondents, *C. J. Smith & Gofton.*

Lunacy.

(Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) Jan. 17.

In re AGNES MARIA KNIGHT. (*a.*)

Lunacy—Lunatic out of jurisdiction—Property within jurisdicdiction—Curator according to law of Jersey—Right to transfer—Discretion.

A lunatic who was resident in Jersey owned stock and shares in this country. The curator of the person and property of the lunatic appointed according to the law of Jersey applied for a transfer to him of such stock and shares.

Held, that, under section 134 *of the Lunacy Act,* 1890, *the court had a discretion to refuse such transfer.*

In re Brown, 44 *W. R.* 17, [1895] 2 *Ch.* 666, *considered.*

This was a petition presented under section 134 of the Lunacy Act, 1890, asking for the transfer to the curator of a lunatic out of the jurisdiction of certain stocks and shares.

The above-named Agnes Maria Knight went to reside in Jersey many years ago. She married there and had resided there ever since.

In 1874 her husband died, and in 1897 she was, in pursuance of the law of Jersey, duly found to be of unsound mind, and a curator of her person and property was thereupon duly appointed.

Evidence was furnished that according to the law of Jersey such curator was entitled to obtain possession of all her property.

Part of such property consisted of a sum of consols standing in her name in the books of the Bank of England, and other part consisted of certain preference and ordinary shares of a company.

The petition asked that, pursuant to section 134 of the Lunacy Act, 1890, the said stock and shares might be transferred into the name of the curator and that the dividends accrued and to accrue thereon might be paid to him.

The curator filed an affidavit in which it was stated that the transfer was required for "the maintenance and sole benefit" of the lunatic, but did not in any other manner specify the purposes for which it was required.

Before Rigby, L.J., in chambers, the applicant contended that under section 134 he was entitled to the transfer as of right, and that the court had no discretion in the matter, and on this point his lordship adjourned the matter to be argued in court.

J. G. Wood, for the applicant, the curator.—The court has no jurisdiction to refuse to make the order asked for; the point was left open in *In re Brown*, 44 W. R. 17, [1895] 2 Ch. 666. [LINDLEY, M.R.—The language of the section is, the court *may* make an order.] If a power is given in aid of a legal right there is no jurisdiction to refuse to exercise it: *Julius* v. *Bishop of Oxford*, 28 W. R. 726. If the property in this case were a personal chattel the curator could undoubtedly sue for it in this country, but it being stock in the books of a company he is in a difficulty. The section gives him no additional right, but gives him a further remedy. A curator appointed according to the law of Jersey has wider powers than a committee in this country—for instance, the curator can sell real estate. [LINDLEY, M.R.—The decision in *In re Brown* really turned on the meaning of "vested" in section 134. His lordship referred to *In re Stark*, 2 Mac. & G. 174, and *In re Garnier*, 20 W. R 288, L. R. 13 Eq. 532.]

LINDLEY, M.R.—I think we all take the same view of this case. This application has been adjourned into court in order to have the question decided whether we are bound to make the order. In my opinion the applicant has put his case too high. It is not our duty to part with the possession of this property without exercising our discretion. The section in point is section 134 of the Lunacy Act, 1890. [His lordship read the section.] The applicant has brought himself within this section so far as regards the condition giving him the right to make the application. In *In re Brown* this court put an

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

extended rather than a restricted interpretation on the word "vested" in that section, and having regard to that decision it seems to me that we are right in saying that this property is vested in Mr. Wood's client according to the law of Jersey within the meaning of the section. What are we to do? We should be running counter to the established practice if we were to hold that we have no discretion in such a case as this. The case of *Julius* v. *Bishop of Oxford* does not carry the applicant far enough. It is to my mind clear to demonstration that we have a discretion, and the law is as old as Lord Hardwicke's time. He decided that this court has jurisdiction to direct an inquisition as to the sanity of a person resident abroad but having property in this country. So that if anybody were to apply for an inquisition as to the sanity of this lady the court would have jurisdiction to appoint a committee and administer her property. How, then, can it be incumbent upon the court to hand over her property to a foreign committee. The real truth is that the jurisdiction of the court over lunatics who have property within the jurisdiction cannot be ousted by such ambiguous words as those which we have in the curator's affidavit here. In *In re Brown* the court was satisfied that the property was in fact required for the maintenance and support of the lunatic, but that point is not before us now. The case must go back to chambers for evidence to satisfy the court that the property is properly required.

RIGBY, L.J.—I am of the same opinion. We should be deciding something quite novel if we held that section 134 left us no discretion. The only point before us is whether we have discretion, and I think this ought to be decided against the applicant.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion.

Solicitors, *Bennett & Co.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Feb. 3.

LLEWELLYN v. VALE OF GLAMORGAN RAILWAY CO. (a.)

Railway—Crossing of road—Penalty for not making substituted road—By whom recoverable—Road belonging to adjoining landowners—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 53, 54.

By section 54 *of the Railways Clauses Act,* 1845, *if a railway company cross a road so as to interfere with it, and do not make a substituted road, they shall forfeit £20 for every day during which such substituted road shall not be made, and such penalty shall, in the case of a private road, be paid to the owner thereof.*

Held, that a part owner of that portion of the road interfered with, can sue for and recover the penalty without joining the owners of the rest of that portion of the road.

Held, also, that the railway are only liable to one penalty for each day during which they fail to make a substituted road.

Appeal from the judgment of Wright, J., at the trial of the action without a jury: [1897] 2 Q. B. 239, 45 W. R. Dig. 135.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The action was brought under section 54 of the Railways Clauses Act, 1845, to recover £1,700 as penalties for eighty-five days' default on the part of the defendants in providing a road in substitution for another road which they had temporarily obstructed.

The plaintiff was the owner of land bounded on one side by a private road, which was used by the owners of the lands adjoining it. The plaintiff, therefore, was the owner of one half of the road—*usque ad medium filum.*

The defendants were, by a special Act incorporating the Railways Clauses Act, 1845, authorized to construct a railway, crossing the road at a point adjoining the plaintiff's land, and in constructing the railway they temporarily cut through the road, without providing a substituted way as required by section 53 of the Railways Clauses Act, 1845.

The plaintiff contended that the defendants were liable to penalties under section 54 of that Act.

The defendants contended that the plaintiff, being the owner of one-half of the road, was not the "owner" of the road within the meaning of section 54, and could not sue for the penalties.

By a compromise it was agreed that, if the plaintiff was entitled to recover, £150 should be the amount recoverable.

Wright, J., held that the plaintiff could recover, and gave judgment for him.

The defendants appealed.

C. A. Cripps, Q.C., and *Kenyon Parker*, appeared for the defendants.

C. A. Russell, Q.C., and *E. F. Buckley*, appeared for the plaintiff.

The sections of the Act are set out in the judgment of the court.

Cur. adv. vult.

Feb. 3.—CHITTY, L.J., read the judgment of the court as follows: This is an action to recover penalties from the defendants, a railway company, who in contravention of section 53 of the Railways Clauses Act, 1845, cut through and otherwise interfered with a private road without first causing a sufficient road to be made in substitution as required by that section. The plaintiff is the owner of the soil of half the road up to the middle line in that part of the road which was wrongfully cut through and interfered with. Wright, J., gave judgment for the plaintiff for the amount at which the parties agreed to estimate the penalties in the event of the plaintiff being entitled to succeed. The only point raised by the defendants on the appeal was that the plaintiff was not "the owner" of the private road within the meaning of section 54 of the Act. The contention was pushed to the extreme length of saying that "the owner" meant all the owners for the entire length and breadth of the road, and apparently without any defined limit in the direction of the road, and it was argued that no action could be sustained for the penalties unless all such owners joined in the action. This contention is extravagant; if accepted it would operate to defeat the obvious intentions of the Legislature in many, if not in most, cases. If any one of a dozen or hundred of such owners declined to join in suing, the railway company would escape the penalty. It was further contended for the appellants that if this argument failed, as we think it does, the owner of the soil in the other half of the road ought to have joined in this action, and that the plaintiff, suing alone, cannot recover. At the outset it is plain that the owner of one half had not in 1845, nor has he now, any power to compel the owner of the other half to join in suing. The question turns on sections 53, 54, and 55 of the Act. It is not necessary to state

in full the terms of section 53. There is nothing in that section or in the other parts of the Act to oust the jurisdiction of the court to grant an injunction. Section 54 divides itself into two parts. The first imposes the penalty, and runs thus: "If the company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid, they shall forfeit £20 for every day during which such substituted road shall not be made after the existing road shall have been interrupted." This is plainly a penalty; it is not intended to be a sum payable by way of compensation for wrong done to any particular person or to his soil or interest in the road. It is imposed by way of punishment on the railway company for their high-handed and illegal acts in violation of the provisions of section 53, and it is intended as a deterrent against the continuance of the illegal acts. There is another point. The penalty is £20 for every day during which the offence is committed. We think it is clear, on the language of the statute itself, and without having recourse to the principle on which the leading case of *Crepps* v. *Durden*, Cowp. 640, was decided, that one penalty, and one penalty only, is inflicted for every day. Wright, J., seems to have been inclined to think that more than one penalty of £20 for each day was recoverable. We are unable to accept that suggestion, but we entirely agree with him in the opinion that the penalty is not apportionable; it is one entire sum of £20. This has an important bearing on the second part of the section, and tends to support the plaintiff's case. The second part runs thus: "And such penalty shall be paid to the trustees, commissioners, surveyor, or other person having the management of such road, if a public road, and shall be applied for the purposes thereof, or, in case of a private road, the same shall be paid to the owner thereof, and every such penalty shall be recoverable with costs by action in any of the superior courts." Before commenting on this part of section 54, we will state shortly the effect of section 55: "If any party entitled to a right of way over any road so interfered with" suffers special damage by reason of the failure to substitute a sufficient road, he may recover the special damage by action, and that "whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same." Damages recoverable under this section are by way of compensation to the person whose right of way is interfered with and who can prove special damage; these damages are wholly distinct from the penalty, and are recoverable whether the penalty has been sued for or not. There may be a question whether the right of way spoken of in this section is a right of way in the strict legal sense of the term, or a right of passing over the road in the more popular meaning of the words. It is not necessary to express any opinion on this point, and we refrain from so doing. If the term is used in the strict sense, the owner of the soil of one half of the road could not recover the special damage in respect of his own half of the soil of the road, because a man has no right of way over his own land; but he could in a case like the present recover his special damage for obstructions of the right of way which he is entitled to over the other half of the soil of the road, and the owner of that half would be in a corresponding position. If, on the other hand, the expression "right of way" is used in the popular sense, then each owner could recover the special damage proved in respect of the entire breadth of the road. Practically there would be little, if any, difference between the amount of the special damage recoverable whichever view be taken of the meaning of the term "right of way." These considerations appear to us to remove in great measure the difficulty which Wright, J., felt in the supposed case of the railway company breaking up or stopping up a mile of road each hundred yards of which is owned by a different person. Section 55 applies to a public road and a private road without distinction, and all persons, whether landowners or not, who are entitled to a right of way or of passing over the road (whichever be the right expression), can recover the amount of the special damage sustained, whether the road be public or private, and quite irrespectively of the penalty. We revert to the second part of section 54. Under the older system of legislation the enforcement of the penalty would probably have been left to the common informer in a *qui tam* action; and had such been the case, the informer who first instituted proceedings or obtained judgment would have received the fruits of his diligence to the exclusion of all others. But here the common informer is excluded by the language used. The enactment is that the penalty shall be paid. Then a distinction is drawn between a public road and a private road. In the case of a public road the penalty is to be paid to the trustees, commissioners, surveyor, or other person having the management of the road. Exactly the same point as is raised on this appeal might arise with respect to a public road. The management of the road, conceivably, might be vested in one body up to the middle of the road on one side and in a different body up to the middle on the other side. It was stated at the Bar that such cases do in fact exist. In the case of a private road the enactment is that the penalty shall be paid "to the owner thereof," and the section concludes by making the penalties recoverable in both cases by action. Now, we think that the word "thereof" relates exclusively to that particular portion of the road which is crossed, cut through, or otherwise unlawfully interfered with by the company in violation of section 53. The appellants' counsel referred to the interpretation clause (section 3) as to words importing the singular number including the plural, which is in the usual form, and argued that "the owner" meant all the owners of the part affected. They did not refer to the same clause as to the interpretation of the term "owner," because they admitted (and rightly) that the plaintiff was owner of the soil of half the road within the Act. Where an Act is open to two constructions, that construction ought to be adopted which is the more reasonable and the better calculated to give effect to the expressed intention, which, in this case, is that the penalty shall be paid. The result of adopting the appellants' contention would be in many cases to enable the company to escape the penalty by placing practical difficulties in the way of its recovery. As already pointed out, the owner of one half of the soil of the road cannot compel the owner or owners of the other half to join in suing; he or they may decline to do so without assigning any reason; they may be numerous, or under some incapacity, as infancy, lunacy, or the like, or they may be interested in the company. The conclusion at which we arrive is that the Act ought so to be read as to afford facilities for suing; that the owner of the soil of part of that portion of the road interfered with can sustain an action for the penalty; and that, in analogy to the case of the common informer, the first of such owners who sues and brings his action to trial can recover. We further hold that the plaintiff can retain the penalty for his own use, and that the defendants are not liable to more than one penalty of £20 for each day during which their wrongful acts are continued. For these reasons we think the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the plaintiff, *Soames, Edwards, & Jones*, for *Randall & Cay*, Bridgend.

Solicitors for the defendants, *Downing, Bolam, & Co.*, for *Downing & Handcock*, Cardiff.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Feb. 1.

MONTGOMERY, JONES, & Co. *v.* LIEBENTHAL & Co. (*a*.)

Practice—Writ—Service—Scotch defendant—Agreement for service within the jurisdiction—Ord. 9, *r.* 2; *ord.* 11, *r.* 1 (e).

The defendant, who was a domiciled Scotchman, entered into a contract of sale with the plaintiffs. The contract contained an agreement that in case of disputes between the parties proceedings might be served on the defendant by leaving the same at a certain office in London and posting a copy thereof to the defendant's address in Scotland.

Held, that such agreement was valid, and that service of a writ in the way specified could not be set aside.

Tharsis Sulphur and Copper Co. *v.* Société Industrielle et Commerciale des Metaux, 38 *W. R.* 78, *followed.*

British Wagon Co. *v.* Gray, 44 *W. R.* 113, [1896] 1 *Q. B.* 35, *distinguished.*

Appeal from the refusal of Phillimore, J., to set aside the service of a writ of summons.

The plaintiffs were corn merchants carrying on business at Liverpool.

The defendant was a corn merchant residing at Leith, in Scotland, and carrying on business there under a firm name.

By a contract in writing, dated the 18th of June, 1897, and made at Leith, the defendant agreed to sell to the plaintiffs a cargo of 14,000 units of Northern Spring wheat at the price of 27s. 6d. per 480 lbs., shipped.

The contract, which was in the form adopted by the London Corn Trade Association, contained the following terms—viz.: "Buyer and seller agree that, for the purpose of proceedings, either legal or by arbitration, this contract shall be deemed to have been made in England and to be performed there, and the courts of England or arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under the contract. Such contracts shall be settled according to the law of England, whatever the domicil, residence, or place of business of the parties to this contract may be or become. . . . Any party to this contract residing or carrying on business in Scotland or Ireland shall be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association. . . . The service of proceedings . . . upon a party residing or carrying on business either in Scotland or Ireland by leaving the same at the office of the London Corn Trade Association, together with the posting of a copy of such proceedings to the address . . . in Scotland or Ireland of such party, shall be deemed good service, any rule of law or equity to the contrary notwithstanding." The contract also contained, among the conditions endorsed thereon, a clause providing that disputes should be referred to arbitration, and that an award of an arbitrator or arbitrators made in pursuance of that clause should be final, subject to an appeal to the Committee of Appeal of the London Corn Trade Association.

A dispute having arisen between the parties in consequence of the defendant's failure to deliver a cargo in accordance with the contract, the matter was referred to arbitration, and, in the result, an award was made by the Committee of Appeal adjudging that the sum of £7,371 8s. 10d. was payable by the defendant to the plaintiffs.

The plaintiffs issued the writ in this action claiming payment of the above sum. The writ, which was an ordinary writ of summons for service within the jurisdiction, was served by being delivered to the secretary of the London Corn Trade Association at the office of the association in the City of London, and a copy of the writ was sent by post to the defendant at his address in Scotland.

The defendant took out a summons to have the service of the writ set aside, on the ground that under the rules of court there was no power to effect such service.

Phillimore, J., refused to set aside the service of the writ.

The defendant appealed.

McCall, Q.C., and *Tindal Atkinson*, for the defendant.—There are only two ways under the rules of serving a writ within the jurisdiction—viz., personal service, and substituted service in pursuance of a judge's order: ord. 9, r. 2; ord. 67, r. 6. In this case there was no personal service, neither was there any order for substituted service. Although there is no application here for leave to effect service out of the jurisdiction, ord. 11, r. 1 (*e*), is important, as showing the intention of the Legislature that no domiciled Scotchman or Irishman shall be compelled to defend an action for breach of contract in the English court. The plaintiffs rely on the contract; but, first, the words "service of proceedings" in the contract do not include service of a writ of summons; and, secondly, parties cannot by agreement alter the rules of the court as to service of proceedings: *British Wagon Co.* v. *Gray*, 44 W. R. 113, [1896] 1 Q. B. 35. This contract is in fact an agreement that service may be effected out of the jurisdiction; for it provides that service may be effected by doing two things—viz., leaving the writ at the office of the London Corn Trade Association, and sending a copy of the writ to the defendant in Scotland.

Joseph Walton, Q.C., and *L. Sanderson*, for the plaintiffs.—We are not asking for any order or leave of the court. We admit that we could not in this case ask for an order for service out of the jurisdiction. And that is all that was decided in *British Wagon Co.* v. *Gray*. Here the writ has been served; and it was served in the way which by the agreement of the parties was to constitute good personal service. *Tharsis Sulphur and Copper Co.* v. *Société Industrielle et Commerciale des Metaux*, 38 W. R. 78, shows that it is competent to parties to enter into such an agreement.

A. L. SMITH, L.J.—I am of opinion that my brother Phillimore was right, and that the appeal fails. The defendant applies to have the service of the writ set aside. The answer is, that the service was effected in the way which the defendant agreed should be deemed to be good personal service. The defendant is a domiciled Scotchman, and he entered into a contract to sell to the plaintiffs a cargo of wheat. The contract provided that any dispute

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

should be settled by arbitration subject to an appeal to the London Corn Trade Association. A dispute having arisen, an award was made in favour of the plaintiffs, and they bring this action to enforce the award. By the terms of the contract the parties agreed as follows: "Any party to this contract residing or carrying on business in Scotland or Ireland shall be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association. The service of proceedings"—and in my opinion "proceedings" here includes writ—"upon a party residing or carrying on business either in Scotland or Ireland by leaving the same at the office of the London Corn Trade Association, together with the posting of a copy of such proceedings to the address in Scotland or Ireland of such party, shall be deemed good service, any rule of law or equity to the contrary notwithstanding." The plaintiffs have served the writ in the way agreed upon. Therefore, if the agreement is valid, good service has been effected. Why cannot the parties enter into such an agreement? Except for ord. 11, r. 1 (*e*), and the case of *British Wagon Co.* v. *Gray* decided under it, I can see no pretence for saying that a Scotchman cannot agree that service of a writ in this manner shall be deemed to be good personal service; and when the plaintiffs, in order to bring the defendant into court, serve a writ in the way in which the defendant has agreed that a writ should be served, I do not think it is open to him to say that there has been no personal service. The case of *Tharsis Sulphur and Copper Co.* v. *Société Industrielle et Commerciale des Metaux* shows that parties may enter into such a contract, so long as it does not involve asking the court to do something which by the rules, the court is prohibited from doing.

In *British Wagon Co.* v. *Gray* the court was asked to grant leave to serve a writ out of the jurisdiction on a defendant domiciled and resident in Scotland, on the ground that the defendant had agreed to submit to the jurisdiction of the English court. Ord. 11, r. 1 (*e*), expressly prohibits a judge from ordering service out of the jurisdiction in an action for breach of contract where the defendant is domiciled or ordinarily resident in Scotland or Ireland. This court held that it could not do that which it was forbidden by the rules to do because of the agreement of the parties, and on that ground refused to make an order. In this case the court is not asked to do anything prohibited by the rules. It is argued that the plaintiffs have in effect served the writ out of the jurisdiction, for the agreement was that service should be effected by leaving the writ at the office in London and posting a copy of it to the defendant in Scotland. But, in my opinion, the writ was served by being left at the office in London; the posting of a copy to the defendant was something subsequent. The ground of my judgment is that parties may contract themselves out of the rules relating to service of proceedings so long as the court is not asked to do anything which is prohibited by the rules.

CHITTY, L.J.—As to the construction of the contract, I agree that the clause relating to service of proceedings extends to service of a writ. Here the service was well effected according to the agreement of the parties. The question is whether the parties could rightly enter into such an agreement. It is argued that the agreement is void by reason of the rules, and reliance is laid on the case of *British Wagon Co.* v. *Gray*. But I think that the distinction which is pointed out between that case and this case is a good distinction. The court has no power to order service out of the jurisdiction in an action of contract where the defendant is domiciled or ordinarily resident in Scotland or Ireland. Ord. 11, r. 1 (*e*), distinctly forbids it. There was, therefore, in that case an express prohibition against that which the court was asked to allow. Here there is no such prohibition. I am of opinion that there is no rule which negatives the right of a person to enter into an agreement as to the mode in which service of a writ may be made upon him. It seems to me that this case comes within the principle which was laid down in *Tharsis Sulphur and Copper Co.* v. *Société Industrielle et Commerciale des Metaux*.

COLLINS, L.J.—I am of the same opinion. The *Tharsis case* seems to me to be exactly in point. It is said that the *British Wagon Co. case* is inconsistent with that case and with our present decision. But I do not think it is so. In the *British Wagon Co. case* the plaintiffs asked the court to do what by the rules it could not do. Here the plaintiffs do not ask any such thing, but the parties have put into operation a proceeding provided by themselves. Service of the writ has been effected in the manner in which the parties agreed that it should be effected, and there is no rule prohibiting such an agreement being made.

Appeal dismissed.

Solicitors for the plaintiffs, *Burton, Yeates, & Hart*, for *Tyrer, Kennion, Tyrer, & Simpson*, Liverpool.

Solicitors for the defendant, *Murray, Hutchins, & Stirling*.

From Q. B. Div. (Earl of Halsbury, L.C., and A. L. Smith and Collins, L.JJ.) — Jan. 26.

WOOD v. MAYOR, &c., OF WIDNES. (*a*.)

Local government—Public health—Notice to provide sufficient water-closet—Validity of notice—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 36.

A local authority, acting under section 36 *of the Public Health Act*, 1875, *served a notice on the owner of a house requiring him to provide a sufficient privy on the waste water-closet system in accordance with plans which might be seen at the office of the borough surveyor.*

Held, that such notice was not in compliance with the statute.

Appeal from the judgment of a Divisional Court (Lawrance and Ridley, JJ.) on a case stated by justices.

At a petty sessions holden at Widnes a complaint was preferred against Edwin Wood by the corporation of Widnes, acting as urban sanitary authority, under section 36 of the Public Health Act, 1875, claiming payment of certain private improvement expenses in respect of slop water-closets fixed at houses, Nos. 52 to 68, Terrace-road, of which he was the owner.

On the 12th of February, 1895, the urban sanitary authority confirmed the following resolution of the Health Committee of the town council: "That in all future cases of nuisances requiring the reconstruction of privies and ashpits the local authority of this borough do, as far as practicable, order that such privies and ashpits be converted into the waste water-closet system, or into such other water-closet system as the local authority may from time to time approve."

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

down by Holt, C.J., in *Keeble* v. *Hickeringill*." After pointing out that "acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action," he proceeds thus: "Of course, it is otherwise—as pointed out by Holt, C.J.—if the acts complained of, although done in the way or under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, and not in the pursuit of lawful rights."

In this House opinions were expressed by seven of their lordships. Not one expressed any disapproval or adverse criticism of the case of *Keeble* v. *Hickeringill*.

If the principle of *Keeble* v. *Hickeringill* is applicable to this case, as in my opinion it is, I fail to see how Kennedy, J., could have withdrawn the case from the jury. In his charge he put Allen's case, as it seems to me, most favourably to the jury. He says (I merely summarize it): "Now, bearing in mind how Allen came, you have to consider whether the plaintiffs have proved to you not merely that he represented to the employers what the men working in that yard would be likely to do unless they could come to some settlement, and left to the employers . . . the choice of action—and I do not think in that case you would say that was an inducement . . . that he felt himself in this position, 'I am a district delegate; in the interest alike of the doing of the employers' work as well as of the men, it is better that I should go and tell the employers what the facts are, after telling the men that they are to take no hurried action'—to let the matter either be settled peaceably by the employers, or if it cannot be settled by them, be brought in due course before the executive of the union."

The charge of the learned judge seems to me to put the case favourably for Allen; but it appears to me that some of your lordships have put yourselves in the place of the jury by coming to the conclusion that Allen had gone to the employers merely to intimate, as has been said, or represent to them the feelings and views of the men, to be their messenger or mouthpiece, that being the very case that was negatived by the jury. Indeed, Lord James, in his judgment, which I have had the advantage of reading, has gone further, for he says, "for him (Allen) to communicate such intention to the company did injure the respondents." If this was correct there was no necessity to go any further. The plaintiffs would not have suffered damage by the act of the defendant. In my opinion it was for the jury, the constituted tribunal in such cases, and not for your lordships, to say whether Allen went to the employers as peacemaker, intimator, representer, messenger, or mouthpiece, as was stated by him, or rather for him by some of your lordships, or whether he went with the purpose of having the plaintiffs punished for past alleged offences by getting them discharged at once from their employment.

The defendant gave a complete denial to the substance of Mr. Halkett's evidence. The defendant did not take in his evidence the position which is now taken up for him by some of your lordships of being a messenger or an intimator of what had occurred. He was conscious he had done wrong, and accordingly to try to save himself he denied altogether what Mr. Halkett had proved. The jury disbelieved him. His untruthful evidence gave colour to his conduct and action which, in my opinion, amounted to this. He was an outsider, though he was telegraphed for by Elliott. He proceeded to threaten the employers with the withdrawal of the boilermakers, which would be most injurious to the employers, unless the plaintiffs were dismissed at once. His object was to injure the plaintiffs and to punish them, and he had the intention of further persecuting them by not allowing them to work anywhere, which was not the wish of the men or their union. His conduct was unauthorized, and he misrepresented to the employers both the wishes of the men and their objects, and acted outside the scope of his authority as a district delegate of the union.

I therefore conclude by adopting as my own the last paragraph of Hawkins, J.'s, opinion on the questions propounded to the judges by your lordships: [His lordship read the passage as set out above.]

I am, therefore, of opinion that the considered judgment of Kennedy, J., which was unanimously affirmed by the Court of Appeal should be affirmed by this House.

Lord SHAND.—I am of opinion that the judgment complained of should be reversed, and judgment entered for the defendant with costs.

Certain facts have, with reference to the evidence and the verdict of the jury, been clearly established. In the first place it is clear that the plaintiffs had no contract with their employers, the Glengall Iron Co., entitling them to continuous employment. They were engaged to work by the day, entitled to leave the employment at the end of each day; and on the other hand, subject to the risk that their employers might at any time cease to employ them further. While this was so, it is, however, to be observed that it is matter of clear inference, and, indeed, of some direct evidence, that the employment would have gone on for some time longer than it did if the employers had not been induced to discontinue it.

It is, in my opinion, further clear that the employment was discontinued by the employers, the Glengall Iron Co., because of the representations made to them by the defendant Allen. This has, I think, been proved, and indeed has been expressly affirmed by the verdict of the jury.

There is no real controversy as to the statement or representation made by the defendant which induced the employers to dispense with the plaintiffs' services. The defendant, in effect, stated that if the plaintiffs were continued as workers, even at woodwork only, on the vessel then in the course of being repaired, the boilermakers then engaged at the ironwork on the ship would cease work, and so put a stop to the completion of the repairs. [After examining the evidence, his lordship continued:] The learned judge was probably bound to lay down the law in the terms he used, having regard to the judgments delivered in the Court of Appeal in the case of *Temperton* v. *Russell*, which, in the view of Rigby, L.J., governed the decision of this case.

I confess that, even if the direction given were sound in law, as I think it was not, the facts of the case were such as I should have thought should have precluded such a verdict being given, if these, with the assistance of the learned judge, had received the weight to which they were entitled at the hands of the jury. If anything is clear on the evidence, it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those he represented in all he did, that this was his motive of action and not a desire to use the words of the learned judge, "to do mischief to the plaintiffs in their lawful calling."

The case was one of competition in labour, which, in my opinion, is in all essentials analogous to competition in trade, and the same principles must apply to it; and I ask myself what would be thought

of the application of the word "malicious" to the conduct of a tradesman who induces the customer of another tradesman to cease making purchases from one with whom he had long dealt and instead to deal with him, a rival in trade. The case before the jury was, in my view, in no way different, except that in the one case there was competition in labour, in the other there would be competition in trade.

Some of the learned consulted judges speak of Allen's conduct as having been caused by a desire to inflict "punishment" on the shipwrights for past acts, and indicate that, if the shipwrights had been actually working at ironwork on the vessel at the time the case would have been different. I cannot agree in any such view. "Punishment" in a wide and popular sense may possibly be used, though incorrectly, to describe the boilermakers' action, but it is quite clear that what they were resolved to do, and really did, was, while marking their sense of the injury which they thought (rightly or wrongly is not the question) the shipwrights were doing to them in trenching on their proper line of business, to take a practical measure in their own defence. Their object was to benefit themselves in their own business as working boilermakers, and to prevent a recurrence in the future of what they considered an improper invasion on their special department of work. How this could possibly be regarded as "malicious," even in any secondary sense that can reasonably be attributed to that term, I cannot see.

Again, the expression was repeatedly used in the argument, and has been also adopted by some of the learned judges, that the men, or rather their representative, Allen, had used "threats" in his communications with the employers, which were represented as improper, and which afforded evidence to support the view that their action was malicious. What were these threats? Simply this, that if the plaintiffs were continued in the employment they, the boilermakers, would leave. Threats may, like false or fraudulent representations, be of such a nature, if used, as to amount to improper and unlawful means used to induce action which may be injurious to others, causing them loss and damage, and I should not for a moment say that damages might not in cases of such threats be recoverable. But this can only apply to threats of violence, intimidation, obstruction, or the like, threats which may be described as menace which properly affects freedom of action in the person who is induced to act or to refrain from acting. The boilermakers were quite entitled to resolve that they would not then or at any future time work at the same vessel or even in the same yard with the plaintiffs. No one can dispute their right so to resolve. They were quite entitled, having formed that resolution, to inform their employers that they had done so; indeed, I should say that the defendant Allen was only doing what was right and proper in intimating this resolution to the employers, in place of allowing the men to leave, without notice to the employers of what would certainly cause them great inconvenience and loss. There was no threat of the nature of menace so as to amount to the use of illegal means to induce the employers to act, no threat to do anything beyond the exercise of their legal right. A master who warns his servant that a repetition of certain faults will result in dismission, may be said to use a threat, but he is not only acting lawfully but in most cases is to be commended for so doing in place of giving an instant dismissal.

Cave, J., has expressed the opinion that if a butler who, for some reason or another, has made up his mind that he will no longer continue in service with the cook, with whom he has been in the same employment, should intimate his resolution to the employer, and the services of the cook should thereupon be dispensed with, the cook would have in law a claim of damages against the butler. If this view were sound then the plaintiffs in this case might be entitled to succeed. Indeed, I have always thought throughout the course of the argument that the case put by the learned judge is perhaps the simplest form in which the very question now under discussion could be raised. But with great deference to the opinion of the learned judge, no such claim could arise in such circumstances, because it cannot be truly said that on the part of the butler there was either an unlawful act, or unlawful means used in the doing of a lawful act. A servant is surely entitled, for any reason sufficient in his judgment, or even from caprice I should say, to resolve that he will no longer continue, after the expiration of a current engagement, in service with another servant in the same employment. This being unquestionable, the only limitation on his right to act is that he must not use unlawful means to induce his employer to dispense with the services of his fellow-servant. His action being lawful, and no unlawful means being used in carrying it out, the motive, even if it be personal illwill to another, would not, in my opinion, create liability to a claim of damages.

Coming now directly to the merits of the question in controversy in the case, the argument of the plaintiffs and the reasons for the opinions of the majority of the consulted judges seem to me to fail, because, although it is, no doubt, true that the plaintiffs were entitled to pursue their trade as workmen "without hindrance," their right to do so was qualified by an equal right, and, indeed, the same right, on the part of other workmen. The hindrance must not be of an unlawful character. It must not be by unlawful action. Amongst the rights of all workmen is the right of competition. In the like manner, and to the same extent as, a workman has a right to pursue his work or labour without hindrance a trader has a right to trade without hindrance. That right is subject to the right of others to trade also, and to subject him to competition—competition which is in itself lawful, and which cannot be complained of where no unlawful means (in the sense I have already explained) have been employed. The matter has been settled, in so far as competition in trade is concerned, by the judgment of this House in the case of *The Mogul Steamship Co.* v. *McGregor*. I can see no reason for saying that a different principle should apply to competition in labour. In the course of such competition, and with a view to secure an advantage to himself, I can find no reason for saying that a workman is not within his legal rights in resolving that he will decline to work in the same employment with certain other persons and in intimating that resolution to his employers.

It is further to be observed, distinguishing the case from one in which a contract might have subsisted between the plaintiffs and their employers for a definite period, or for the work, it might be, on a particular ship until the whole was completed (in which case the refusal to continue to give the work would be a breach of contract on the employer's part), that there was here no such breach of contract. The employers' act in dispensing with the services of the plaintiffs at the end of any day was a lawful act on their part. The defendant induced them only to do what they were entitled to do, and in the absence of any fraud or other unlawful means used to bring this about, the action fails.

As already fully explained, there was no case of malice in the ordinary sense of the term, as meaning personal ill-will, presented to the jury; but I agree

with those of your lordships who hold that, even if such a motive had existed in the mind of the defendant, this would not have created liability in damages. On the grounds already stated, I think the defendant only exercised a legal right in intimating that the boilermakers would leave work if the plaintiffs were continued. He used no fraud or illegal means in the assertion of that right; and the exercise by a person of a legal right does not become illegal because the motive of action is improper or malicious: *Mayor of Bradford* v. *Pickles* and *The Mogul Steamship Co.*, already cited. In the former of these cases Lord Watson said: "No use of property which would be legal, if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious." It seems to me, with reference also to the judgment in the latter case bearing on the rights of competitors in trade, that, on the same principle, it may be affirmed that the exercise of any legal right in the course of competition in labour or in trade does not become illegal because it is prompted by a motive which is improper or even malicious.

Lord Herschell and Lord Macnaghten have reserved their opinions as to the law applicable to a case in which the ground of action is that the defendant had induced an employer to commit a breach of contract, as in the cases of *Lumley* v. *Gye*, *Bowen* v. *Hall*, and the first branch of *Temperton* v. *Russell*. I desire also to reserve my opinion as to that case. The person who has committed a breach of contract is, of course, liable in damages in consequence. If it has not yet been decided by this House that a third party who had, without the use of fraud or other unlawful means, induced the contracting party to break his contract himself thereby incurs liability in damages, the question seems to me worthy of full discussion and consideration. The proper and usual application of the maxim, *Qui facit per alium facit per se*, in cases in which a wrongful act has been performed is to hold the person who has committed the wrong—*i.e.*, in the case supposed the person who has broken his contract—liable although his act has been done through another acting for him, and it is at least open to consideration whether the maxim would apply to one who is not himself the wrongdoer committing a breach of contract, but only persuades or induces another to do so.

The case was not presented by the learned judge to the jury as one of conspiracy, and does not raise any question of that kind. Combination of different persons in pursuit of a legitimate trade object occurred in the case of *The Mogul Steamship Co.*, and was there held to be lawful. Combination for no such object but in pursuit really of a malicious purpose to ruin or injure another would, I should say, be clearly unlawful, but this case raises no such question.

As to the older authorities referred to in the argument, I agree in the views of Lord Herschell and Lord Watson, and I agree in thinking with them and with Lord Macnaghten that *Lumley* v. *Gye* was not decided on any question of malice.

It was urged by the counsel for the respondent that a disapproval of the law laid down in *Temperton* v. *Russell*, and repeated in this case, will be attended with dangerous consequences, as extending the power of trades unions or combinations beyond limits which these cases laid down, and I am not insensible to the truth of the observation that a certain amount of restraint which these cases introduced will be removed. But if that measure of restraint was not founded, as I believe it was not, on sound legal principle, it is only right that by legal decision in this court of last resort it should be removed. And if the force of combination should be harshly or oppressively used, if it should be used in circumstances in which right-minded men would deplore its use, it must be observed that those against whom combination is so employed have precisely the same liberty of action for resisting oppressive measures and for causing those who use them to desist from that course of action.

Lord DAVEY.—In this case the jury have found (1) that the defendant Allen maliciously induced the Glengall Iron Co. to discharge the plaintiffs from their employment; (2) that the defendant Allen maliciously induced the company not to engage the plaintiffs; and (3) that damages to the extent of £20 to each plaintiff was thereby suffered by the plaintiffs.

The learned judge directed the jury that there was no evidence of any breach of contract involved in the plaintiffs being discharged by the company; that there was not a shred of evidence of any conspiracy at all; and that there was no evidence of anything amounting to intimidation or coercion in any legal sense of the term. No exception has been taken, or, in my opinion, could be taken, to these directions. We must, therefore, take the finding of the jury to mean that the company were "induced" by the persuasion and representations of Allen to discharge the plaintiffs—*i.e.*, not to continue to employ them. The sense in which "maliciously" was intended to be used in the verdict is shown by the passage in the summing up which has already been read and commented on by your lordships, to be the popular sense of intending to do a mischief to the respondents. The main question which has been argued before your lordships was whether the plaintiffs were entitled to judgment on the findings of the jury.

The learned judge in his judgment, on further consideration after verdict, followed the decision of the Court of Appeal in *Temperton* v. *Russell*, and gave judgment for the plaintiffs. The Court of Appeal affirmed that decision. The Master of the Rolls considered that *Temperton* v. *Russell* was an authority binding on that court, that a thing which you may lawfully do to the injury of another if you do it without malice, is made unlawful and gives him a right of action if you do it with malice. The learned lord gave additional reasons for his decision, in the course of which he laid down that whether the advice is to break a contract or not to make a contract, it has just the same effect, and that if you give advice to one not to make a contract with intent of doing an injury to the person who is going to make the contract with him, then the malice is the thing which makes that thing which would have been a lawful thing without malice, unlawful. Lopes, L.J., also said that he could see no distinction between inducing a party to a contract to break it and inducing a party to discharge a servant, as in the present case. Rigby, L.J., simply followed *Temperton* v. *Russell*.

I have stated the views expressed by the Court of Appeal at some length, because they exactly express the points on which I am constrained to differ from them. The proposition of those learned judges, when analysed, seems to me to amount to this: that *damnum absque injuria*, if accompanied by malicious intent, will give a right of action, or that a malicious motive *per se* amounts, or may in certain circumstances amount, to *injuria*. I am unable to assent to either of these propositions. "Malice, in common acceptation," says Bayley, J., in the well-known case of *Bromage* v. *Prosser*, 4 B. & C. 247, "means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse." If so, it seems to be an argument in a circle to say that an act not otherwise wrongful becomes so if malicious. Nor can I agree that there is no legal

difference between persuasion to break a contract and persuasion not to enter into a contract. In the former case, if the persuasion is successful the other party is deprived of the benefit of having his contract completed. In the latter case he loses nothing to which he has a legal right, and he has no legal ground of complaint against the person who refuses to contract with him. In the one case there is a violation of right; in the other case there is not.

I accept for the present purpose without comment the doctrine laid down in *Lumley* v. *Gye* and *Bowen* v. *Hall*, that to maliciously induce one to break a contract of exclusive personal service with an employer to the injury of that employer is actionable. But a perusal of the judgments delivered by the learned judges in *Lumley* v. *Gye* shows that in their opinion at any rate it was vital to the plaintiffs' case that there was a subsisting contract of service. [His lordship read the passages cited by Lord Herschell, *supra*.]

An employer may discharge a workman (with whom he has no contract), or may refuse to employ one from the most mistaken, capricious, malicious, or morally reprehensible motives that can be conceived, but the workman has no right of action against him. It seems to me strange to say that the principal who does the act is under no liability, but the accessory who has advised him to do so without any wrongful act is under liability.

To persuade a person to do or abstain from doing what that person is entitled, at his own will to do or abstain from doing is lawful and in some cases meritorious, although the result of the advice may be damage to another. This is not a case of conspiracy. I do not say whether, if it were, it would or would not make an essential difference. But I do say that I am not aware of any authority binding on this House for holding, and it humbly appears to me to be against sound principle to hold, that the additional ingredient of malice should give a right of action against an individual for an act which if done without malice would not be wrongful although it results in damage to a third person. The case of libel on a privileged occasion is, of course, altogether different. A libel is held to be excused if the words complained of were used on a privileged occasion. But that excuse may be rebutted by proof of express malice and abuse of the privilege.

In my opinion the somewhat anomalous action for malicious prosecution is based on the same principle. From motives of public policy the law gives protection to persons prosecuting, even where there is no reasonable or probable cause for the prosecution. But if the person abuses his privilege for the indulgence of his personal spite he loses the protection, and is liable to an action, not for the malice but for the wrong done in subjecting another to the annoyance and expense of a causeless prosecution.

It was, however, argued that the act of the appellant in the present case was a violation of the right which every man has to pursue a lawful trade and calling, and that the violation of this right is actionable. I remark in passing that if this be so the right of action must be independent of the question of malice, except in the legal sense. The right which a man has to pursue his trade or calling is qualified by the equal right of others to do the same, and compete with him though to his damage. And it is obvious that a general abstract right of this character stands on a different footing from such a private particular right as the right to performance of a contract into which one has entered. A man has no right to be employed by any particular employer, and has no right to any particular employment if it depends on the will of another.

But is there any such general cause of action irrespective of the means employed or mode of interference? I think it unnecessary to comment on all the cases which have been cited by counsel and are referred to by the learned judges. I have read them carefully and I am satisfied that in no one of them was anything decided which is an authority for the abstract proposition maintained. In every one of them you find there was either violence or the threat of violence, obstruction of the highway or the access to the plaintiff's premises, nuisance, or other unlawful acts done to the damage of the plaintiff. Nor does it appear to me that the gist of the action in those cases was that the plaintiff was a trader or exercised a profitable calling. That circumstance no doubt afforded evidence of the damage; but I suppose that if a person obstructed the access to my house or to my vessel by molesting and firing guns at persons resorting thither on their lawful occasions, I may have my action against him though I do not keep a school or I am not a trader, but sailing in my yacht for my own pleasure. Or if a person obstructs my free use of the highway, and I suffer damage thereby, I have a right of action though my carriage does not ply for hire, but is used only for my own purposes. It is strange that if there be any such right of action for interference with trade, there is not to be found some clear authority in the law books in its favour. And as remarked by one of the learned judges, if those who argued and those who decided *Lumley* v. *Gye* had been aware of any such general doctrine, it would have disposed of that case without the elaborate consideration to be found in the judgments. I do not think that the well-known action for slander of a trader's goods supports the larger proposition attempted to be founded on it. Blackstone treats that action as a particular example of slanderous words. And it appears to me an obvious fallacy to argue from the existence of some recognized and well known cause of action to a larger and wider legal proposition of which the cause of action in question might be treated as a particular case if the larger proposition had been generally recognized.

The authority most relied on in support of the the proposition maintained by the respondents is the well-known case of *Keeble* v. *Hickeringill*, or more properly the *dicta* of Lord Holt as reported in 11 East 574*n*. That case was an action by the owner of a decoy pond, against the defendant for driving away his wild fowl by firing guns with intent to damnify the plaintiff. It appears to have been twice argued, and there are four separate reports of it which do not altogether agree as to the grounds of the judgment. But I think it was decided on the ground that the act of the defendant was a wilful disturbance of the enjoyment by the plaintiff of his own land for a lawful and profitable purpose, and what is called in law a nuisance. The reported cases in which the case has been followed: *Carrington* v. *Taylor*, 11 East 571, and *Ibbotson* v. *Peat*, 13 W. R. 691, 3 H. & C. 644, support this view. If this be a correct view of the decision, it is no authority for the larger proposition founded on it by the respondents; and the *dicta* of Lord Holt, however much entitled to respect, are inadequate to support the weight which it is sought to place upon them.

Another point was made at your lordships' bar. It was contended that Allen was guilty of wilful misrepresentation in what he told Halkett, that the men never really intended to strike; and that Allen knowingly exceeded his instructions or what the men had authorized him to say, when he said that they would do so. This is a question of fact to be determined on the evidence, and it might and should have been submitted to the jury. In my view such a state of facts amounting to a charge of fraud

would have constituted a legal wrong and have been of the essence of the action. The point should therefore, in my opinion, have been pleaded. But it is not to be found in the pleadings, and I cannot find a trace of its having been taken at the trial. No reference to such a question is to be found in the very full summing up of the learned judge. So far as I can understand, the contention of counsel for the respondents at the trial was the exact contrary, as they were then endeavouring to recover against the other defendants, the representatives of the union. It is not the practice of your lordships where there has been a trial by jury to allow a new issue or question to be raised at the bar which might and ought to have been, but was not, submitted to the jury for their consideration on the evidence. To do so would be to usurp the function of the jury. I do not therefore find it necessary to express any opinion on the point.

I am of opinion that the judgment of the Court of Appeal should be reversed, and the action dismissed with the usual consequences.

Lord JAMES OF HEREFORD.—[His lordship stated the facts, and continued:] Upon this state of facts the respondents brought their action against the appellant and others, the cause of action in the fifth paragraph of the claim being thus alleged: "The defendant has maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced the Glengall Co. to break their contracts with the plaintiffs to the plaintiffs' damage, and has further intimidated and coerced the Glengall Co. and others not to enter into new contracts with the plaintiffs whereby the plaintiffs have suffered damage."

It was admitted during the trial that the first head of this claim could not be supported, for, as I have said, the Glengall Co. broke no contract. The question, therefore, is confined within the second alleged cause of action. Thus your lordships have to determine whether there was sufficient evidence given at the trial to support the allegation that the appellant "intimidated and coerced the Glengall Co." not to employ the respondents; and, secondly, it is advisable to consider whether in any view of the appellant's conduct there was evidence to support a cause of action.

Looking at the facts, I come to the conclusion that the appellant cannot be said to have intimidated or coerced (within the legal meaning to be given to those words) the Glengall Co. It is true he informed the company's representative of the existing intention of the boilermakers; but that intention to discontinue work if the respondents were further employed was not formed in consequence of any words or act of the appellant. He had learnt that that intention was formed by the boilermakers before his arrival at the ship. For him to communicate such intention to the company did not injure the respondents. The boilermakers would have acted upon it whether the company knew or were ignorant of their resolution. For they were about to desert their work when the appellant by his threat prevented them from doing so, and prevailed upon them to give him an opportunity of communicating with the representatives of the company.

For myself I believe that the appellant communicated only the boilermakers' preformed intention, but even if he said that the union would call out the boilermakers if the respondents were further employed, I presume he was only communicating that which he knew would be the fact, and he was therefore warning the company's representatives not to pursue a course which would be detrimental to the company's interest.

The appellant doubtless desired that the boilermakers' view of their claim that they alone should execute ironwork should prevail, and, therefore, that steps should be taken to secure to them the success of that claim, and so naturally he would use solicitation and persuasion to the company's representatives with the intention of procuring the non-employment of the respondents. Thus it appears to me that the question for your lordships' decision is thus resolved: Is it actionable for A. to solicit and persuade B. not to enter into contract with C.?

Before dealing with the answer that ought to be given to this question, it is worthy of observation that there were three actors in the events leading to the non-employment of the respondents: (1) The boilermakers, who refused to work with them; (2) the appellant, who communicated that refusal to the Glengall Co.; and (3) the representatives of the company, who, in consequence of the expressed intention of the boilermakers, determined not further to employ the respondents.

In all substance the injury inflicted upon the respondents proceeded, in the first degree, from the action of the boilermakers, and, in the second, from the action of the company in yielding to the demand of the boilermakers. That the appellant took part in the transaction is true, but he played but a very minor part, and if he had never appeared on the scene at all the injury to the respondents would have been the same; for the company would equally have exercised their option, and would have refused to employ the respondents in order to secure the services of the boilermakers. Under these circumstances it seems strange that it is not alleged that any action lies against the boilermakers, and that it should be distinctly admitted that no cause of action can be maintained against the company.

If the principles laid down in the judgment of Lord Esher, M.R., in the case of *Bowen* v. *Hall* and in the case of *Temperton* v. *Russell* were applied to the ordinary affairs of life great inconvenience as well as injustice would ensue. Every competitor for a contract who alleged that he was the best person to fulfil it would be liable to an action. Take the case of an architect who seeks to be employed to the exclusion of his rivals. He says: "My plans are the best, and following them will produce the best house at the least cost. Therefore employ me, and not A. or B." If he be so employed the architect would, according to the *dicta* in *Bowen* v. *Hall*, be liable to an action at the suit of his rivals. For he has induced a person not to enter into a contract with a third person, and his object clearly was to benefit himself at the expense of such third person. Indeed, if the opinion delivered by Cave, J., that it is actionable for a cook to say to her master, "Discharge the butler or I will leave you," is correct, in that case the ingredient of "being desirous to benefit herself at the expense of a third person" is wanting. For the objection of the cook might well proceed from a motive which would not represent any gain to herself.

But I am aware that it was urged at the bar that, even if the views which I have expressed to your lordships be correct, there is an exception from general principles in favour of those whose trade or employment has been interfered with. I do not assent to this view. Before discussing the question it is necessary that some definition of the words "interfered with" in their legal sense should be given. Every man's business is liable to be "interfered with" by the action of another, and yet no action lies for such interference. Competition represents "interference," and yet it is in the interest of the community that it should exist. A new invention utterly ousting an old trade would certainly "interfere with"

it. If, too, this loose language is to be held to represent a legal definition of liability, very grave consequences would follow. Of course, the conduct of the boilermakers in the case before your lordships amounted to an interference with the plaintiff's business, and yet, as has been pointed out, it is not said that an action lies against them. Every organizer of a strike, in order to obtain higher wages, "interferes with" the employer carrying on his business; also every member of an employers' federation who persuades his co-employer to lock out his workmen must "interfere with" those workmen. Yet I do not think it will be argued that an action can be maintained in either case on account of such interference. But whatever meaning may be attached to the words "interfere with," I see no ground for saying that any different rule should be applied to cases of interference with a man when carrying on his trade or business or when he is engaged in any other pursuit. In the case of *The Mogul Steamship Co.* there was an extreme case of interference with the plaintiff's business by methods which directly injured the plaintiffs in their trade for the express purpose of benefiting the defendants. The admitted interference was carried on by several defendants in a combination which in one sense amounted to a conspiracy, yet it was held by this House that no action could be maintained, for the acts done were not unlawful and the combination was not a criminal conspiracy.

I abstain from passing in review the older cases which refer to the interference with trade or business, for they have already been very fully reviewed and dealt with. I content myself with saying that I do not think that they establish more than that the interference which is in itself unlawful constitutes a cause of action. It seems somewhat contrary to common sense that an interference which is rightful when applied to general subjects becomes wrongful when a trade or business is subjected to it.

For these reasons I have, after some hesitation, come to the conclusion that inasmuch as the appellant has used no unlawful means to produce a result, and that as the result produced represents nothing that is unlawful, this action cannot be maintained.

I therefore think that the decision of the Court of Appeal should be reversed, and that judgment should be entered for the appellant.

Order appealed from reversed, and judgment entered for the appellant with costs here and below, including the costs of the trial.

Solicitors for the appellant, *Shaen, Roscoe, Massey, & Co.*

Solicitors for the respondents, *C. J. Smith & Gofton.*

Lunacy.

(Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) Jan. 17.

In re AGNES MARIA KNIGHT. (*a.*)

Lunacy—Lunatic out of jurisdiction—Property within jurisdicdiction—Curator according to law of Jersey—Right to transfer—Discretion.

A lunatic who was resident in Jersey owned stock and shares in this country. The curator of the person and property of the lunatic appointed according to the law of Jersey applied for a transfer to him of such stock and shares.

Held, that, under section 134 *of the Lunacy Act,* 1890, *the court had a discretion to refuse such transfer.*

In re Brown, 44 *W. R.* 17, [1895] 2 *Ch.* 666, *considered.*

This was a petition presented under section 134 of the Lunacy Act, 1890, asking for the transfer to the curator of a lunatic out of the jurisdiction of certain stocks and shares.

The above-named Agnes Maria Knight went to reside in Jersey many years ago. She married there and had resided there ever since.

In 1874 her husband died, and in 1897 she was, in pursuance of the law of Jersey, duly found to be of unsound mind, and a curator of her person and property was thereupon duly appointed.

Evidence was furnished that according to the law of Jersey such curator was entitled to obtain possession of all her property.

Part of such property consisted of a sum of consols standing in her name in the books of the Bank of England, and other part consisted of certain preference and ordinary shares of a company.

The petition asked that, pursuant to section 134 of the Lunacy Act, 1890, the said stock and shares might be transferred into the name of the curator and that the dividends accrued and to accrue thereon might be paid to him.

The curator filed an affidavit in which it was stated that the transfer was required for "the maintenance and sole benefit" of the lunatic, but did not in any other manner specify the purposes for which it was required.

Before Rigby, L.J., in chambers, the applicant contended that under section 134 he was entitled to the transfer as of right, and that the court had no discretion in the matter, and on this point his lordship adjourned the matter to be argued in court.

J. G. Wood, for the applicant, the curator.—The court has no jurisdiction to refuse to make the order asked for; the point was left open in *In re Brown,* 44 W. R. 17, [1895] 2 Ch. 666. [LINDLEY, M.R.—The language of the section is, the court *may* make an order.] If a power is given in aid of a legal right there is no jurisdiction to refuse to exercise it: *Julius* v. *Bishop of Oxford,* 28 W. R. 726. If the property in this case were a personal chattel the curator could undoubtedly sue for it in this country, but it being stock in the books of a company he is in a difficulty. The section gives him no additional right, but gives him a further remedy. A curator appointed according to the law of Jersey has wider powers than a committee in this country—for instance, the curator can sell real estate. [LINDLEY, M.R.—The decision in *In re Brown* really turned on the meaning of "vested" in section 134. His lordship referred to *In re Stark,* 2 Mac. & G. 174, and *In re Garnier,* 20 W. R 288, L. R. 13 Eq. 532.]

LINDLEY, M.R.—I think we all take the same view of this case. This application has been adjourned into court in order to have the question decided whether we are bound to make the order. In my opinion the applicant has put his case too high. It is not our duty to part with the possession of this property without exercising our discretion. The section in point is section 134 of the Lunacy Act, 1890. [His lordship read the section.] The applicant has brought himself within this section so far as regards the condition giving him the right to make the application. In *In re Brown* this court put an

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

extended rather than a restricted interpretation on the word "vested" in that section, and having regard to that decision it seems to me that we are right in saying that this property is vested in Mr. Wood's client according to the law of Jersey within the meaning of the section. What are we to do? We should be running counter to the established practice if we were to hold that we have no discretion in such a case as this. The case of *Julius* v. *Bishop of Oxford* does not carry the applicant far enough. It is to my mind clear to demonstration that we have a discretion, and the law is as old as Lord Hardwicke's time. He decided that this court has jurisdiction to direct an inquisition as to the sanity of a person resident abroad but having property in this country. So that if anybody were to apply for an inquisition as to the sanity of this lady the court would have jurisdiction to appoint a committee and administer her property. How, then, can it be incumbent upon the court to hand over her property to a foreign committee. The real truth is that the jurisdiction of the court over lunatics who have property within the jurisdiction cannot be ousted by such ambiguous words as those which we have in the curator's affidavit here. In *In re Brown* the court was satisfied that the property was in fact required for the maintenance and support of the lunatic, but that point is not before us now. The case must go back to chambers for evidence to satisfy the court that the property is properly required.

RIGBY, L.J.—I am of the same opinion. We should be deciding something quite novel if we held that section 134 left us no discretion. The only point before us is whether we have discretion, and I think this ought to be decided against the applicant.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion.

Solicitors, *Bennett & Co.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Feb. 3.

LLEWELLYN v. VALE OF GLAMORGAN RAILWAY CO. (a.)

Railway—Crossing of road—Penalty for not making substituted road—By whom recoverable—Road belonging to adjoining landowners—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 53, 54.

By section 54 *of the Railways Clauses Act,* 1845, *if a railway company cross a road so as to interfere with it, and do not make a substituted road, they shall forfeit £20 for every day during which such substituted road shall not be made, and such penalty shall, in the case of a private road, be paid to the owner thereof.*

Held, that a part owner of that portion of the road interfered with, can sue for and recover the penalty without joining the owners of the rest of that portion of the road.

Held, also, that the railway are only liable to one penalty for each day during which they fail to make a substituted road.

Appeal from the judgment of Wright, J., at the trial of the action without a jury: [1897] 2 Q. B. 239, 45 W. R. Dig. 135.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The action was brought under section 54 of the Railways Clauses Act, 1845, to recover £1,700 as penalties for eighty-five days' default on the part of the defendants in providing a road in substitution for another road which they had temporarily obstructed.

The plaintiff was the owner of land bounded on one side by a private road, which was used by the owners of the lands adjoining it. The plaintiff, therefore, was the owner of one half of the road—*usque ad medium filum.*

The defendants were, by a special Act incorporating the Railways Clauses Act, 1845, authorized to construct a railway, crossing the road at a point adjoining the plaintiff's land, and in constructing the railway they temporarily cut through the road, without providing a substituted way as required by section 53 of the Railways Clauses Act, 1845.

The plaintiff contended that the defendants were liable to penalties under section 54 of that Act.

The defendants contended that the plaintiff, being the owner of one-half of the road, was not the "owner" of the road within the meaning of section 54, and could not sue for the penalties.

By a compromise it was agreed that, if the plaintiff was entitled to recover, £150 should be the amount recoverable.

Wright, J., held that the plaintiff could recover, and gave judgment for him.

The defendants appealed.

C. A. Cripps, Q.C., and *Kenyon Parker,* appeared for the defendants.

C. A. Russell, Q.C., and *E. F. Buckley,* appeared for the plaintiff.

The sections of the Act are set out in the judgment of the court.

Cur. adv. vult.

Feb. 3.—CHITTY, L.J., read the judgment of the court as follows: This is an action to recover penalties from the defendants, a railway company, who in contravention of section 53 of the Railways Clauses Act, 1845, cut through and otherwise interfered with a private road without first causing a sufficient road to be made in substitution as required by that section. The plaintiff is the owner of the soil of half the road up to the middle line in that part of the road which was wrongfully cut through and interfered with. Wright, J., gave judgment for the plaintiff for the amount at which the parties agreed to estimate the penalties in the event of the plaintiff being entitled to succeed. The only point raised by the defendants on the appeal was that the plaintiff was not "the owner" of the private road within the meaning of section 54 of the Act. The contention was pushed to the extreme length of saying that "the owner" meant all the owners for the entire length and breadth of the road, and apparently without any defined limit in the direction of the road, and it was argued that no action could be sustained for the penalties unless all such owners joined in the action. This contention is extravagant; if accepted it would operate to defeat the obvious intentions of the Legislature in many, if not in most, cases. If any one of a dozen or hundred of such owners declined to join in suing, the railway company would escape the penalty. It was further contended for the appellants that if this argument failed, as we think it does, the owner of the soil in the other half of the road ought to have joined in this action, and that the plaintiff, suing alone, cannot recover. At the outset it is plain that the owner of one half had not in 1845, nor has he now, any power to compel the owner of the other half to join in suing. The question turns on sections 53, 54, and 55 of the Act. It is not necessary to state

in full the terms of section 53. There is nothing in that section or in the other parts of the Act to oust the jurisdiction of the court to grant an injunction. Section 54 divides itself into two parts. The first imposes the penalty, and runs thus: "If the company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid, they shall forfeit £20 for every day during which such substituted road shall not be made after the existing road shall have been interrupted." This is plainly a penalty; it is not intended to be a sum payable by way of compensation for wrong done to any particular person or to his soil or interest in the road. It is imposed by way of punishment on the railway company for their high-handed and illegal acts in violation of the provisions of section 53, and it is intended as a deterrent against the continuance of the illegal acts. There is another point. The penalty is £20 for every day during which the offence is committed. We think it is clear, on the language of the statute itself, and without having recourse to the principle on which the leading case of *Crepps* v. *Durden*, Cowp. 640, was decided, that one penalty, and one penalty only, is inflicted for every day. Wright, J., seems to have been inclined to think that more than one penalty of £20 for each day was recoverable. We are unable to accept that suggestion, but we entirely agree with him in the opinion that the penalty is not apportionable; it is one entire sum of £20. This has an important bearing on the second part of the section, and tends to support the plaintiff's case. The second part runs thus: "And such penalty shall be paid to the trustees, commissioners, surveyor, or other person having the management of such road, if a public road, and shall be applied for the purposes thereof, or, in case of a private road, the same shall be paid to the owner thereof, and every such penalty shall be recoverable with costs by action in any of the superior courts." Before commenting on this part of section 54, we will state shortly the effect of section 55: "If any party entitled to a right of way over any road so interfered with" suffers special damage by reason of the failure to substitute a sufficient road, he may recover the special damage by action, and that "whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same." Damages recoverable under this section are by way of compensation to the person whose right of way is interfered with and who can prove special damage; these damages are wholly distinct from the penalty, and are recoverable whether the penalty has been sued for or not. There may be a question whether the right of way spoken of in this section is a right of way in the strict legal sense of the term, or a right of passing over the road in the more popular meaning of the words. It is not necessary to express any opinion on this point, and we refrain from so doing. If the term is used in the strict sense, the owner of the soil of one half of the road could not recover the special damage in respect of his own half of the soil of the road, because a man has no right of way over his own land; but he could in a case like the present recover his special damage for obstructions of the right of way which he is entitled to over the other half of the soil of the road, and the owner of that half would be in a corresponding position. If, on the other hand, the expression "right of way" is used in the popular sense, then each owner could recover the special damage proved in respect of the entire breadth of the road. Practically there would be little, if any, difference between the amount of the special damage recoverable whichever view be taken of the meaning of the term "right of way." These considerations appear to us to remove in great measure the difficulty which Wright, J., felt in the supposed case of the railway company breaking up or stopping up a mile of road each hundred yards of which is owned by a different person. Section 55 applies to a public road and a private road without distinction, and all persons, whether landowners or not, who are entitled to a right of way or of passing over the road (whichever be the right expression), can recover the amount of the special damage sustained, whether the road be public or private, and quite irrespectively of the penalty. We revert to the second part of section 54. Under the older system of legislation the enforcement of the penalty would probably have been left to the common informer in a *qui tam* action; and had such been the case, the informer who first instituted proceedings or obtained judgment would have received the fruits of his diligence to the exclusion of all others. But here the common informer is excluded by the language used. The enactment is that the penalty shall be paid. Then a distinction is drawn between a public road and a private road. In the case of a public road the penalty is to be paid to the trustees, commissioners, surveyor, or other person having the management of the road. Exactly the same point as is raised on this appeal might arise with respect to a public road. The management of the road, conceivably, might be vested in one body up to the middle of the road on one side and in a different body up to the middle on the other side. It was stated at the Bar that such cases do in fact exist. In the case of a private road the enactment is that the penalty shall be paid "to the owner thereof," and the section concludes by making the penalties recoverable in both cases by action. Now, we think that the word "thereof" relates exclusively to that particular portion of the road which is crossed, cut through, or otherwise unlawfully interfered with by the company in violation of section 53. The appellants' counsel referred to the interpretation clause (section 3) as to words importing the singular number including the plural, which is in the usual form, and argued that "the owner" meant all the owners of the part affected. They did not refer to the same clause as to the interpretation of the term "owner," because they admitted (and rightly) that the plaintiff was owner of the soil of half the road within the Act. Where an Act is open to two constructions, that construction ought to be adopted which is the more reasonable and the better calculated to give effect to the expressed intention, which, in this case, is that the penalty shall be paid. The result of adopting the appellants' contention would be in many cases to enable the company to escape the penalty by placing practical difficulties in the way of its recovery. As already pointed out, the owner of one half of the soil of the road cannot compel the owner or owners of the other half to join in suing; he or they may decline to do so without assigning any reason; they may be numerous, or under some incapacity, as infancy, lunacy, or the like, or they may be interested in the company. The conclusion at which we arrive is that the Act ought so to be read as to afford facilities for suing; that the owner of the soil of part of that portion of the road interfered with can sustain an action for the penalty; and that, in analogy to the case of the common informer, the first of such owners who sues and brings his action to trial can recover. We further hold that the plaintiff can retain the penalty for his own use, and that the defendants are not liable to more than one penalty of £20 for each day during which their wrongful acts are continued. For these reasons we think the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the plaintiff, *Soames, Edwards, & Jones*, for *Randall & Cay*, Bridgend.

Solicitors for the defendants, *Downing, Bolam, & Co.*, for *Downing & Handcock*, Cardiff.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) Feb. 1.

MONTGOMERY, JONES, & CO. *v.* LIEBENTHAL & CO. (*a*.)

Practice—Writ—Service—Scotch defendant—Agreement for service within the jurisdiction—Ord. 9, *r.* 2; *ord.* 11, *r.* 1 (*e*).

The defendant, who was a domiciled Scotchman, entered into a contract of sale with the plaintiffs. The contract contained an agreement that in case of disputes between the parties proceedings might be served on the defendant by leaving the same at a certain office in London and posting a copy thereof to the defendant's address in Scotland.

Held, that such agreement was valid, and that service of a writ in the way specified could not be set aside.

Tharsis Sulphur and Copper Co. *v.* Société Industrielle et Commerciale des Metaux, 38 *W. R.* 78, *followed.*

British Wagon Co. *v.* Gray, 44 *W. R.* 113, [1896] 1 *Q. B.* 35, *distinguished.*

Appeal from the refusal of Phillimore, J., to set aside the service of a writ of summons.

The plaintiffs were corn merchants carrying on business at Liverpool.

The defendant was a corn merchant residing at Leith, in Scotland, and carrying on business there under a firm name.

By a contract in writing, dated the 18th of June, 1897, and made at Leith, the defendant agreed to sell to the plaintiffs a cargo of 14,000 units of Northern Spring wheat at the price of 27s. 6d. per 480 lbs., shipped.

The contract, which was in the form adopted by the London Corn Trade Association, contained the following terms—viz.: "Buyer and seller agree that, for the purpose of proceedings, either legal or by arbitration, this contract shall be deemed to have been made in England and to be performed there, and the courts of England or arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under the contract. Such contracts shall be settled according to the law of England, whatever the domicil, residence, or place of business of the parties to this contract may be or become. . . . Any party to this contract residing or carrying on business in Scotland or Ireland shall be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association. . . . The service of proceedings . . . upon a party residing or carrying on business either in Scotland or Ireland by leaving the same at the office of the London Corn Trade Association, together with the posting of a copy of such proceedings to the address . . . in Scotland or Ireland of such party, shall be deemed good service, any rule of law or equity to the contrary notwithstanding." The contract also contained, among the conditions endorsed thereon, a clause providing that disputes should be referred to arbitration, and that an award of an arbitrator or arbitrators made in pursuance of that clause should be final, subject to an appeal to the Committee of Appeal of the London Corn Trade Association.

A dispute having arisen between the parties in consequence of the defendant's failure to deliver a cargo in accordance with the contract, the matter was referred to arbitration, and, in the result, an award was made by the Committee of Appeal adjudging that the sum of £7,371 8s. 10d. was payable by the defendant to the plaintiffs.

The plaintiffs issued the writ in this action claiming payment of the above sum. The writ, which was an ordinary writ of summons for service within the jurisdiction, was served by being delivered to the secretary of the London Corn Trade Association at the office of the association in the City of London, and a copy of the writ was sent by post to the defendant at his address in Scotland.

The defendant took out a summons to have the service of the writ set aside, on the ground that under the rules of court there was no power to effect such service.

Phillimore, J., refused to set aside the service of the writ.

The defendant appealed.

McCall, Q.C., and *Tindal Atkinson*, for the defendant.—There are only two ways under the rules of serving a writ within the jurisdiction—viz., personal service, and substituted service in pursuance of a judge's order: ord. 9, r. 2; ord. 67, r. 6. In this case there was no personal service, neither was there any order for substituted service. Although there is no application here for leave to effect service out of the jurisdiction, ord. 11, r. 1 (*e*), is important, as showing the intention of the Legislature that no domiciled Scotchman or Irishman shall be compelled to defend an action for breach of contract in the English court. The plaintiffs rely on the contract; but, first, the words "service of proceedings" in the contract do not include service of a writ of summons; and, secondly, parties cannot by agreement alter the rules of the court as to service of proceedings: *British Wagon Co.* v. *Gray*, 44 W. R. 113, [1896] 1 Q. B. 35. This contract is in fact an agreement that service may be effected out of the jurisdiction; for it provides that service may be effected by doing two things—viz., leaving the writ at the office of the London Corn Trade Association, and sending a copy of the writ to the defendant in Scotland.

Joseph Walton, Q.C., and *L. Sanderson*, for the plaintiffs.—We are not asking for any order or leave of the court. We admit that we could not in this case ask for an order for service out of the jurisdiction. And that is all that was decided in *British Wagon Co.* v. *Gray*. Here the writ has been served; and it was served in the way which by the agreement of the parties was to constitute good personal service. *Tharsis Sulphur and Copper Co.* v. *Société Industrielle et Commerciale des Metaux*, 38 W. R. 78, shows that it is competent to parties to enter into such an agreement.

A. L. SMITH, L.J.—I am of opinion that my brother Phillimore was right, and that the appeal fails. The defendant applies to have the service of the writ set aside. The answer is, that the service was effected in the way which the defendant agreed should be deemed to be good personal service. The defendant is a domiciled Scotchman, and he entered into a contract to sell to the plaintiffs a cargo of wheat. The contract provided that any dispute

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

should be settled by arbitration subject to an appeal to the London Corn Trade Association. A dispute having arisen, an award was made in favour of the plaintiffs, and they bring this action to enforce the award. By the terms of the contract the parties agreed as follows: "Any party to this contract residing or carrying on business in Scotland or Ireland shall be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association. The service of proceedings"—and in my opinion "proceedings" here includes writ—"upon a party residing or carrying on business either in Scotland or Ireland by leaving the same at the office of the London Corn Trade Association, together with the posting of a copy of such proceedings to the address in Scotland or Ireland of such party, shall be deemed good service, any rule of law or equity to the contrary notwithstanding." The plaintiffs have served the writ in the way agreed upon. Therefore, if the agreement is valid, good service has been effected. Why cannot the parties enter into such an agreement? Except for ord. 11, r. 1 (*e*), and the case of *British Wagon Co.* v. *Gray* decided under it, I can see no pretence for saying that a Scotchman cannot agree that service of a writ in this manner shall be deemed to be good personal service; and when the plaintiffs, in order to bring the defendant into court, serve a writ in the way in which the defendant has agreed that a writ should be served, I do not think it is open to him to say that there has been no personal service. The case of *Tharsis Sulphur and Copper Co.* v. *Société Industrielle et Commerciale des Metaux* shows that parties may enter into such a contract, so long as it does not involve asking the court to do something which by the rules, the court is prohibited from doing.

In *British Wagon Co.* v. *Gray* the court was asked to grant leave to serve a writ out of the jurisdiction on a defendant domiciled and resident in Scotland, on the ground that the defendant had agreed to submit to the jurisdiction of the English court. Ord. 11, r. 1 (*e*), expressly prohibits a judge from ordering service out of the jurisdiction in an action for breach of contract where the defendant is domiciled or ordinarily resident in Scotland or Ireland. This court held that it could not do that which it was forbidden by the rules to do because of the agreement of the parties, and on that ground refused to make an order. In this case the court is not asked to do anything prohibited by the rules. It is argued that the plaintiffs have in effect served the writ out of the jurisdiction, for the agreement was that service should be effected by leaving the writ at the office in London and posting a copy of it to the defendant in Scotland. But, in my opinion, the writ was served by being left at the office in London; the posting of a copy to the defendant was something subsequent. The ground of my judgment is that parties may contract themselves out of the rules relating to service of proceedings so long as the court is not asked to do anything which is prohibited by the rules.

CHITTY, L.J.—As to the construction of the contract, I agree that the clause relating to service of proceedings extends to service of a writ. Here the service was well effected according to the agreement of the parties. The question is whether the parties could rightly enter into such an agreement. It is argued that the agreement is void by reason of the rules, and reliance is laid on the case of *British Wagon Co.* v. *Gray*. But I think that the distinction which is pointed out between that case and this case is a good distinction. The court has no power to order service out of the jurisdiction in an action of contract where the defendant is domiciled or ordinarily resident in Scotland or Ireland. Ord. 11, r. 1 (*e*), distinctly forbids it. There was, therefore, in that case an express prohibition against that which the court was asked to allow. Here there is no such prohibition. I am of opinion that there is no rule which negatives the right of a person to enter into an agreement as to the mode in which service of a writ may be made upon him. It seems to me that this case comes within the principle which was laid down in *Tharsis Sulphur and Copper Co.* v. *Société Industrielle et Commerciale des Metaux*.

COLLINS, L.J.—I am of the same opinion. The *Tharsis case* seems to me to be exactly in point. It is said that the *British Wagon Co. case* is inconsistent with that case and with our present decision. But I do not think it is so. In the *British Wagon Co. case* the plaintiffs asked the court to do what by the rules it could not do. Here the plaintiffs do not ask any such thing, but the parties have put into operation a proceeding provided by themselves. Service of the writ has been effected in the manner in which the parties agreed that it should be effected, and there is no rule prohibiting such an agreement being made.

Appeal dismissed.

Solicitors for the plaintiffs, *Burton, Yeates, & Hart*, for *Tyrer, Kennion, Tyrer, & Simpson*, Liverpool.

Solicitors for the defendant, *Murray, Hutchins, & Stirling*.

From Q. B. Div.
(Earl of Halsbury, L.C., and A. L. Smith and Collins, L.JJ.) — Jan. 26.

WOOD v. MAYOR, &c., OF WIDNES. (*a*.)

Local government—Public health—Notice to provide sufficient water-closet—Validity of notice—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 36.

A local authority, acting under section 36 *of the Public Health Act*, 1875, *served a notice on the owner of a house requiring him to provide a sufficient privy on the waste water-closet system in accordance with plans which might be seen at the office of the borough surveyor.*

Held, that such notice was not in compliance with the statute.

Appeal from the judgment of a Divisional Court (Lawrance and Ridley, JJ.) on a case stated by justices.

At a petty sessions holden at Widnes a complaint was preferred against Edwin Wood by the corporation of Widnes, acting as urban sanitary authority, under section 36 of the Public Health Act, 1875, claiming payment of certain private improvement expenses in respect of slop water-closets fixed at houses, Nos. 52 to 68, Terrace-road, of which he was the owner.

On the 12th of February, 1895, the urban sanitary authority confirmed the following resolution of the Health Committee of the town council: "That in all future cases of nuisances requiring the reconstruction of privies and ashpits the local authority of this borough do, as far as practicable, order that such privies and ashpits be converted into the waste water-closet system, or into such other water-closet system as the local authority may from time to time approve."

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

On the 22nd of March, the corporation's inspector of nuisances served upon Wood a notice stating that there was a nuisance at 52 to 68, Terrace-road, caused by the state of the privies, and requiring that they be converted into water-closets, either slop, waste, or cistern, to abate the nuisance.

On the 3rd of April the inspector reported that certain houses in the borough, including Wood's, were without a sufficient water-closet, earth-closet, or privy, and on the 9th of April the local authority confirmed a resolution of the Health Committee that "the local authority do by written notice require the owner or occupier of each of the said houses to provide a sufficient privy and ashpit upon the waste water-closet system approved by the corporation."

On the 23rd of April notice was served upon Wood requiring him "to provide for the said houses within the period of one month from the service of this notice a sufficient privy and ashpit on the waste water-closet system in accordance with plans and specifications which may be seen at the office of the borough surveyor." The notice proceeded to state that in case of non-compliance the corporation would do the work, and recover in a summary manner from the owner the expenses incurred by them in so doing. The notice not having been complied with, the local authority did the necessary work, and then took these proceedings to recover the amount. The justices made an order for payment of the amount claimed, and stated this case. The question for the opinion of the court was whether the resolution of the 12th of February was valid, and, if not, whether it invalidated the subsequent proceedings.

The Divisional Court were of opinion that the resolution of the 12th of February was invalid, and that the proceedings taken under it were thereby invalidated, and they gave judgment for Wood.

The corporation appealed.

McCall, Q.C., Macmorran, Q.C., and *Bonsey*, for the corporation.

C. A. Russell, Q C., and *Rycroft*, for Wood.

Earl of HALSBURY, L.C.—It is admitted that a local authority, when it is acting under section 36 of the Public Health Act, must exercise a discretion in each particular case, and that it has no right to enforce upon the borough or district, whatever it may be, a complete uniform system of sanitation. In this case I have come to the conclusion that there has been an effort on the part of the local authority, without applying to each particular case the discretion which it is bound to apply, to enforce upon the whole district a complete alteration and improvement of the sanitary arrangements. I think that on this ground the judgment of the court below ought to be affirmed.

I am further of opinion that the notice of the 23rd of April was not a notice within the statute. The notice to be given under the statute is a notice requiring the person to whom it is addressed to provide in his house a sufficient water-closet, earth-closet, or privy, and a proper ashpit. Such a notice was not given in the present case; this notice, on the contrary, in terms orders the owner to do a particular thing and says that if he does not do that particular thing he will not be complying with the notice. It was properly admitted that unless this was merely a direction or intimation of what would satisfy the corporation the notice was not in compliance with the statute. If there had been a note at the bottom stating that it would be convenient to the proprietor to learn that such-and-such a water-closet would satisfy the requirements of the corporation, there would be no harm in that. But if it had gone on to say that no other kind would satisfy them it is clear that that would be bad. Here it is even worse because it is not an intimation of that sort, but the particular requirement is made absolutely a part of the notice itself.

I am of opinion that the appeal must be dismissed on both grounds—viz., first, that there was no proper exercise of discretion, and secondly, that there was no notice under the statute such as to give rise to the consequences now insisted upon, that the local authority could do the work themselves and charge the owner with the expense.

A. L. SMITH and COLLINS, L.JJ., concurred.

Appeal dismissed.

Solicitors for Wood, *Alfred Grundy, Son, & Co.*, Manchester.

Solicitors for the corporation, *Sharpe, Parker, Pritchard, & Barham*, for *H. S. Oppenheim*, Widnes.

From Chan. Div.
(Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) — Dec. 8.

In re MASKELYNE BRITISH TYPEWRITER (LIMITED). STUART v. MASKELYNE BRITISH TYPEWRITER (LIMITED). (a.)

Company — Debenture — Power to appoint receiver — Fiduciary power—Jurisdiction of court.

Each of a series of debentures issued by a company and ranking pari passu, *contained a condition that in a certain event a named debenture-holder should have power to appoint a receiver. The event having happened, that debenture-holder, who was a large shareholder in the company, appointed a receiver, not for the protection of the debenture-holders, but in the interest of the company and its shareholders.*

Held, that the power was a fiduciary one, and must be exercised in the interest of the debenture-holders as such, and that the court had jurisdiction to interfere for their protection by appointing another receiver. Receiver appointed accordingly.

Decision of North, J., *affirmed.*

Appeal against two orders, one made by Ridley, J., as vacation judge, and the other, a consequential order, made by North, J.

The action was brought by a debenture-holder in the Maskelyne British Typewriter (Limited), suing on behalf of himself and all other holders of debentures of the same series (except the London and Northern Debenture Corporation), and was for the purpose of enforcing the security. Mr. J. M. Maclean, M.P., was chairman of the company, and also of the London and Northern Debenture Corporation. The debentures contained certain conditions, of which the following were material: The principal moneys were to become payable if a distress were levied on any of the property of the company and not promptly satisfied, and on demand of payment by the registered holder. At any time after the principal moneys had become due the corporation might, as if it were a mortgagee within the meaning of the Conveyancing Act, 1881, appoint a receiver or receivers, who should have power to take possession and to carry on the business of the company. The plaintiff was the holder of debentures to the amount of £1,870. In October, 1897, a distress was levied and not satisfied, and before the end of the month the company

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

passed and confirmed a resolution for a voluntary winding-up, Akers, the secretary of the company, being appointed liquidator. In October, also, the plaintiff and the corporation demanded payment of their debentures. Payment not being made, the plaintiff commenced this action; and, subsequently, the corporation, under the power in their debentures, appointed a receiver, Akers the secretary, who went into possession. The plaintiff moved for the appointment of a receiver in the action, and Ridley, J., appointed Akers receiver in the usual way on giving security. Akers, however, did not consent to this order, but relied upon his appointment by the corporation, and continued in possession without giving security. On the 16th of October, Maclean wrote as follows to the company's solicitors: "I am glad to find that you approved of the appointment of Mr. Akers as receiver. We were reluctant to use our authority as debenture-holders until we were forced to do so by Mr. Stuart, and have only interfered in order to protect our interests as the largest shareholders in the company. These interests are the same as those of the whole body of shareholders. I hope it may still be possible for us to save the concern." In November, 1897, an order was made to continue the winding-up under the supervision of the court, and another liquidator was appointed. On the 15th of November, Akers not having given security, North, J., on a summons taken out by the plaintiff, appointed one W. F. Marreco receiver and manager on giving security. The corporation appealed against the orders made by Ridley, J., and North, J.

Vernon Smith, Q.C., and *W. F. Hamilton*, for the appeal, cited *In re Pound, Son, & Hutchins*, 38 W. R. 18, 42 Ch. D. 402.

Swinfen Eady, Q.C., and *F. Whinney*, for the plaintiff.

W. F. Hamilton, in reply, cited *Holmes* v. *Millage*, 41 W. R. 354, [1893] 1 Q. B. 551; and *Gaskell* v. *Gosling*, [1896] 1 Q. B. 669, 44 W. R. Dig. 132.

LINDLEY, M.R.—In this case it appears to me that the whole case really turns, first of all, upon the admissibility in evidence of the letter of the 16th of October, 1897; and, secondly, upon the true inference which is to be drawn from it. Now, before I come to that, it will be necessary to say a few words upon what I will call the bargain between the parties. The bargain between the parties—that is, between the debenture-holders themselves and the mortgagor company. The mortgagor company—that is to say, the Maskelyne British Typewriter Co.—wanted to borrow some money, and they issued debentures. They are the mortgagors; and amongst others they issued debentures to this London and Northern Debenture Corporation, and it was part of the bargain between that corporation and the Maskelyne Typewriter (Limited) that the London and Northern Debenture Corporation should, if the debenture-money became payable, have the right to appoint a receiver. As between the Debenture Corporation and the mortgagor there is nothing more to be said. They have that right, and bargained for it. But we have to consider on whose behalf that right to appoint a receiver was conferred. It was not conferred on the London and Northern Debenture Corporation for their own exclusive benefit, for it is part of the bargain between them and other persons who advanced money upon other debentures that the whole mass of the debentures shall rank *pari passu*. Clause 8 shows this. Therefore this right for which the London and Northern Debenture Corporation have stipulated is a right which they are bound as between themselves and other debenture-holders to exercise for the advantage of the debenture-holders. They cannot do as they like with it. They are trustees for themselves and others of this power or this right to appoint a receiver. Now it so happens—and this is the peculiarity of this case—that there is a quarrel between themselves and those others for whom they are trustees. Mr. Stuart is the holder of some debentures. He says that, although the London and Northern Debenture Corporation have a right to appoint a receiver—a right which it would be extremely difficult, if not impossible, for the mortgagor to control—he, Mr. Stuart, has a right to control it if he finds that the corporation are exercising that power not for the benefit of Mr. Stuart and other debenture-holders, but for the benefit of the mortgagor or for the benefit of the corporation as holding shares in the mortgagor company. He says, and his case is unanswerable, that in point of law and principle, if it be true that this power of appointing a receiver is being exercised not in the interest of all the debenture-holders, but in the interest of the mortgagor and in the interest of the corporation as shareholders, he has a right to ask the court to interfere. In a case like that, the jurisdiction of the court to interfere is, it seems to me, beyond all question. It is not contrary to the bargain, quite the reverse; it is to enforce the bargain according to the good faith and real meaning of it, and Mr. Stuart is perfectly justified, if he can make out his case, in coming to the court and saying, "Control the London and Northern Debenture Corporation in the exercise of their power of appointment of a receiver, and appoint a receiver for the benefit of themselves and all other the debenture-holders—that is to say, carry out the bargain between me and the other debenture-holders and the London and Northern Debenture Corporation according to the true meaning and construction of the clause." That is his case; a case which is unanswerable if he can prove it. There cannot be a shadow of doubt about it. Now comes the proof of it. The proof of it, according to him, is this. He says that the London and Northern Debenture Corporation are really presided over by Mr. Maclean. He says that Mr. Maclean is their chairman and manager in these litigations and these proceedings, and he is their agent in these matters. Now, is that true—that is to say, is there evidence of it? Of course we know nothing except from the evidence. If you read Mr. Maclean's two affidavits together, which I have done with care, it appears that he is the person who is acting for the London and Northern Debenture Corporation in giving instructions for the proceedings which have been instituted and carried on. He is therefore their agent for such purposes, for the purposes of conducting these litigations. I do not mean professionally, of course, but for giving instructions to solicitors and so on. That is apparent from his own affidavit, especially paragraph 6 of the longer affidavit, but there are other paragraphs in the shorter affidavit. I do not stop to read them.

Now, you find Mr. Maclean writing a very extraordinary letter to the solicitors of the Maskelyne Co., dated 16th of October, 1897. Bear in mind that before the 14th of October, 1897, the London and Northern Debenture Corporation had, pursuant to the power conferred upon them by the debenture, sent in a demand for payment, and had appointed Mr. Akers to be the receiver. That is what they had done. Upon the same day Ridley, J., had appointed Mr. Akers upon giving security. I will pass that over for the moment. Bearing in mind what the London and Northern Debenture Corporation had done by the authority and instructions, and at the instigation (I do not doubt), of Mr. Maclean, we find

him writing this letter: "I am glad to find that you approved of the appointment of Mr. Akers as receiver." Now, that standing alone is ambiguous. That may mean the appointment by the court of Mr. Akers upon giving security, or it may mean—and I think the next paragraph shows that it does mean—"I am glad to find that you approved of the appointment by the corporation of Mr. Akers as receiver." I think the context shows that that is the real meaning of it, because he goes on: "We were reluctant to use our authority as debenture-holders"—which authority they had used in appointing Mr. Akers on the 14th—"until we were forced to do so by Mr. Stuart." I think it is plain that there he is speaking of the appointment made by the corporation of Mr. Akers on the 14th; "and we have only intervened in order to protect our own interests as the largest shareholders in the company." That is to say: We have appointed Mr. Akers as receiver, not to protect our co-debenture-holders and ourselves in the character of debenture-holders, but to protect our interests as the largest shareholders in the Maskelyne Co. "These interests are the same as those of the whole body of shareholders." Be it so, but this letter convinces me that Mr. Akers was appointed by the London and Northern Debenture Corporation not in the interests of the debenture-holders at all. He goes on: "I hope it may still be possible for us to save the concern," and so on. I regret that Mr. Maclean, who is abroad, has not had an opportunity of commenting upon this; but we can only act upon the evidence, and, upon this evidence, it appears to me that the statement made by Mr. Swinfen Eady, and which I thought had no evidence to support it until he called our attention to this letter, is absolutely made out, and if so, it is not only within the jurisdiction of the court, but it is right and proper, to say to the London and Northern Debenture Corporation: "You have exercised your power not *bonâ fide* for the purpose of protecting the interests of your co-debenture-holders, but for a purpose which is adverse to their interests, and it is competent for Mr. Stuart to apply to the court for the exercise of its jurisdiction, and it is fit and proper for the court to exercise that jurisdiction and protect Mr. Stuart against such an exercise of the power, by appointing a receiver itself." I have not the slightest doubt that the case is made out upon this letter, and that this appeal must be dismissed.

CHITTY, L.J.—I agree. This controversy about the receiver is not a question between mortgagor and mortgagee, but it arises between the several mortgagees—that is, the several debenture-holders—themselves. I think that in such a suit as that which is instituted by Mr. Stuart, the suit which we have before us, the jurisdiction of the court to appoint as a receiver its own officer to get in and collect the assets in such a case as the present is unquestionable. Mr. Stuart is one of the equitable mortgagees. But it is said that the effect of the court appointing its own officer to act as receiver is in substance to set aside a bargain which has been come to between all the debenture-holders; and that, I think, is the real point in the case. Now, the power which is contained in all the debentures is clearly not a power to be exercised for the benefit only of the donees of the power—that is, the appellants. I have never before seen such a power as this inserted in debentures. There may be cases, but they have not come under my experience. Generally speaking, a power of this kind to be exercised for the benefit of the whole body of the debenture-holders is to be found in a trustee deed of some kind or other. But, on the face of the instrument itself, it is quite clear that this is not a case in which the sole mortgagee is entitled to appoint a receiver as against his mortgagor so as to escape from the liability of entering into possession and other liabilities. It is a power agreed to, no doubt, by the mortgagor, but agreed to also by all the debenture-holders, and unquestionably the power is a fiduciary power—I am not afraid of using the word—and it is essential that it should be exercised for the benefit of all the debenture-holders. It must be exercised *bonâ fide*, and for their protection.

That brings one to the point as to whether the respondents on this appeal have made out their case as to the power not being well exercised in the sense of not being exercised for the common benefit of all. I think that case has been made out upon the evidence. For the reasons the Master of the Rolls has given I think the letter in controversy of the 16th of October, 1897, is admissible as against the appellants themselves; and the result is that, the power not having been exercised in a manner which the power itself required, the appointment cannot be set up as a bar to the jurisdiction of the court. No doubt the court, whenever it finds a contract of this kind, in the exercise of its discretionary jurisdiction will pay great attention to the existence of such a power. It appears to me that that power does not oust the jurisdiction, nor does it control it beyond this, that it is proper for the court, in the exercise of its discretion, to pay regard, and, according to the circumstances of the case to pay more or less attention to it. For these reasons I agree that the appeal should be dismissed.

VAUGHAN WILLIAMS, L.J.—I agree.

Appeal dismissed.

Solicitors, *Baker, Blaker, & Hawes; Chester & Co.*

High Court of Justice.

Chan. Div. North, J. — Jan. 14, 15.

In re BARKER.

RAVENSHAW *v.* BARKER. (*a.*)

Trustee—Breach of trust—Conversion of improper investments—Judicial Trustee Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

A trustee, to be entitled to relief under section 3 *of the Judicial Trustee Act,* 1896, *must act both honestly and reasonably; the mere fact that he acted honestly is not sufficient.*

Originating summons.

William Barker by his will, dated the 24th of January, 1879, appointed his wife, Anne Elizabeth Barker and another, executors and trustees, and, after making certain bequests, devised and bequeathed the residue of his estate and effects unto his trustees upon trust that his trustees or trustee should, when they, she, or he should in their, her, or his discretion think fit, sell call in and convert the same into money and invest the proceeds in manner therein mentioned and should pay to his wife the income of the investments or the income of his property until sold during her life or widowhood, and in case of her marrying again he gave her an annuity of £150 out of the income, and directed that his trustees should divide the surplus income equally between his children; and the testator declared that after her death his trus-

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

tees should hold the trust funds upon the trusts therein declared in favour of the testator's children.

The testator died on the 30th of September, 1882, and his will was duly proved by his widow alone.

Some of the investments constituting part of the testator's estate were converted by the widow within a year of the testator's death, but others were retained by her on the advice of a commission agent, an old friend of the testator's, in the hope that they would rise in value.

The plaintiff, one of the testator's daughters, and her children brought an action in 1893 against the widow and her other children and their children to have the liability of the widow determined in respect of any loss or misapplication of the testator's trust funds.

By an order of compromise, dated the 4th of August, 1894, the court stayed all proceedings in the said action upon the terms therein mentioned, and thereby, after appointing new trustees, directed the sale forthwith of certain of the investments, and gave liberty to the trustees to postpone at their discretion for six months the sale of the remaining investments retained by the widow as above mentioned, and liberty was also given to the plaintiffs to apply by summons in the action for the determination of the question whether the widow was liable to make good to the estate of the testator all loss which had already accrued, or which might hereafter accrue, by reason of not having converted, *inter alia*, the above-mentioned investments.

The investments were sold in accordance with the said order. On the 22nd of January, 1897, the court, on a summons taken out by the plaintiffs, declared that on the true construction of the testator's will his residuary estate and effects ought to have been sold and converted at the expiration of twelve calendar months from the date of his death, and directed inquiries as to the loss or gain resulting from the non-conversion. The chief clerk certified that the loss incurred by the retention of the investments above referred to amounted to £1,593. This amount would be reduced to £349 by deducting the gain which had accrued from the other investments, which, although kept, had, when sold, realized a profit.

The present summons was taken out by the plaintiffs for the determination whether the widow was liable to make good to the testator's estate the loss which had accrued thereto by reason of her having postponed the conversion of the investments sold under the order of compromise, and whether she could set off the gain arising from the postponement of the other investments forming part of the testator's estate.

Walters Horne, for the plaintiff, referred to *In re Kay*, *ante*, p. 74, [1897] 2 Ch. 518, and submitted that the case did not come within the Judicial Trustee Act, 1896.

A. J. Chitty, for other beneficiaries.

J. Gatey, for the widow, submitted that she acted reasonably and honestly, and referred to *In re Turner*, 45 W. R. 495, [1897] 1 Ch. 536; *In re Roberts*, 76 L. T. Rep. 479, 45 W. R. Dig. 55; *In re Stuart*, *ante*, p. 41, [1897], 2 Ch. 583. It was to be noticed that the testator himself had selected the investments, and that there had been a profit on some of them.

NORTH, J.—I am not going to comment on the Judicial Trustees Act, 1896, I thoroughly adopt the authorities referred to; but a trustee, to be relieved under section 3 of that Act must have acted honestly and reasonably. In this case there is no doubt the trustee acted honestly, the only question is whether she acted reasonably. The chief clerk has found the facts in a somewhat meagre way. There is nothing to show when the widow consulted the commission agent; his advice, in order to be a justification at all, ought to have been obtained within the period within which she ought to have sold the investments. It may well be that the prices of the shares rose and then fell again during the years that elapsed since the testator's death. I am not in a position to say that keeping the shares during those years was reasonable. The conclusion I come to is that it was not a reasonable postponement of the sale; the executrix ought to have consulted a solicitor. The solicitor might have advised that the opinion of the court should be taken, and the court might have directed what was to be done. I will assume that the commission agent thought it a reasonable dealing with the shares if her own property; it is not conclusive if you find that a trustee has acted with trust property as he would with his own; that is a point in his favour, but that is not enough, because what might be reasonable for a man to do with his own property might not be a proper dealing with trust property. I do not see my way to relieve the widow from liability for the loss of the £1,593, but I shall not require her to pay interest on that sum.

Solicitors, *J. Banks Pittman; Simpson, Palmer, & Winder.*

Chan. Div. } Kekewich, J. } Jan. 14.

In re MEDOWS.
NORIE *v.* BENNETT. (*a.*)

Copyholds—Tenant for life and remaindermen—Custom of the manor—Leases for lives—No right of renewal—Arbitrary fines on renewal.

A tenant for life of a manor is entitled to use and enjoy his life estate according to the custom of the manor, and although he is seised of a limited interest only, yet as lord of the manor he may grant such estate as is authorized by the custom of the manor, notwithstanding that the interest so granted may continue longer than his own. Accordingly, where it is the custom of the manor for the lord to grant the copyhold lands of the manor on leases for lives, for the fines on renewal to be arbitrary, and for the tenants to have no right of renewal, a tenant for life unimpeachable for waste who is lord of the manor can grant valid leases for lives to the tenants, and is entitled as against the remaindermen to the whole of the moneys received by him in respect of the fines on renewal paid to him by the tenants during the continuance of his life estate.

Adjourned summons.

By his will dated the 7th of May, 1825, Evelyn Philip Medows gave and devised his freehold messuage and premises in Charles-street, Berkeley-square, unto and to the use of his trustees therein named upon trust for his wife and her assigns during her life, and after her decease unto and to the use of William Heather Norie and his assigns without impeachment of waste, with remainder to the trustees and their assigns during the life of the said William Heather Norie upon trust to preserve contingent remainders, with remainder to the use of the first and every other son of the said William Heather Norie in tail male, with remainder to the use of all and every daughter of the said William Heather

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

Norie as therein mentioned, and, in default, which happened, of such issue, to the use of Evelyn Harriet Norie, Ann Norie, and Frances Norie, the daughters of John William Norie, or such of them as should be living at the testator's death equally share and share alike as tenants in common in tail general with cross-remainders between them in like tail general, with divers remainders over. The testator empowered his wife during her life, and William Heather Norie while he was in possession of the said house, under the above-mentioned limitations, to grant any lease thereof for any term not exceeding twenty-one years at the best approved rent and in all other respects upon the usual terms of granting leases of property under similar circumstances. And the testator gave and devised all manors, messuages, farms, lands, tenements, and other hereditaments vested in him in reversion as the right heir of his late uncle, Sir Sidney Medows, on failure of the limitations created by his will and all other his real estates unto and to the use of such person and persons, and for such estate and interest, and upon and for such trusts, intents and purposes, and with such power of leasing and in all other respects in such manner and form as were thereinbefore expressed, declared, and contained of and concerning his said freehold messuage and premises in Charles-street, Berkeley-square, aforesaid. And the testator directed that the persons beneficially entitled to possession should take the name and quarter the arms of Medows.

The testator died in July, 1826, and his will was duly proved in the Prerogative Court of Canterbury.

The testator's widow died on the 25th of November, 1861.

On the 15th of February, 1864, the ultimate limitations to the right heirs of Sir Sidney Medows contained in his will took effect, and the real estate thereby devised became subject to the uses of the said will of Evelyn Philip Medows. The real estate comprised, *inter alia*, the lordships of the manors of Penton Mewsey and Chute, in the counties of Wilts and Hants.

On the 22nd of August, 1864, William Heather Norie assumed the name and quartered the arms of Medows.

Evelyn Harriet Norie, Ann Isabella Norie (in the will called Ann Norie), and Frances Norie survived the testator. Ann Isabella Norie married James Potter, and died on the 31st of October, 1872, leaving William Potter, her eldest son, surviving her. William Potter, with the consent of William Heather Medows, as protector of the settlement, disentailed his share on the 18th of October, 1877, and died on the 29th of November, 1886, having by his will dated the 23rd of May, 1874, devised and bequeathed all his residuary estate (comprising, *inter alia*, the disentailed lands) to his trustees upon trust for sale. Frederick Lewis Edwards and Richard Cummings Gleed were the present trustees of William Potter's will.

Willliam Heather Medows, the tenant for life, died in the month of December, 1896.

It appeared from the evidence that in both the manors of Penton Mewsey and Chute it had been the custom for the lord to grant to the tenants leases for lives, but the fines for renewal on the falling in of the lives were arbitrary and the tenants had no right of renewal.

The lord had always appropriated to his own use the whole of the fines.

William Heather Medows while tenant for life had, as lord of the manor, granted leases for lives, and received the fines in accordance with the above-mentioned custom, and at the date of his death he had received the following sums—namely, £1,351—for fines on renewal in respect of the manor of Penton Mewsey comprising 198 acres, 2 roods, and 17 perches of copyhold tenement, and yielding quit rents amounting to £4 13s. 8d., and £205 for fines on renewal in respect of the manor of Chute comprising 31 acres, 1 rood, and 4 perches of copyhold tenement, and yielding quit rents amounting to 10s. 4d.

On the 26th of July, 1897, the remaindermen joined in selling the manor of Penton Mewsey, and the particulars and conditions of sale contained a statement of the terms on which the copyhold tenements were held, and the property was sold subject to the grants to the tenants.

The manor of Chute had not yet been sold.

This was a summons taken out by the present trustees of William Potter's will against the executrix of the tenant for life in a creditor's action for the administration of his estate, for the determination of the question whether the estate of the tenant for life was entitled to the whole of the fines received by him or whether a portion thereof belonged to the remaindermen.

Similar claims had been raised on behalf of the other remaindermen and were still pending.

Sebastian, for the remaindermen.—The question is, Are the amounts received for fines by the tenant for life chargeable against him, or can his estate retain them? The tenant for life was not entitled to put all the fines into his pocket, the remaindermen ought to get a share of them, for their property has been impoverished by the grant of these leases at almost nominal quit rents. These fines should be treated as capital and not income. The tenant for life was not empowered by the testator's will to grant these leases, he was not obliged to renew, for the tenants had no right of renewal, and the fines were arbitrary; for these reasons the decision in *Brigstocke* v. *Brigstocke*, 8 Ch. D. 357, 26 W. R. Dig. 214, does not apply to this case, and the fines must not be treated as income only. The tenant for life should have granted common law leases of the lands.

Bathurst, for the executor of the tenant for life.—There are two questions which arise—namely, had the tenant for life power to grant these leases? and had he any right to do so? In the first place, the usual way to enjoy the copyhold lands of a manor is by granting them in return for fines, heriots, &c. In Scriven on Copyholds there is the following passage on p. 91 of the 4th edition: "The law does not regard either the quality of the person of the lord or the quantity of his estate; for although he be not *sui juris*, or be seised of a limited interest only, yet may he make a voluntary grant in fee, or for such estate as is authorized by the custom of the manor, which grant would be good notwithstanding the interest granted should continue longer than that of the lord." Accordingly there was power in the present case to grant these leases. The tenant for life was also entitled to grant them, for he was not impeachable for waste, and the evidence shows that for 100 years it had been customary to enjoy the manor in this way. Where fines are received in the ordinary and customary enjoyment of a manor those fines belong to the lord of the manor: *Earl Cowley* v. *Wellesley*, 14 W. R. 528, 35 Beav. 635. William Heather Medows was tenant for life of this property, one of the incidents of which was that the lord of the manor could exercise this power of granting leases. The quit rents and heriots were fixed by the custom of the manor, and consequently the lord would not have got a higher rent, even if he had not taken the fines. Under ecclesiastical leases the fines were taken by the tenant for life, and the same principle applies in this case. If common law leases had been granted, the

tenure of the property would have been changed and the copyhold extinguished. The remaindermen have recently sold the manor of Penton Mewsey subject to those leases, they must therefore be taken to have adopted them and acknowledged their validity.

Sebastian, in reply.—In *Earl Cowley* v. *Wellesley* the grants were made by the trustees, and the trustees therefore would be in a different position to that of tenant for life in the present case. *Earl Cowley* v. *Wellesley* was not even referred to in the judgments in *Brigstocke* v. *Brigstocke*. The remaindermen sold subject to the leases in order to avoid possible litigation with the tenants; they in no way intended to acknowledge the right of the tenant for life to grant those leases.

KEKEWICH, J.—This gentleman, Mr. William Heather Medows, against whose estate the claim is made, was tenant for life under a settlement which comprised a manor; therefore during his life he was lord of that manor. As lord of the manor he granted leases for lives, receiving fines for renewal of the leases. The question which I have to decide is, Is he entitled to hold those fines for his own benefit? Are the remaindermen entitled to say that a portion of the fines belongs to them? The remaindermen have only one way of stating their case. The tenant for life, though not a trustee, occupies a certain legal position towards the remaindermen inasmuch as he can only use his powers for the benefit of the remaindermen. If he destroys the inheritance he is responsible, because its preservation is a part of his duty as tenant for life. He had power to grant these renewals as lord of the manor. The custom of the manor was to renew, and any lord could say that it was his right according to the custom to grant those renewals by virtue of his lordship during his life.

I think the passage read by Mr. Bathurst from Scriven to be right, and that the law does not concern itself about his estate so long as he is lord of the manor, and that the tenant gets a good title according to the law of the manor. It was said that he ought to have granted common law leases, but it has not been shown that he ought to do anything of the kind. He did use his legal position to grant those leases, and if that was wrong he would be accountable to the remaindermen. Whether he is or not, is the question which I have to decide. He was not impeachable for waste. I do not rely overmuch on that fact, and I am not sure how it applies to a matter of this kind. I think the proper view is that the tenant for life is entitled to use and enjoy his life estate according to the custom of the manor. That certainly is the proper view where the question arises in respect of timber, and as regards those estates, common in this country, where woods have to be cut, it is right that they should be cut and the tenant for life receive the profits. In the present case the position of the tenant for life was to do what was fair, right, and reasonable. He has acted according to the custom of the manor, and he could not have acted otherwise so far as I can see. In the exercise of his legal power he has put money into his pocket. In so doing he was acting according to the custom of the manor, and on this ground, and bearing in mind that he was also unimpeachable for waste, I think he was entitled to the whole of these moneys.

Solicitors, *Marson & Sons; Dawson, Bennett, & Ryde.*

Chan. Div. } Dec.
Kekewich, J. }

In re TOMLINSON.
TOMLINSON *v.* ANDREW. (*a.*)

Will—Leaseholds—Legal tenant for life—Remaindermen—Liability for rent and repairs.

The legal tenant for life of a leasehold house, which was bequeathed directly (without the intervention of trustees) to one for life and then over, is not, in the absence of further provision, liable to pay the rent reserved by, or perform the covenants contained in, the lease by which the house was demised to the testator.

In re Courtier, 35 *W. R.* 85, 34 *Ch. D.* 136; In re Baring, 41 *W. R.* 87, [1893] 1 *Ch.* 61; *and* In re Redding, 45 *W. R.* 457, [1897] 1 *Ch.* 876, *discussed.*

Adjourned summons.

By his will dated the 19th of January, 1891, Charles Tomlinson gave and bequeathed to his niece, Mary Tomlinson (*inter alia*), "the house in which we now reside, No. 7, North-road, Highgate, together with the furniture, books, plate, pictures, &c., therein contained, for the term of her natural life, and after her death to go to George Andrew and his wife, my niece, Mary Andrew, for their benefit and that of their family of children."

The testator appointed Mary Tomlinson and George Andrew his executors and residuary legatees.

In a letter to Mary Tomlinson dated the 20th of June, 1894, which was admitted to probate as a codicil of his will, the testator wrote as follows: "I leave you in absolute possession of the house and furniture and monetary residue for the remainder of your life."

The house referred to was a leasehold house held by the testator under an indenture of lease dated the 28th of December, 1867, for the term of ninety years from the 25th of December, 1867, at a yearly rent of £10. The lease contained the usual covenants by the lessee to pay the rent, rates, and taxes, to insure, keep in repair, and paint, and to deliver up at the end of the term in good and substantial repair.

Neither the will nor codicil contained any provisions relating to the house other than those above stated.

The testator did not appoint trustees of his will.

He died on the 15th of February, 1897, and his will and the above-mentioned letter were duly admitted to probate.

This was a summons taken out by Mary Tomlinson for the determination (*inter alia*) of the following question—namely, whether, upon the true construction of the will and codicil, the plaintiff, Mary Tomlinson, as tenant for life, was liable to pay the rent reserved by, and perform the covenants by the lessee contained in, the said lease under which the said house was held, or by whom the same ought to be paid and performed?

Cann, for the plaintiff.—The tenant for life is entitled to enjoy the house free of rent and without any liability for repairs under the covenants in the lease: *In re Courtier*, 35 W. R. 85, 34 Ch. D. 136, and *In re Baring*, 41 W. R. 87, [1893] 1 Ch. 61. *In re Redding*, 45 W. R. 457, [1897] 1 Ch. 876, was a case upon the construction of a particular will, and does not apply to the present case.

H. Terrell, Q.C., and *P. S. Oswald*, for the defendants George and Mary Andrew.—This is a case of a specific bequest of the legal estate to the tenant for life. In the cases cited the leaseholds were bequeathed to trustees, and therefore those cases do not apply.

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

If the legal tenant for life does not do the repairs, who can repair? The executors cannot enter on the property to do them. *In re Hotchkys*, 34 W. R. 569, 32 Ch. D. 408, does not apply, for that was a bequest to trustees. The executor is not liable in the case of a specific bequest: *Hickling* v. *Boyer*, 3 Mac. & G. 635.

A. W. Rowden and *Pattisson*, for other parties.

KEKEWICH, J.—The argument on behalf of the respondents has turned mainly upon the distinction between the present case and the cases of *In re Courtier*, *In re Baring*, and *In re Redding*. It is said that in each of those cases there was a bequest of the leaseholds to trustees, but that in the present case there is a direct gift to the legatee, the gift being: "I bequeath to my niece, Mary Tomlinson, the house in which we now reside, No. 7, North-road, for the term of her natural life." It is said that this must be a gift *cum onere*, and all the more so because there are no trustees, no persons to intervene, no persons having the legal estate vested in them to enable them to perform the covenants in the lease. The answer to that is, to my mind, that this being a lease granted to the testator, he was liable to perform the covenants of the lease, and he was liable to pay the rent and to keep in repair. This liability is now a burden on his estate, and his executors are bound to discharge the liability and to see that it is discharged. If the executors plead *plene administravit*, then the remedy is against the the legatees, but otherwise the executors would be liable in an action on the covenants, and if they are, there is no substance in the argument that they cannot go upon the property to do the repairs. They are entitled to say to the tenant for life that they must go on to the property to do them. That argument does not, in my opinion, differentiate the present case from those cases which have been cited to me. That being so, ought I to reconsider the view that I took in *In re Baring* of the decision in *In re Courtier*? I am bound to do so because of the judgment in *In re Redding*, when Stirling, J., though not differing from my opinion in *In re Baring* so far as the decision rested on the language of the particular will, yet said that he thought I took a wrong view of the language used by the Court of Appeal in *In re Courtier*. I have had an opportunity of looking at Stirling, J.'s, remarks in *In re Redding*, and I must say that, though he may be right, to my mind he is not so conclusively right that I ought to depart from what I said of *In re Courtier* when I was giving judgment in *In re Baring*. What Stirling, J., says is this: "Certainly in point of decision *In re Courtier* does not cover the present case, because it was exclusively directed to the question whether the tenant for life was bound to discharge the liabilities in respect of repairs to property which had accrued at the death of the testator. The decision of the Court of Court of Appeal was directed to that and nothing else, for it seems to me that when the judgments are looked at that was the sole question which the Court of Appeal dealt with." I have read the judgments of the Court of Appeal again, and I think I see what Stirling, J., means, and there is no doubt a good deal to justify his conclusion, but with great respect I do not think that there is enough to support the construction which he puts upon the judgments. Cotton, L.J., says: "The widow has kept them"—*i.e.*, the leaseholds, "in the same state as they were in at the testator's death, but declines to put them in such a state of repair as to satisfy the covenants in the leases," and then a little further on he says: "But it is said that if the widow is to have the right to possess the leaseholds in specie during her lifetime she is bound to spend her money in putting them into sufficient repair to satisfy the covenants of the leases. I think that there is no such obligation on her. She is not bound to the landlords under the covenants; the trustees are bound, and it is their duty to repair the houses in accordance with the covenants in the leases out of the *corpus* of the estate." What the lord justice says is that the widow was not bound to spend her money in satisfying the covenants; he does not say that while tenant for life she had satisfied those covenants by keeping the leaseholds in the state of repair in which they were at the testator's death. Further on in his judgment he says: "There is no rule of law that the tenant for life is bound to do these repairs out of the rents and profits." It seems to me that the judgments also of Bowen, L.J., and Fry, L.J., do not necessarily point to the liability of the tenant for life in respect of the state of repair at the testator's death, but do deal with the general liability to repair under the covenants. As I understand the decision, I think the tenant for life is not bound to do anything at any time to the leaseholds. The testator's estate seems to me to be subject to the liability of executing the necessary repairs upon such terms as will be fair for both the tenant for life and remaindermen, as was pointed out in *In re Hotchkys*. I think I am bound to adhere to the view I took of *In re Courtier* in *In re Baring*, and to decide this question on the general law. It is said that the case before Lord Truro of *Hickling* v. *Boyer*, is applicable. I do not intend to criticise that case, for I am bound to follow *In re Courtier*, which I must take as my guide. I therefore hold that this lady, the tenant for life, is not bound to do any of these repairs or pay the rent under the covenants in the lease.

Solicitors, *C. Sawbridge & Son.*

Chan. Div. } Romer, J. } Dec. 14, 16; Feb. 12.

In re DUTHY AND JESSON'S CONTRACT. (a.)

Vendor and purchaser — Completion — Agreement to accept "best title the vendors can give"—Deeds deposited with mortgagees—Vendor's duty to hand over—Expense of obtaining—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-section* 6.

The Conveyancing and Law of Property Act, 1881, *s.* 3, *sub-section* (6), *concerns the expenses of "production and inspection" of documents, but does not affect the ordinary right of a purchaser on completion to have the title-deeds handed over to him.*

A special contract that the purchaser is to accept the best title that the vendor can give does not take away this right, and the mere fact that obtaining the deeds for the purpose of handing them over on completion may cause the vendor trouble and expense is no answer to a requisition founded on this right.

Held, accordingly, that the vendors of a house under such a special contract were not in a position under such contract or otherwise to refuse compliance with a requisition that certain title-deeds in the possession of solicitors who had acted for the mortgagees of a former owner should be handed over to the purchaser on completion.

Summons.

This was an application under the Vendor and

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Purchaser Act, 1874, by Herbert A. Duthy, William R. Duthy, and F. E. Duthy, the vendors of a freehold house, No. 32, Paget-street, Southampton, for a declaration that a good title to the property had been shown in accordance with the contract for sale dated the 18th of January, 1897. The instrument containing the contract was in the following terms—viz., "Received the 18th day of January, 1897, of Mr. Robert Wm. Jesson the sum of £10 as a deposit and in part payment of the sum of £480 for the purchase of a freehold dwelling-house and premises, No. 32, Paget-street, Southampton. The purchaser to accept the best title the vendors can give. The purchase to be settled on or before the 1st day of February next. The vendors to give the purchasers a bond of indemnity against any claim of George Henry Duthy, who has not been heard of for the past thirty-two years, at their expense. (Signed) Herbert Duthy, William R. Duthy. I agree to purchase on the terms above mentioned, the 18th of January, 1897. (Signed) Robert W. Jesson."

It appeared that George Henry Duthy the elder, purchased the property in 1846. In 1847 he made a post-nuptial settlement of certain moneys in favour of his wife and children, the trust of *corpus* (in default of appointment under certain powers contained in the settlement) being for the children of Mr. and Mrs. Duthy living at the death of the survivor of them in equal shares. In 1848 he mortgaged the property to the trustees of this settlement, of whom there were two, to secure £300 and interest. In 1862, one of these trustees having died, another trustee was appointed in his place, but the mortgage was not transferred to the new trustee, and would seem to have remained vested in the survivor of the original trustees until his death, which took place subsequent to this appointment. The settlor died in 1890, having by his will dated in 1847 in effect directed his estate to be divided amongst all his children on their attaining the age of twenty-one years, and his widow died in 1892. The vendors were the surviving children of the settlor (other than George Henry Duthy).

On the 21st of January, 1897, an abstract of title was delivered to the purchaser, commencing with a conveyance dated the 5th of November, 1894, by Wm. R. Duthy and F. E. Duthy of their respective interests in the property to Herbert A. Duthy. A requisition was made on behalf of the purchaser asking that the earlier title-deeds should be handed over on completion. But the vendors declined to comply with this requisition, on the ground that the solicitors who had acted for the mortgagees declined to hand these deeds over, and that the title abstracted was the best title that the vendors could give, and ultimately took out the above summons.

The earlier title had been disclosed to the purchaser before the contract was entered into, and he was informed at the same time that the mortgage had been paid off, and that the earlier title-deeds were in the possession of the mortagees' solicitors.

Farwell, Q.C., and *Mark Romer*, for the summons.—The earlier documents of title are not in the vendors' possession, and the Conveyancing and Law of Property Act, s. 3 (6), throws the expense of producing them on the purchaser: *In re Stuart and Olivant and Seadon's Contract*, 44 W. R. 610, [1896] 2 Ch. 328. The inability of the vendors to obtain the documents would not in any case be an objection to their title (see the Vendor and Purchaser Act, s. 2 (iii.)), but the purchaser having agreed to accept the best title which the vendors can give cannot now raise any objection on this ground.

Neville, Q.C., and *Sargant*.—This is not a matter of title, and the special contract as to title does not apply. The vendors are bound to produce the documents in question on completion for delivery to the purchaser, and they are not relieved from this duty either by contract or by statute. The Conveyancing Act does not apply to production on completion (see *In re Johnson and Tustin*, 33 W. R. 737, 30 Ch. D. 42), and the Vendor and Purchaser Act refers to cases where the title-deed is the title to other property as well as the property sold. Moreover, the vendors here might, if they tried, obtain a better title.

Farwell, in reply.—The purchaser's case really amounts to a claim of a warranty of title.

ROMER, J.—The question raised by this summons concerns certain title-deeds of the property contracted to be sold. The purchaser is not asking to have these deeds produced for the verification of or for information as to the title, but is calling upon the vendors to fulfil the ordinary obligation they are under of handing over on completion all title-deeds in their possession or power. The Conveyancing and Law of Property Act, 1881, s. 3, sub-section (6), has therefore no application. For that sub-section only concerns the expenses of "production and inspection," and is not, in my opinion, intended to affect the ordinary right of a purchaser on completion to have the title-deeds handed over to him. See as to the limited operation of this sub-section the case of *In re Johnson and Tustin*, in which, at 30 Ch. D., p. 46, Cotton, L.J., says (though, of course, with reference to the case then immediately before him) that the sub-section is dealing only with the expenses of requisitions made on the footing of the abstract by the purchaser, so far as he requires verification or information as to the title shown thereby.

Now, *primâ facie*, the deeds now in question are such as the vendors would in the ordinary course be obliged to hand over on completion to the purchaser. The deeds were deposited with certain mortgagees whose debt has since been paid off. If the debt had not been paid off the vendors would have been bound on completion to obtain the concurrence of the mortgagees in the conveyance to the purchaser, and the deeds would then have been handed over. And the mere fact that the debt has been previously paid off can make no difference in the right of the purchaser to have the deeds handed over. Nor is there anything in the contract of sale which would take away this right of the purchaser. The provision that the purchaser is to accept the best title that the vendors can give certainly does not take away the purchaser's right. So far as I can see no question of title is involved. If the vendors had been unable to obtain the deeds because of some defect of title which under the contract they were not bound to cure, different considerations would apply, but this is not the case. The mere fact that obtaining the deeds for the purpose of handing them over on completion may cause the vendors trouble and expense is no answer to the purchaser. If the debt had not been paid off the vendors could not under this contract have excused themselves because it would cause them trouble and expense to procure the mortgagees to join in the conveyance. But the case does not stop there. For the only ground raised by the vendors for not complying with the purchaser's request to have the deeds handed over is that they have applied to the solicitors who acted for the mortgagees, and that those solicitors decline to hand them over. Of course the solicitors will not hand over the deeds. The deeds do not belong to them and they could not part with the deeds without the authority of the mortgagees or their representatives. So far as I can ascertain no endeavour has been made by the vendors to obtain

the authority of the mortgagees or their representatives to the solicitors to hand over the deeds. In order to try and prevent the possibility of future disputes between these parties I suggested that the vendors should try and see if they could not ascertain who the mortgagees now living (if any) or their representatives were, and obtain their direction to the solicitors to hand over the deeds. And of course it is just possible that further investigation might show some real difficulty as to title which would prevent the vendors handing over the deeds, and had that been shown I might have seen my way (subject to a question as to costs) to decide whether the difficulty was one that the vendors under this special contract were not bound to overcome, and so I might have prevented future disputes arising. But though time was given by me nothing of any importance has come of it, and I must now deal with the summons strictly on the materials before me. On those materials it appears to me that the vendors are not now in a position to call upon the purchaser to waive his claim to have the deeds handed over on completion, and I therefore dismiss the summons with costs.

Summons dismissed.

Solicitors for the applicants, *Rowcliffes, Rawle, & Co.*, for *Cousins & Burbridge*, Portsmouth.

Solicitors for the respondent, *Barlow & Barlow*, for *Stanton, Bassett, & Stanton*, Southampton.

Q. B. Div. (Div. Court.) (Mathew and Wright, JJ.) Feb. 15.

COLBECK v. ASHFORD. (a.)

Fishery—Sea fishing—Trawl-net with beam—"Otter" trawl net—Sea Fisheries Regulation Act, 1888 (51 & 52 *Vict. c.* 54)—*Fishery Act*, 1891 (54 & 55 *Vict. c.* 37)—*North-Eastern Sea Fisheries District Bye-laws, bye-law* 1.

By bye-law 1 *of the North-Eastern Sea Fisheries District Bye-laws, made under the Sea Fisheries Regulation Acts*, 1888 *and* 1889, *and confirmed by order of the Board of Trade, dated the* 17*th of July*, 1894, *it is provided that* ". . . *a person shall not use in fishing for sea fish any trawl or trawl-net having a beam which is pulled or pushed or otherwise propelled along or over the bottom of the sea* . . ."

Held, that an "otter" trawl, which is a trawl not having any beam across from side to side, but which has two "otter" boards so fixed that the motion through the water keeps them apart, thus stretching a line across the net in the place of a beam, comes within the meaning of bye-law 1.

This was a case stated by three of her Majesty's justices of the peace for the East Riding of the County of York.

At a petty sessions holden at Bridlington in and for the division of Dickering on the 4th day of September, 1897 (to which date the hearing of the information hereinafter mentioned had been adjourned from the 21st of August, 1897), an information preferred by William Henry Ashford, the respondent, against Haggitt Colbeck, the appellant, under bye-law No. 1 of the bye-laws of the Local Fisheries Committee of the North-Eastern Sea Fisheries District, charging that the said appellant, on the 4th of August, 1897, eastward of the South Landing at Flamborough, in the said division of Dickering and within the North-Eastern Sea Fisheries District, did unlawfully use, in fishing for sea fish, a certain trawl contrary to the bye-law No. 1 of the said North-Eastern Sea Fisheries District bye-laws, and which said bye-law was then and still is in force, according to the statute in such case made and provided, was heard and determined by the said justices, and upon such hearing the appellant was convicted of the said offence and was adjudged to pay a fine of £10 and 4s. for costs, and the fishing instrument so used as aforesaid was ordered to be forfeited.

Upon the hearing of the said information the following facts were proved or admitted:

The bye-laws of the Local Fisheries Committee of the North-Eastern Sea Fisheries District were admitted by the appellant and a copy of such bye-laws was made part of this case. The said bye-law No. 1 is as follows:

"Within the North-Eastern Sea Fisheries District, except as may be otherwise provided by the 13th section of the Sea Fisheries Regulation Act, 1888, a person shall not use in fishing for sea fish any trawl or trawl-net, or any net having a beam which is pulled or pushed, or otherwise propelled along or over the bottom of, or in the sea, or along or over the seashore, or any seine net, sand-eel net, sparling net, haffle net, or offal net."

The appellant was in the area named in the said information with a steamboat about 50 feet long, one and a-half horse-power, and was trawling, and the net used was an otter trawl. The respondent seized the trawl which appellant was using.

A model of the "otter trawl" was produced before the court. It was stated to be a new invention, and on the occasion when the alleged offence was committed the owner was giving it a public trial. The net had no beam across it from side to side as in the case of the ordinary trawl-nets, but it had at each side an "otter" board fixed by a new mechanical system and they were so constructed that when the net was dragged through the water the motion kept them apart and thus stretched a line across the trawl instead of a beam.

On behalf of the appellant it was contended that the bye-law under which the information was preferred applied only to a trawl with a beam, and that an otter trawl, which has no beam, but which is used in fishing for sea fish as a trawl with a beam, did not come within the meaning of the said bye-law.

The question for the court was whether the said bye-law applies to an otter trawl, or whether the fact that the appellant was using such a trawl excluded him from its operation.

Isaacs, for the appellant.—The bye-law is not clear, and it should be construed in favour of the appellant. It only applies to a trawl-net with a beam. The net used by the appellant was a new net, and was not contemplated when the bye-law was made. It dispenses with the beam, and therefore it does not come within the words "trawl or trawl-net having a beam." The conviction was wrong.

H. E. Kemp, for the respondent.—This net comes within the bye-law. It produces the same result as a trawl-net with a beam, and comes within the mischief provided against by the bye-law. The appeal should therefore be dismissed.

MATHEW, J.—This appeal must be dismissed. The language of the rule or regulation seems clear enough. It prohibits the use of "any trawl or trawl-net, or any net having a beam which is pulled or pushed or otherwise propelled along, or over the bottom of or in the sea." What was used here was an otter trawl. We are asked to say it is not within

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

the language of the rule. The argument is that the otter trawl was not known, or could not be known, to be efficiently used at the time when this regulation was passed in the year 1894; but we have no finding of the magistrates to that effect before us. We must construe the terms that are used in their ordinary sense, without introducing any such limitation as counsel for the appellant suggests. He says "any trawl or trawl-net" implies the existence of the beam, and that no equivalent mechanical contrivance would suffice. I can only say I am not satisfied with that argument, or with the suggestion that "trawl or trawl-net" does not mean any contrivance for catching fish in the deep sea so supplied with mechanical contrivances as to work effectively.

Then our attention is called to a subsequent regulation which contains exceptions upon the previous regulations, but those exceptions seem to me only to come to this—that a trawl-net may be used for the purpose mentioned there, provided the beam be not of a greater width than that indicated therein. It throws no light whatever, it seems to me, on the provision in the earlier regulation.

I regret the conclusion I have come to in one respect. Of course we do not know what facts presented themselves to the minds of the magistrates, which induced them to inflict a very severe penalty, as it appears to me, and to entail upon the appellant the confiscation of an ingenious contrivance, but we have nothing to do with that.

WRIGHT, J.—I am entirely of the same opinion. I should think an application to the authority, whoever it is, that has got the money and the nets would possibly be useful.

Appeal dismissed with costs.

Solicitors for the appellant. *C. J. Smith & Hudson*, for *Hearfields & Lambert*, Hull.

Solicitors for the respondent, *Sharp, Parker, Pritchards, & Barham*, for *Alfred West*, Bridlington Quay.

Q. B. Div.
(Wright and Darling, JJ.) } Jan. 13.

In re A SOLICITOR.

Ex parte THE INCORPORATED LAW SOCIETY. (*a*.)

Solicitor—Striking off rolls—Solicitor struck off rolls by colonial court—Production of order of colonial court—Application to strike off upon such order—Sufficiency of ground for striking off.

The court will not strike a solicitor off the roll of solicitors in England merely upon the production before them, without more, of the order of a colonial court striking off the same solicitor from their rolls for professional misconduct in his practice as a solicitor in that colony.

Application on behalf of the Incorporated Law Society to strike a solicitor off the roll of solicitors. On the ground that he had already been struck off the roll of solicitors of the Cape of Good Hope by the Supreme Court of that colony for professional misconduct in having there misappropriated the moneys of a client.

The solicitor had come to England, and was personally served with notice of this application, but was not represented at the hearing.

The solicitor was admitted as a solicitor in this country in the year 1880, and practised in this country until 1894, when he went to the Cape of Good Hope, and was there admitted and practised as a solicitor.

He had, in 1884, been suspended in England for two years for professional misconduct.

In February, 1896, a rule—which had been obtained in the previous December—was made absolute striking him off the rolls of the Supreme Court of the Cape of Good Hope, on the ground that he had collected and received on behalf of a client a sum of money, which he had misappropriated. He did not attend at such hearing.

The application now made to strike the solicitor off the rolls in this country, on the ground that he had been struck off the rolls by the Supreme Court of the Cape of Good Hope, was a novel one, and one for which no precedent could be cited, and the application was based merely on the order of the Supreme Court—which was verified by affidavit—striking him off the rolls, and the question now was whether the court ought, merely upon production of the order of a colonial court striking a solicitor off the rolls, strike the solicitor off the rolls in this country also

Hollams, for the Incorporated Law Society.—It is admitted that this application is a novel one, and that there is no precise precedent for striking a solicitor off the rolls in this country merely because he has been struck off the rolls by a colonial court. Although there is no precedent for this application, the case ought to be decided according to the old practice, that where an application of this kind was made to the old Court of Common Pleas, for instance, the Court of Common Pleas, on being informed that the Court of Queen's Bench had exercised their discretion in striking a solicitor off the rolls, abstained from going into the facts, but made the order on the mere presentation of the order of the Queen's Bench: *In re John Collins*, 18 C. B. 272, 4 W. R. C. L. Dig. 139. According to that practice, and by analogy thereto, the solicitor ought to be struck off the rolls in this country merely upon production to the court of the order of the colonial court striking him off for professional misconduct. In this particular case the solicitor had come to England and had had personal notice of this application served upon him, and there could not be any hardship upon him as he could attend and explain the circumstances, if they were capable of explanation. If the court refused to act upon this order the result would be that a person so struck off by the court of a colony could come to this country and practice here as a solicitor, and, in addition, in most cases it would be extremely difficult to have an investigation of the facts in this country.

The solicitor did not appear.

WRIGHT, J.—It seems to me that no one can complain in any way of the Incorporated Law Society for having sought the help of the court on a point of this importance; but in my judgment the application is not one we can properly grant. It is entirely without precedent, because the suggested precedent of the comity which existed between the various branches of the common law courts before they were united by the Judicature Acts, is not one that can at all guide us in this case. Although having separate provinces to some extent, they were courts mostly of co-equal jurisdiction, all of them deriving their power practically from the same sovereign and acting in close harmony with each other, and having to do with a body of solicitors who were, generally speaking, officers of each of these courts, and it was only natural that, when any court had pronounced on the conduct of a solicitor, the other courts would feel

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law

themselves bound to follow it. But this case goes far beyond any case of that kind. There must have been numerous instances, one would suppose, in which persons who are on the roll of solicitors in this country have committed offences in their capacity of solicitors in colonies or in other parts of the Queen's dominions, as well as in foreign countries, and it must often have been desirable that they should be punished here, if possible, for offences of that kind; but no such case has been shown. The difficulties appear to me to be quite insuperable. How are we to say what description of court we are to treat with such respect that we are to accept their decision as enough to justify us in acting here? I do not know whether it is suggested that we ought to take that view of the decisions of strictly foreign courts, or whether the decision of every small colony ought to be acted upon by this court, without inquiry by this court on its own account. We do not know what the procedure may be in these cases; we do not know what their rules of evidence are, and here we know absolutely nothing of the facts of the case.

The only evidence before us is an affidavit of the president of the Incorporated Law Society of the Cape of Good Hope, who says that an action had been tried, and that, from the facts proved in that action, it appeared that the offence was committed. Of course that is the merest hearsay. We are quite unable to judge for ourselves what the real gravity or what the real nature of the facts alleged against the solicitor may have been. There is nothing to guide us to form our judgment as to whether the sentence of the court there was properly pronounced, or whether the punishment was too severe or not severe enough, or was the right punishment. I certainly cannot bring myself to think that, simply because a court in a colony has struck a solicitor off the rolls, therefore we ought to accept their decision as guiding us, not merely as to the fact of the misconduct, but as to the degree of punishment inflicted. I do not at all say that there may not be cases in which the court ought to act, and probably would act, if the facts were brought before it in a proper way on evidence which was legal evidence, and if it could see clearly what it was that the solicitor had done and that the sentence or punishment inflicted by the colonial court was such as we should, according to our own practice, be inclined to inflict here. I do not think that in this case we have sufficient evidence even to raise these questions.

DARLING, J.—I agree; and I only add this. I desire to speak with every respect for the decisions of the courts of the colonies; but at the same time I cannot see that there is any real analogy between the Court of the Cape of Good Hope, or any other distant colony, and the Court of Queen's Bench, or the Court of Common Pleas, or the Court of Exchequer, which were not only courts sitting in this country, but sitting within a very few yards of one another, all in the same building in Westminster Hall; and therefore the procedure of the judges of one court was necessarily thoroughly understood by the judges of the other courts, and the kind of evidence on which they would act was thoroughly understood. There was this other fact, that, if they were in any doubt as to whether they would act simply on decisions of the other court with regard to the discipline of its officers, they could easily ascertain what was the evidence in any particular case. Therefore, I can well imagine that they would apply a rule with regard to decisions with regard to officers of any of those courts which they would not apply to decisions with regard to their officers come to in very distant courts. If there were any evidence at first hand—not merely hearsay, which is all there is in these affidavits—of what this solicitor had done, then I think this court would regard the decision arrived at by the Supreme Court of the Cape of Good Hope, or any court holding a similar position, with great deference, and would give to such decision its proper weight in coming to a conclusion; but I do not think that, having no evidence whatever but the mere statement that the court has struck a solicitor off the rolls, this court ought to say without further inquiry that they will simply do the same thing.

Application refused.

Solicitor for the Incorporated Law Society, *E. W. Williamson.*

Court of Appeal.

From Q. B. Div. (Bkcy.) (A. L. Smith, Rigby, and Collins, L.JJ.) — Dec. 10.

In re IZOD.

Ex parte THE OFFICIAL RECEIVER. (*a*.)

Bankruptcy—Receiving order—Application to rescind—Arrangement with creditors—Jurisdiction and discretion of registrar—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 104—*Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-section* 6.

A debtor presented a petition in bankruptcy against himself and obtained a receiving order. Subsequently to this he entered into an arrangement with all his creditors, under which they received a composition of 10*s. in the pound, and released the debtor from their respective debts and withdrew their proofs. The debtor then applied to the registrar to rescind the receiving order. The registrar rescinded the order, though the debtor had undergone no public examination.*

Held, by A. L. Smith *and* Collins, L.JJ. (Rigby, L.J., *dissenting*), *that the registrar had jurisdiction to rescind the receiving order, and that, under the circumstances of the case, he had exercised his discretion properly.*

This course should, however, only be adopted with great caution and under special circumstances, when there has been no misconduct on the part of the debtor, and it is for the benefit of the creditors that the receiving order should be rescinded.

This was an appeal from an order of Mr. Registrar Hope rescinding a receiving order.

The debtor was a hosier. In 1897 he was in financial difficulties, and two judgment creditors levied execution upon his premises.

On the 22nd of July, 1897, the debtor presented a bankruptcy petition against himself, and a receiving order was made against him.

On the 31st of July he underwent a preliminary examination by the official receiver.

The first meeting of the creditors took place on the 9th of August, and was adjourned until the 30th of the same month so that the debtor might enter into negotiation with his creditors for the private settlement of his affairs.

A meeting of the creditors was held, and they appointed three of their number as a committee to inquire and report what was the best course to adopt.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

This committee reported that it would be more advantageous to the creditors to receive an immediate payment of ten shillings in the pound than that the debtor's estate should be administered in bankruptcy.

An arrangement was therefore carried out in the month of October by which the debtor's father paid all the creditors ten shillings in the pound, and the creditors withdrew their proofs and released the debtor from their claims.

Prior to this, but subsequent to the adjourned meeting on the 30th of August, an order was made by the registrar, with the consent of the official receiver, for a stay of all proceedings in the bankruptcy until the 26th of October for the debtor to make such application as he might be advised, he, the debtor, undertaking to keep an account of the business and pay over to the official receiver all moneys received, less current expenses and an amount, to be fixed by the official receiver, for his maintenance.

This order was subsequently extended to the 5th of November, and on that date the debtor made an application to the registrar to rescind the receiving order, and, no opposition being raised by the official receiver, the registrar made the order asked for.

Against this order the official receiver, nominally, but in reality the Board of Trade, now appealed.

Sir Richard Webster, A.G. (*Muir Mackenzie* with him), appeared in support of the appeal.—The registrar had no jurisdiction to rescind the receiving order on the ground that a private arrangement had been entered into by the debtor with the creditors; and even if he had jurisdiction he exercised it wrongly. Under section 3, sub-section 6, of the Bankruptcy Act, 1890, a scheme of composition cannot be approved by the court until after the conclusion of the debtor's public examination, and section 104 of the Bankruptcy Act of 1883, which empowers the court to rescind or vary its orders, must be read as subject to the provisions contained in section 3, sub-section 6, of the Act of 1890. By that section it is provided that where a debtor's proposal for a composition or a scheme of arrangement is accepted by the creditors, his application to the court to approve it "shall not be heard until after conclusion of the public examination of the debtor." It is contrary to the whole spirit of the Bankruptcy Acts that a debtor against whom a receiving order has been made should be allowed to enter into a private arrangement with his creditors. It is for the court to protect the creditors and to decide whether the estate should be administered or a scheme approved of. The authorities show that the court will not rescind a receiving order merely on the ground that a private arrangement has been entered into between the debtor and the creditors: see *In re Leslie, Ex parte Leslie*, 35 W. R. 395, 18 Q. B. D. 619; *In re Dixon and Cardus*, 37 W. R. 161, 5 Morrell 291; and *In re Hester, Ex parte Hester*, 22 Q. B. D. 632, 37 W. R. Dig. 20. It might be that if there were a public examination here it would be shown that the estate could pay more than ten shillings in the pound. A receiving order ought only to be rescinded in two cases—namely, where the court is of opinion that the receiving order ought never to have been made, or where the creditors have been paid in full (see *In re Leslie*). In the case of *In re Flatau*, 41 W. R. 529, [1893] 2 Q. B. 219, the court refused to rescind a receiving order.

Herbert Reed, Q.C. (*A. H. Carrington* with him), for the debtor.—By section 104 of the Bankruptcy Act of 1890 the court is given a general power to rescind a receiving order. There is nothing in section 3, sub-section 6, of the Bankruptcy Act of 1890 which limits this general power. The matter entirely rests in the discretion of the court, and it is not necessary in the exercise of this discretion that there should be, as a condition precedent, a public examination of the debtor: see *In re Wemyss, Ex parte Wemyss*, 32 W. R. 1002, 13 Q. B. D. 244; *In re Davidson, Ex parte Davidson*, [1894] W. N. 210; and *Ex parte Carr*, 35 W. R. 150. A public examination of the debtor now would be of no benefit to the estate, for there are neither creditors nor proofs. The registrar had every means of investigating into the matter, and he was satisfied that there had been no misconduct on the part of the debtor, and the official receiver made no objection to the receiving order being rescinded.

Muir Mackenzie replied.

A. L. SMITH, L.J.—Speaking for myself, I think the registrar's decision should be affirmed. There are two questions here. One is whether the registrar had jurisdiction to rescind the receiving order, and the second is, assuming he had jurisdiction, whether he has exercised that discretion rightly.

The circumstances in this case are such that I look upon it as an exceptional case, and not in the ordinary run of cases at all. The debtor carried on business as a hosier in the city of London, and in July one of his creditors put in an execution. The debtor did not wish to go to his father for money, so he filed a petition against himself in bankruptcy on the 22nd of July, 1897, and upon the same day a receiving order was made against him. A short time after, however, he induced his father to enter into an arrangement with the creditors to pay them ten shillings in the pound. The official receiver, an officer of the court, was standing between the creditors and the debtor, and he knew exactly the position of this debtor. He knew perfectly well that there had been no delinquency on the debtor's part under the Bankruptcy Acts. He knew right well that ten shillings in the pound was more than the creditors would have got if proceedings had been taken in bankruptcy, and he considered it a proper sum to pay the creditors, and he did not wish for any public examination in the matter, and he assented to the proposition that the receiving order should be rescinded. That is where this case, in my judgment, is a different case from ninety-nine cases out of a hundred which come before the court. It is a case in which the public official, whose duty it is to investigate the affairs of the debtor, comes forward and says: "I know nothing against this young man; I have been negotiating his affairs from the time of the receiving order, and I tell, first of all, the registrar, and I now tell the court, in my opinion there is nothing against the debtor in any shape or way, and I do not want any further public examination." That is what I want to emphasize. The official receiver is not asking for a public examination; it is the Board of Trade. He is an officer in the Board of Trade inquiring into these matters, and knows all about them. He says, "I am content." The Board of Trade comes here and says, "Although my officer is content, yet for public morality I say there ought to be a public examination," which, according to this hypothesis, would end in absolutely nothing. Therefore I say this case is an exceptional case.

It is quite true that the Attorney-General argued, first of all, that the registrar had no jurisdiction to rescind the receiving order until there has been a public examination, but when he found the authorities on that point against him he abandoned it, and said the registrar had exercised his discretion wrongly. Now, as to the question about jurisdiction—that

is, whether the registrar has a discretion. I own when I first read section 3, sub-section 6, of the Act of 1890, I certainly thought there was a direct legislative enactment that an application to the court to approve a proposal for a composition after it had been agreed to by the creditors should not be heard until after the conclusion of the public examination of the debtor. I thought that was a direct legislative enactment prohibiting this being done until the public examination had been concluded, but it was pointed out that by section 104 of the Act of 1883 the court has jurisdiction to "review, rescind, or vary any order made by it under bankruptcy jurisdiction," and it was said that under that general power there was jurisdiction in the registrar to rescind the receiving order, and that it was a matter of discretion whether he should do so or not. I agree with the contention of the debtor's counsel that, although the 3rd section of the Bankruptcy Act, 1890, differs somewhat in its terms from section 18 of the Act of 1883, they are substantially the same as regards the present point. When I take the cases which have been decided from the year 1884 down to 1894 I do not find any doubt expressed as to there being a discretion in such a matter.

Now comes the question whether or not that discretion has been wrongly exercised. It is said it is wrongly exercised because the authorities show that it should not be exercised unless twenty shillings in the pound have been paid, or unless the receiving order ought not to have been made; and that it is only upon those two grounds that the discretion should be exercised. I do not find that laid down hard and fast in the cases at all. I do find, no doubt, in *Ex parte Leslie*, such a rule laid down, but when I come to the other authorities I find that those are not the only grounds. I take first the case of *In re Hester*, decided in 1889 under the old Act. Lord Esher there says: "But I think that in that case (*Dixon and Cardus*) the court also said that, if the proposed arrangement is equivalent to a scheme under section 18, and the court can see that it may with perfect safety be sanctioned, they would not decide that such a proposition must be at once rejected merely because the formalities imposed by section 18 have not been complied with." Again, Fry, L.J., also says: "In my judgment in *In re Dixon and Cardus* I agreed with the Master of the Rolls that we should not lay down that no arrangement with creditors could have effect given to it unless it proceeded under section 18. I will not say that now." It seems to me those two learned judges not only decided there was discretion in a matter like this, but they would not decide that that discretion could not be exercised except in the case of payment of twenty shillings in the pound, or where a receiving order ought not to be made.

The next case which I refer to is *In re Flatau*, in which Lord Esher, M.R., clearly shows that discretion may be exercised, and he points out in what cases it ought to be exercised. He points out that in that case the registrar had only the fact before him that the creditors assented, and that was not sufficient. The debtor "then went before the registrar with an application to rescind the receiving order, which, as it then stood, was a good and valid order. He did not produce any affidavit, but he satisfied the registrar that he had the consent of the petitioning creditor; and I think the appeal must be decided on the assumption that that fact was proved to the registrar, but that fact alone. He had the consent of the petitioning creditor; he had paid him and satisfied him. But there were, or might be, other creditors, and they were not there, and the circumstances were not known to the registrar. Could the registrar properly on that, and that alone, rescind the receiving order without entering upon a consideration of all the circumstances of the debtor's insolvency—how it came about, what had been the conduct of the debtor when he incurred the debts, what had been his conduct after the debts were incurred, and what was the position of things at the time?" This case shows that other matters were to be taken into consideration when the registrar was determining whether he would rescind the receiving order; and if other matters may be taken into consideration it seems to me there is nothing against the debtor in the way he carried on his business or kept his books, or any offence against the Bankruptcy Act. In my judgment it shows there was discretion in the registrar to rescind the receiving order. In the present case it seems to me these matters have all been considered by the registrar, and what is more, the official receiver is at the elbow of the registrar, and is informing him what the matters were.

The last case is *In re Davidson*, which was decided as late as the 23rd of November, 1894, and in this case the registrar refused to rescind because he thought there were matters which ought to be investigated. Here in this case the registrar has rescinded because he says it is a special case, and I agree with him. In *In re Davidson* the court affirmed the decision. They said that "the registrar had a discretion, and had to take into consideration all the circumstances of the case; and when he had exercised his discretion it would require a very strong case to authorize or to induce the Court of Appeal to interfere." It seems that is applicable to the present case, although in that case the registrar had refused to rescind and in the present case, having taken all the circumstances into consideration, he has rescinded.

For these reasons I think this is a very exceptional case, and I cannot bring myself to say the registrar has exercised his discretion wrongly.

RIGBY, L.J.—I feel it my duty to dissent from the judgment which has been given, and I do so on several grounds. I do not question for a moment that under the Act, and under certain conditions, the registrar—that is to say, the court—has authority and discretion to rescind the order. Certainly I do not pretend to lay down such a proposition, but the Act shows plainly, to my mind, that that discretion must be limited in certain cases, and I say that this is one of those cases. We all know that one of the grave evils which the bankruptcy laws in recent years were intended to remedy, was a settlement with creditors by private arrangement. It seems to me, for reasons that I will presently give, that the Act has very effectually guarded against this; but I think if a general discretion is supposed to exist with regard to rescinding a receiving order, that will very materially detract from the beneficial effect of the recent legislation. Now let us see what has been decided. I do not quite take the view that Smith, L.J., has taken.

Undoubtedly section 18 of the Act of 1883 was very much on the same lines as section 3 of the Act of 1890, but it did not in terms say an application for approval of a scheme of arrangement should not be heard until after the conclusion of the public examination of the debtor. There are a series of cases which, I think, ought to guide us in all these matters, whether there has been a scheme within section 18 or not. *In re Hester* is the leading case. I think the learned judges expressly refused to determine whether or not there was a discretion, though certain sentences, picked out here and there, may, no doubt, lead to a different conclusion, but as the judges in those cases were affirming the decision not to rescind the receiving order, it was not necessary for them to decide the point. They expressly

but as it appeared on the depositions that it was not a case of rape, the bill laid before the grand jury and the indictment found by them was for an offence under this sub-section 1 of section 5.

The prisoner pleaded not guilty.

At the close of the case for the Crown counsel for the prisoner submitted that there was no case to go to the jury, or, alternatively, that I ought to direct an acquittal, because of the last proviso in section 5: "No prosecution shall be commenced for an offence under sub-section 1 of this section more than three months after the commission of the offence"; and because, the date of the offence being the 19th of July, no prosecution under this sub-section could be said to have been commenced until, at the earliest, the 22nd of November, when the indictment was laid before and found by the grand jury.

After hearing counsel for the Crown I overruled the objection on two grounds, the first being that the proviso does not speak of a prosecution under sub-section 1, but of a prosecution for an offence under sub-section 1, and that a prosecution for an actual offence under sub-section 1 had been commenced in due time, though the offence had been wrongly described as greater than it proved to be; the second ground being that if the indictment had been according to the commitment the prisoner could, under section 9, have been found guilty of the offence for which he was actually indicted.

The case proceeded. The prisoner was convicted, and sentenced by me to imprisonment for nine calendar months with hard labour.

After conviction counsel for the prisoner further submitted to me that, under the provisions of section 17 of the Act in question, and of the Vexatious Indictments Act (22 & 23 Vict. c. 17) (not in this respect affected by section 1 of 30 & 31 Vict. c. 35), no indictment for an offence under this sub-section 1 ought to have been allowed to be found by the grand jury, inasmuch as the prisoner had not been committed for that offence.

The questions for the consideration of the Court for Crown Cases Reserved are:

1. Ought the court, in obedience to the proviso in section 5 of the Criminal Law Amendment Act, to have directed an acquittal?

2. Ought the indictment, having regard to section 17 of the same Act, to have been quashed?

3. Was the objection, if any, to the indictment cured by the prisoner pleading to it, or by the objection not being taken till after conviction?

Counsel for the prisoner has referred me to the case of *Reg.* v. *Casbolt*, 11 Cox C. L. C. 385.

Section 5 of the Criminal Law Amendment Act, 1885, provides that "any person who (1) unlawfully and carnally knows or attempts to have carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years . . . shall be guilty of a misdemeanour . . . Provided . . . that no prosecution shall be commenced for an offence under sub-section 1 of this section more than three months after the commission of the offence." Section 9 enacts that "if, upon the trial of any indictment for rape . . . the jury shall be satisfied that the defendant is guilty of an offence under section 5 of this Act . . . but are not satisfied that the defendant is guilty of the felony charged in the indictment . . . ." they may acquit him of the felony and find him guilty of the offence aforesaid. Section 17 provides that misdemeanours under the Act shall be deemed offences under and subject to the provisions of the Vexatious Indictments Act (22 & 23 Vict. c. 17).

The prisoner was not represented.

Meynell, for the prosecution.—The conviction ought to be sustained. The indictment was for an offence which is included in the greater offence for which the prisoner was committed. The prosecution before the magistrates for rape was a prosecution for any offence of which a prisoner might be convicted on a charge of rape. Therefore the prosecution for an offence against section 5 (1) of the Criminal Law Amendment Act was commenced within three months after the commission of the offence. In *Rex* v. *Willace*, 1 East P. C. 186, the proceedings before the magistrates were held to be the commencement of the prosecution. The objection founded on the Vexatious Indictments Act is substantially the same as the objection founded on the proviso to section 5 of the Act of 1885. The commitment was for any offence of which a person indicted for rape could be convicted.

Lord RUSSELL OF KILLOWEN, C.J.—In this case a charge of rape was preferred against the prisoner before the magistrates, and on the hearing it was considered proper to commit him for trial for that offence, and he was committed accordingly. When in due course the indictment was sent up to the grand jury more than three months had elapsed since the commission of the offence with which the prisoner was charged. Counsel for the prosecution considered the matter, and thought that it would not be proper to put the man on his trial for rape: the evidence pointed to some degree of consent on the part of the prosecutrix, and the indictment was framed under section 5 of the Criminal Law Amendment Act, 1885, for the offence of having carnal knowledge of a girl between the ages of thirteen and sixteen years. I have to observe that if that course had not been taken, and an indictment for rape had been sent up and found, no difficulty could have arisen; for the judge could have directed the jury to acquit the prisoner on the charge of rape, and to consider only the misdemeanour. But the point taken is that this was an indictment for a misdemeanour under section 5, and that the final proviso to that section enacts that "no prosecution shall be commenced for an offence under sub-section (1) of this section more than three months after the commission of the offence." Can it be said that in the present case the prosecution for the offence of which the man was convicted was commenced within three months after the commission of the offence? I think that it was. A prosecution for rape is a prosecution for any offence of which a man can be convicted upon an indictment for rape. The evidence before the magistrate may raise a doubt as to whether he ought to commit the accused on a charge of rape; but he may properly think that no harm can be done by so committing him, because if the charge of rape is not established, he can be convicted of the lesser offence.

In my judgment the learned commissioner was right in refusing to direct an acquittal or to quash the indictment.

HAWKINS, J.—I am of the same opinion. I think the point is quite clear.

MATHEW, J.—I am of the same opinion. The point on the Vexatious Indictments Act is practically a repetition of the point on the proviso to section 5 of the Act of 1885. To give effect to the contention for the prisoner would be to render section 17 of that Act inoperative, and I cannot think that section 5 has that effect.

GRANTHAM, J.—I am of the same opinion. I should have been sorry if we had been obliged to decide otherwise; for in that case it would be

second meeting, and therefore *a fortiori* no application to the court based upon it until there had been a complete public examination of the debtor. That was the machinery of the earlier Act. The later Act substituted one meeting for two, and having done that, it was also made a condition precedent that the public examination should take place before application could be made to the court. Therefore I say the decisions under the earlier Act affirming there was a discretion notwithstanding the failure of the condition precedent are still authorities now; but it does not rest there, because we have at least two authorities after the passing of that Act—namely, *In re Flatau*, which was decided in 1893, the headnote of which is this: "When a receiving order has been made the court will not, even though the proceedings under it have been stayed, rescind the order merely upon the consent of the petitioning creditor. The court has a discretion in the matter and will not rescind the order without the full investigation of all the circumstances, including the conduct of the debtor." There was no scheme in that case and therefore no approval. That is followed by the case of *In re Davidson*. There, after the making of the order, a friend of the debtor had bought up his unsecured debts, and out of three secured creditors two had agreed to rely upon their security. I only call attention to that to show there was no scheme. The court in that case says that "the registrar had a discretion and had to take into consideration all the circumstances of the case." It seems to me, therefore, clear that the registrar had in this case a discretion to deal with the application for rescission of the receiving order. Then it is said that that discretion was wrongfully exercised.

Now, I approach the case from the point of view that he has discretion. The registrar has exercised it, having the most abundant opportunities, which this court has not got, of enquiring into the matter. This discretion cannot be interfered with without the greatest possible consideration. The learned registrar is the very same registrar who in *In re Davidson* refused to rescind. He now, in this case, upon full examination of all the facts, thinks he was justified in rescinding it. I quite agree it is absolutely essential that the closest possible vigilance should be exercised over the debtor and his affairs and also over the creditors themselves in the interests of the public. That has been done in this case. The preliminary examination has taken place, and the business has been carried on under the direct supervision of the receiver from July to November. The official receiver himself, with every means of information, has been an assenting party throughout these proceedings. Therefore we are safeguarded by the accredited officer of the court whose function it is to advise in these matters, and we are further safeguarded by the great experience and known rectitude of the registrar who in this case—a very exceptional case—rescinded the receiving order. For these reasons I am of opinion that the decision ought to be upheld.

Appeal dismissed.

Solicitor for the official receiver, *Solicitor to the Board of Trade.*

Solicitor for the debtor, *P. C. Ray.*

From Prob. Div. & Adm. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Feb. 16.

"THE GLENGYLE." (*a.*)

Ship—Salvage—Service rendered by salvage vessels—Assessment of remuneration.

In assessing the amount payable for salvage services rendered by salvage steamers, the court can take into account, as enhancing the amount of the award, the fact that the salvage steamers are equipped and maintained at considerable expense for the sole purpose of rendering salvage services.

Appeal from the judgment of Barnes, J., in an action of salvage.

The action was brought by the plaintiffs, the owners of the salvage steamers *Hermes* and *Newa*, and the masters and crews of the steamers, to recover salvage for services rendered to the steamship *Glengyle*, her cargo and freight, in August, 1897. *The Hermes* was a screw steamer of 394 tons register, fitted with engines working up to 750 indicated horse power, with a pumping capacity of 2,750 tons per hour, and manned by a crew of twenty-three hands, and of the value of £22,000. *The Newa* was a screw steamer of 459 tons register, fitted with engines working up to 750 indicated horse power, with a pumping capacity of 5,000 tons per hour, and manned by a crew of twenty-one hands, and of the value of £20,000. Both the steamers were specially built for and solely employed in rendering salvage services, and were equipped with divers and diving apparatus and powerful engines and pumps and other salving appliances.

On the 26th of August the steamship *Glengyle*, of 3,455 tons gross register, on her voyage with passengers and cargo from London to China, came into collision with the steamship *Coronet* in the Straits of Gibraltar, and sustained serious damage in the way of the engine-room, and commenced to sink. *The Hermes* and *The Newa* were lying at Gibraltar with steam up, and shortly after 3 a.m. on the 26th, in response to signals from the signal-station at Gibraltar, they proceeded to sea and found *The Glengyle* several miles away to the south-west with her engine-room full of water, her fires drowned out, large quantities of water in her holds, and no one on board of her. She was gradually settling down. On the arrival of the salvage steamers at 4.10 a.m. the master of *The Glengyle*, from a boat, requested that his vessel should be towed to Gibraltar if she would keep afloat long enough. The sea was smooth. *The Hermes* and *Newa* were made fast, the former ahead and the latter lashed to the starboard side of *The Glengyle*. As it appeared improbable that *The Glengyle* could reach Gibraltar, it was arranged to steer for Getares Bay, the nearest shore with a sandy bottom, where *The Glengyle* could be beached. *The Glengyle* was eventually beached in Getares Bay at 6 a.m. on the 26th. The holes in her sides were patched by divers, the pumping gear of the salving steamers set to work, and at night *The Glengyle* was floated, and on the 27th was taken to Gibraltar Bay, where further work was done by the divers to the damaged places, and the pumping was continued until the 28th, when *The Glengyle* was able to keep down the water with her donkey-pump. The value of *The Glengyle* and of her cargo and freight, when salved, was agreed at £76,596.

Barnes, J., in giving judgment, said that the establishment and maintenance of salvage steamers were for the general benefit of owners and under-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

writers and others interested, and the crews and passengers of such vessels, and the Admiralty Court would be liberal in its awards in respect of services rendered by salvage steamers, even though the awards might fall somewhat heavily on individual owners. He accordingly awarded the sum of £19,000 to the owners, masters, and crews of *The Hermes* and *Neva* in equal moieties to each ship. The defendants appealed, and contended that the award was excessive.

Sir R. T. Reid, Q.C., Aspinall, Q.C., and *Butler Aspinall*, for the defendants.

F. W. Raikes, Q.C., and *Dawson Miller*, for the plaintiffs.

The following authorities were referred to: *The Thetis*, 2 Knapp 390; *The Scindia*, L. R. 1 P. C. 241, 14 W. R. P. C. Dig. 6; *The True Blue*, 1 P. C. 250, 15 W. R. P. C. Dig. 7; *The Glenduror*, L. R. 3 P. C. 589, 19 W. R. P. C. Dig. 19; *The Amérique*, 23 W. R. 488, L. R. 6 P. C. 468; *The William Beckford*, 3 C. Rob. 355; *The Accomac*, [1891] P. 349, 40 W. R. Dig. 5.

A. L. SMITH, L.J.—My mind has fluctuated during the argument, but in the result I have come to the conclusion that this award, large though it undoubtedly is, must stand. It was said that this case constituted a new departure, because the case of salvage vessels, constructed and maintained for the sole purpose of rendering salvage services, had never before come before the Court of Admiralty. Large expense is incurred in keeping these salvage steamers at Gibraltar. Though the sea was smooth at the time when the salvage services were rendered, *The Glengyle* was in such a moribund state that if the salvage vessels had not come alongside of her she would inevitably have been lost with her cargo. The salvage vessels also incurred considerable risk in getting *The Glengyle* on to the shore, and their crews were exposed to considerable danger. Our assessors so advise us. There was therefore imminent danger to and probable loss of *The Glengyle*, and danger to and possible loss of the salvage vessels. If this had been the case of an ordinary tug or an ordinary steamer, speaking for myself I should have said, upon the authorities, that the award of £19,000 would have been too large. But these salvage vessels are kept at great expense solely for salvage purposes, and I cannot shut my eyes to this, that, unless those two vessels had been kept at Gibraltar for that purpose, *The Glengyle*, with her cargo and freight, would have been lost. Taking also into consideration the danger which the salvage vessels ran, I cannot say that the learned judge, who took all the circumstances into account, awarded too much.

CHITTY, L.J.—I am of the same opinion. The question is not whether we should have arrived at the same figure, but whether we are satisfied that the sum is in excess, and largely in excess, of what should be awarded. There is no new departure in the principle upon which this case should be decided. There is merely an important new factor in this case. These two salvage vessels, valued at £42,000, were equipped and maintained solely for salvage purposes. It is, to my mind, a matter of high importance to encourage persons to keep at a port like Gibraltar vessels of this kind. These salvage vessels were properly equipped for the purpose, and had divers and crews specially skilled. These circumstances do not constitute a new departure; they give rise to a new element to be taken into consideration, to which Barnes, J., has not attached too much importance. We have also been assisted by our assessors with regard to the danger incurred by the three vessels. In the circumstances I cannot say that the award is excessive.

COLLINS, L.J.—I am of the same opinion and have nothing to add.

Appeal dismissed.

Solicitors for the plaintiffs, *W. A. Crump & Son.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 7.

GUARDIANS OF DORKING UNION *v.* GUARDIANS OF ST. SAVIOUR'S UNION. (*a.*)

Poor law—Settlement—Divided parish—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *ss.* 1 (3), 67, 68.

A poor law settlement gained by birth is a settlement in a particular parish. Consequently the settlement is destroyed on the division of the original parish under section 1, *sub-section* 3, *of the Local Government Act*, 1894, *as the parish in which it was acquired thereby ceased to exist.*

This was an appeal by the guardians of St. Saviour's Union from an order of a Divisional Court consisting of Collins, L.J. (then Collins, J.), and Ridley, J., and raised a question as to the result, for purposes of pauper settlement law, of the division of a parish under the Local Government Act, 1894.

A special case was stated by a court of quarter sessions for the County of London which had quashed an order of justices, dated the 18th of August, 1896, adjudging the settlement of one Albert Edward Bridger, a pauper, to be in the parish of Dorking, in the county of Surrey, in the Dorking Union, and ordering his removal from the St. Saviour's Union, in the county of London, to the Dorking Union.

The facts were as follows: The pauper was born in 1879 at Westcott, a hamlet then forming part of the parish of Dorking, and in the Dorking Union. He never acquired a settlement elsewhere. In August, 1896, he became chargeable to St. Saviour's Union. At the time of the passing of the Local Government Act, 1894, the parish of Dorking was situate partly within and partly without the Dorking rural sanitary district. It had one set of overseers, and one poor rate was made and levied for the entire parish. By the operation of section 1 (3) of the Local Government Act, 1894, the part of the parish which was within the rural sanitary district, and the part which was without, were constituted and became two separate parishes, called Dorking and Dorking Rural, and the old parish of Dorking ceased to exist. Since that date separate overseers have been appointed and separate rates levied for each of the two new parishes, and overseers have ceased to be appointed and a poor rate has ceased to be made for the old parish of Dorking. It was contended by the guardians of Dorking Union (1) that, as the hamlet of Westcott was within the parish of Dorking Rural and not the parish of Dorking, the order of the justices was bad, inasmuch as the pauper, if settled at all in any parish of Dorking Union, was settled in the parish of Dorking Rural, not in Dorking; that, there being no evidence before the justices who made the order that the old parish of Dorking had been divided as aforesaid and that the new parish of Dorking Rural had been formed and was in existence, the said order

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

could not be amended by the insertion of the word "rural"; (2) that, in consequence of the division of the old parish, it had ceased to exist, and the pauper had lost his birth settlement in the old parish, and that, as there was not at the time of his birth any parish of Dorking Rural, he could not have any settlement in that parish now, not having acquired one since its formation.

The court of quarter sessions held that they could amend the order by adding the word "rural." As to the second contention, that court held, upon the authority of *Reg.* v. *Tipton*, 3 Q. B. 215; *Reg.* v. *Hunnington*, 5 Q. B. 273; *Stourbridge Union* v. *Droitwich Union*, L. R. 6 Q. B. 769, 19 W. R. C. L. Dig. 58; *Reg.* v. *St. Martin's New Sarum*, 9 Q. B. 241, that the pauper had no settlement in Dorking Rural and could not be removed to the Dorking Union in virtue of his birth settlement in the old parish of Dorking, that parish for the purposes of settlement having been destroyed, and the pauper's settlement gained in it by birth being wholly lost.

On the special case stated by the court of quarter sessions the Divisional Court decided that the principle of the authorities above cited was that when the parish in which a pauper was born was divided the entity maintaining its own poor in which the pauper had acquired his settlement no longer existed; that, whether those cases were rightly decided or not, they had been law for so long it would be quite impossible for the court not to follow them; and that as, therefore, the place to which the pauper in the present case ought to be sent no longer existed, he must remain chargeable to the union where he was—viz., St. Saviour's.

From that decision the guardians of St. Saviour's Union now appealed.

Macmorran, Q.C., and *G. Elliott*, referred to the above cases. [LINDLEY, M.R.—How are you going to get over the authorities? The decisions go back to 1842.] The question is whether these decisions are binding on this court in view of the doubt cast on them by the Court of Queen's Bench in the *Stourbridge case*. Section 68 of the Local Government Act, 1894, is in point. Collins, L.J., seems to have regarded the word "liabilities" in that section as meaning only pecuniary liabilities, but the definition is found in the Local Government Act, 1888, and is much wider. [LINDLEY, M.R.—Is there any section which says that that Act shall be read as one with the other?] Yes, section 75. The Act recognizes the continuance of liabilities of all kinds, and does not intend to abolish them. [RIGBY, L.J.—Unless it was done under the Divided Parishes Act, 1876.] It was not done under the Act of 1876 because the Local Government Board under section 8 of that Act had power to make an adjustment of debts and liabilities. [VAUGHAN WILLIAMS, L.J.—Collins, L.J., says that section 8 of the Act of 1876 has been repealed.] It was repealed by the Local Government Act of 1894 in the schedule, but cases where the Local Government Board has dealt with a parish are excepted. [LINDLEY, M.R.—You say that section 8 is not repealed to the extent Collins, L.J., thought?] No, it is not. [LINDLEY, M.R.—Are the powers and debts expressly transferred in this case?] No. [LINDLEY, M.R.—Then it comes down to section 68?] Section 68 is wider than section 67, and is not required in a case of this kind because a settlement is acquired in a particular part of the parish. [RIGBY, L.J.—This is decided the other way in *Reg.* v. *Tipton*.] As the Act of 1894 did not abolish the liabilities it must have contemplated an adjustment of them when necessary. [LINDLEY, M.R.—Must there not be some power or debt transferred before you talk of adjustment?] There is nothing in the Act which expressly transfers any liability in terms. Section 68 is an enabling section, and the principle of the *Tipton case* should not be extended to a case under the Act of 1894.

Bosanquet, Q.C., and *W. F. Barry, contra.*—The real question is whether this pauper was settled at the time of the order in Dorking Rural Parish. He was born in the old parish of Dorking, and therefore that was his poor law domicil. That parish does not now exist. The question is, When the old parish has ceased to exist, what becomes of the settlement? Now, the settlement is a parish settlement and nothing else. The suggestion is that the old parish settlement in Dorking becomes a settlement in Dorking Rural. The reason of the old decisions was that the entity to which the settlement attached by birth was the parish as it existed at the time. The question originally arose under the statute of 13 & 14 Car. 2, c. 12, s. 21, and the reason why these decisions were considered unsatisfactory is based on that statute because under it the parishes were not expressly divided. But the real question is, What is the meaning of settlement? It is a *status* in a parish, and when the parish ceases to exist so does the *status*. The entity is a parish and the settlement is in that parish and not in another one: *Plomesgate case*, 29 W. R. 630, 6 Q. B. D. 576. Now, it is said that under the Act of 1894 there is a new settlement in Dorking Rural. But the Act of 1894 only says that they are to be separate parishes as if they had been constituted separate parishes under the Divided Parishes Act, 1876. Under section 6 of that Act each part of Dorking has become a separate parish for all lay and civil purposes, but there is no provision that each part shall have settled in it its own paupers. There is no power at all to deal with the *status* of paupers. The Act has never said that when the parishes are divided the settlements shall be divided also. [VAUGHAN WILLIAMS, L.J.—It is not said that you can create a new parish settlement, but that you have an Act which for the purpose of administration cuts up a parish into two and imposes on each of those halves the liabilities which the old parish used to have, and it is suggested that the old parish never ceased to exist.] The answer is that the parish is divided for all civil purposes, and therefore has ceased to exist: see section 6 of the Act of 1876.

Macmorran, Q.C., replied.

LINDLEY, M.R.—I do not see that we can differ from the judgment of the court below. I think it is right in point of law. As regards the case of *Reg.* v. *Tipton*, which has been followed by a great many others, all I say is that that case put a very narrow construction upon the Act of 13 & 14 Car. 2, c. 12: but it is past praying for, and I say nothing more about it. At all events it comes to this: It seems now to be settled, as I understand the law, that a birth settlement, that is to say, a settlement gained by birth, is a settlement gained in a parish, and if that parish is sub-divided the old parish goes and the settlement goes with it; and you cannot by implication say that a person who had acquired a birth settlement in that parish is to be treated as settled in that half of the parish which is made a new parish. In other words, the view, as I understand, has always been taken that if the Legislature means to do that, it must say so. There is nothing in the Act which we have to construe, the Local Government Act of 1894, which does say so. The inferences which might possibly be drawn from sections 67 and 68 of that Act about transfer of property and debts and liabilities and

"adjustment of property and liabilities" really do not take the case out; they are not plain enough, and one of course is struck by the fact that in 1894 when this Local Government Act was passed the Legislature perfectly well by the decisions to which we have been referring how the Poor Law stood—viz., that a person settled by birth in an old parish should not be deemed to have a settlement in that part of the old parish which was made a new parish. The consequence is that the appeal must be dismissed, and dismissed in the ordinary way, with costs.

RIGBY, L.J.—I am of the same opinion. At any rate, in the year 1842, with regard to the case of *Reg.* v. *Tipton*, there was one point decided which, so far as I know, has never been departed from at all, and that was that when you were dealing with a birth settlement it was a matter of absolute indifference as to the part of the parish in which the birth took place. All you had to show was that the pauper was born in the parish, and that he got a settlement in the parish. The idea of a settlement in a part of a parish had not then occurred. I do not find that that has ever been argued since. The court might perhaps in those cases have held that the Act 13 & 14 Car. II. did not make any division of the parish, but merely set up the different townships in the parish as though they were independent poor law districts. Again, it seems to have been thought that, whether what they held was right or wrong, time has established that. It was pointed out in the case of *Reg.* v. *Tipton* in the year 1842 that the result might be to destroy settlements. That was recognized and accepted as a result, and, very possibly, not an intentional result, of the legislation. Whether that was a useful and laudable result, or one that ought to be deprecated and cured by legislation is quite a different matter. It may be very much doubted whether in any Parliament subsequent to that date of 1842 it would have been possible to get legislation which should extend the doctrine, not by any manner of means at that date universally approved of, of birth settlements. We know perfectly well that at an earlier date even than that, the principle of the settlement law in the case of removing a pauper from one part of the country where he had friends and, presumably, opportunities at a future date of doing well for himself, to another where he would be stranded altogether and rendered a pauper for life, was very much questioned. However, from whatever motive, I see no ground to suppose that in any statute that has been referred to, or in any statute that I am aware of, that policy of doing what the Queen's Bench said in 1842 could not be done—namely, create a fancy settlement, as it were, by relation, has ever so much as been discussed. At any rate, it is reasonably clear to my mind that the sections in the different Acts of Parliament which have been referred to have no relation to that matter. Sections 67 and 68 of the Act of 1894 were relied upon, and, I think rightly, section 68 was put in the foreground, for I doubt whether, under section 67, the case arises at all. Section 67 appears to me—I do not lay it down because it has not been very much discussed—to relate to the transfer from one authority of the debts and liabilities to a new authority; but section 68 undoubtedly deals with the relations of new authorities generally, not the case merely of transfer; but then it must be the debts and liabilities which are either liabilities of the two parishes together or liabilities of one of them by reason of the separation, in respect of which it has some kind of equity to be relieved, from the other. Now, if the doctrine laid down in 1842, and not as I think questioned since, holds, there is no liability adjust; the parish in which the pauper gained the birth settlement no longer exists; it is impossible therefore to take him to the parish in which he was born, because there is none, and there is nothing for section 68 to operate upon in any point of view. In my opinion, therefore, the judgment of the court below ought to be affirmed and the appeal dismissed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion, but, speaking for myself, I cannot pretend at present quite to understand the judgments of the Court of Queen's Bench in the case of *The Guardians of the Stourbridge Union* v. *The Guardians of the Droitwich Union*. Cockburn, C.J., and Blackburn, J., say in so many words in that case that they think that the reasons which led the Court of Queen's Bench to decide as they did decide in *Reg.* v. *Tipton* set forth in the judgment of Lord Denman were founded on mistake, but they say that they must not lightly overrule that authority, and so proceed to follow it. I am not quite sure that I know why the Court of Queen's Bench in the days of Cockburn, C.J., thought that the reasons given by Lord Denman, and upon which the decision in *Reg.* v. *Tipton* was founded, were founded on mistake. It seems to me to-day, at all events, that we are not only following *Reg.* v. *Tipton* because it has been the established law for fifty years but we are following the reasoning of it. I looked myself to try and see whether there was not some feature presented by the words of the 21st section of the statute of the 13 & 14 Car. II., c. 12, to which Cockburn, C.J., and Blackburn, J., were referring when they said that the reasoning of *Reg.* v. *Tipton* was founded on mistake, which we could find either in the statute of 1894 or in the principles of the statute of 1876 to which really the statute of 1894 throws one back. I say for myself that I am unable to find with any certainty what it was that Cockburn, C.J., and Blackburn, J., were referring to when they made the observations that they did. I entirely agree myself with the reasoning in *Reg.* v. *Tipton* in so far as it says, if you treat legislation as abolishing the old parish and creating new parishes, instead of it, that unless there are some express words in the statute that the old liabilities shall be borne by the new parishes, you cannot impose upon the new parishes a liability which, because it happened to be a liability, had to be borne by the old parish. You can only do so, according to my view of the matter, if you are of opinion that the true effect of the legislation dividing the old parish and creating two new parishes is to create the new parishes in one sense for purposes of administration only, and to continue the old parish as a poor law parish for the purpose of settlements and liabilities and the rest of it. But whether you look at the statute of Charles II. or whether you look at the Act of 1894 it is extremely difficult to take that view, and if you do take that view it would almost look as if the proper order was the order made by the justices in this case without any amendment at all; because if the old poor law parish continues to exist so that you can say that the birth settlement gained in it has not gone, then it would seem that the proper order ought to have been as the justices originally made it; and leave the two new parishes to adjust their liabilities under that order.

For myself I concur, but I prefer to put my judgment upon the same ground that has been put in so many cases since *Reg.* v. *Tipton*, and I think that decision binds us here; it has been law for so long that I do not think we ought to alter it now.

Solicitors, *Langhams*, for *G. Scales*, Dorking; *Howard C. Jones*.

different? I think not. In plain reason it must be said that the use to which the defendant's signature was applied was in substance and effect forgery, whether or not it amounted to the criminal offence of forgery? I think it well to point out that cases like the present differ widely from those in which the party sought to be charged has agreed and intended to enter into contractual obligation by bill or note but has been defrauded into agreeing, or been defrauded in the manner in which the bill or note has been dealt with. In such cases he is liable, on principle and authority, to any one who has dealt with the bill or note in good faith and for value. It was in argument admitted that the case of *Foster* v. *Mackinnon* is in point, and is an authority binding on me if the Bills of Exchange Act of 1882 has not altered the law as there declared. I find that the law has not been so altered. I see nothing in the Act to warrant the suggestion that it has been altered, and it is noteworthy that all the text-writers dealing with the Bills of Exchange Act, 1882 (including, indeed, the draftsman of the Act), treat that case as an existing authority. The facts in *Foster* v. *Mackinnon* were that an old man of feeble sight was induced—without, as the jury found, any negligence on his part—to sign his name on the back of a bill by the fraudulent statement that it was a guarantee which, in fact, he had undertaken to sign. The Court of Common Pleas (consisting of Bovill, C.J., and Byles, Keating, and Montagu Smith, JJ.) held that he was not liable, and this in an action by what was then called a *bonâ fide* holder for value and without notice, of which "holder in due course" is now the legal equivalent. In these islands, cases in litigation of frauds such as that here practised are of rare occurrence, partly because of the existence and character of our stamp laws. But in the United States of America, where no such laws exist, there are many authorities dealing with points similar to that in the present case: *Douglas* v. *Matting*, 4 Amer. Rep. 238 (1870); *Taylor* v. *Atchison*, 5 Amer. Rep. 118 (1870); *Whitney* v. *Snyder*, 2 Lans. 477 (1870); *Walker* v. *Egbert*, 9 Amer. Rep. 548 (1871); and *Griffiths* v. *Kellogg*, 20 Amer. Rep. 48 (1876). The great weight of United States authorities supports the view of the common law expressed by the English judges.

I have thought it right to say so much, but in truth these authorities are not necessary for the purposes of this case. They are all cases where the bills or notes had been negotiated to persons now called "holders in due course." It follows, if such a holder cannot in a case like the present recover, *a fortiori* that the plaintiff—who, as named payee, is one of the immediate parties—cannot recover.

In the result, therefore, my judgment must be for the defendant, and the plaintiff must be enjoined from in any way dealing with the notes, and the same must be cancelled so far as they purport to be the notes of the defendant.

Judgment for the defendant with costs; stay of execution.

Solicitor for the plaintiff, *Algernon E. Sydney.*

Solicitors for the defendant, *Renshaw, Kekewich, & Smith.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — March 3.

In re HUMPHREYS.

Ex parte LLOYD-GEORGE AND ANOTHER. (a.)

Solicitor—Costs—Charging order—"Property recovered or preserved"—Bankruptcy—Criminal proceedings under the Debtors Act, 1869—Order to trustee to prosecute bankrupt—Money found on bankrupt at time of arrest—Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28.

The words "property recovered or preserved" in section 28 of the Solicitors Act, 1860, means property recovered or preserved in a suit, matter, or proceeding in a court of justice.

The appellants acted as solicitors for a trustee in bankruptcy who, in the course of the bankruptcy proceedings, was directed by the court to prosecute the bankrupt for an offence under the Debtors Act, 1869. The bankrupt, who had left the country, taking with him a sum of money, was arrested abroad, and the money found upon him at the time of his arrest was taken possession of by the police, and remitted to the appellants by virtue of a power of attorney prepared by them on behalf of the trustee in bankruptcy. The appellants claimed a charging order upon this sum under section 28 of the Solicitors Act, 1860, for their costs and expenses of and incidental to the recovery thereof, including the costs and expenses of procuring the arrest of the bankrupt and of the proceedings consequent thereon, as money recovered by them in the proceedings.

Held, that the appellants were not entitled to a charging order, as the money was not recovered in the proceedings in bankruptcy, but by virtue of the power of attorney.

Appeal by a firm of solicitors from a decision of the Divisional Court (Wright and Kennedy, JJ.) reversing an order of the county court judge of Carnarvonshire.

The facts and arguments are stated in the judgment.

W. S. Robson, Q.C., and *S. T. Evans*, for the appellants.

H. Reed, Q.C., and *Carrington*, for the trustee.

Cur. adv. vult.

March 3.—CHITTY, L.J., read the judgment of the court: This in an appeal from the order of the Divisional Court discharging an order dated the 10th of November, 1896, made by the county court judge of Carnarvonshire sitting in bankruptcy. The appellants are a firm of solicitors who obtained the order in the county court. It was made on their petition for a charging order under the provisions of section 28 of the Solicitors Act, 1860. The order declared that the sum of £813 mentioned in the petition had been recovered and preserved for the bankrupt's estate through the instrumentality of proceedings instituted by the petitioners on behalf of the trustee in bankruptcy, and ordered that the costs, charges, and expenses of the petitioners of and incidental to the recovery and preservation of the £813, including the costs and expenses of the petitioners in procuring the arrest of the bankrupt and the costs and expenses of the proceedings taken before the justices preliminary to and consequent on such arrest, and of

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the petition and the parties properly appearing thereon, should be taxed and paid out of the £813 recovered and preserved as aforesaid. The bankrupt, a horse dealer, had absconded to Australia, taking with him the sum of £813, the proceeds of the sale of his horses, and the property of his creditors under the bankruptcy. Two criminal charges were made against him. The first was for forgery, and in this matter the appellants acted as solicitors for his father. Although they introduced charges against the trustee in their cash account for proceedings on this charge, the appellants do not now seek to have these charges paid out of the bankrupt's estate. The other criminal charge was for offences against the Debtors Act, 1869. In respect of this charge the county court judge, on an application made by the appellants on behalf of the trustee, whose solicitors they then were, directed the trustee to prosecute the bankrupt by order made in April, 1895. To this order section 166 of the Bankruptcy Act, 1883, applied, and thereupon it became the duty of the Director of Public Prosecutions to institute and carry on the prosecution. The object of the enactment appears to be to save the bankrupt's estate from the costs of the prosecution. The bankrupt was arrested in Australia on the criminal charges and brought to this country; he was afterwards discharged by the justices on the charge of forgery, and was tried and acquitted on the charge under the Debtors Act, 1869. At the time of his arrest he had on him the sum of £813, which was taken from him by the police authorities. The balance of this sum, amounting to upwards of £700, was remitted to the appellants by virtue of a power of attorney prepared by them on behalf of the trustee in bankruptcy. The appellants have retained in their own hands the money thus received. They delivered to the trustee a cash account, in which they sought to deduct large sums in respect of the costs of the prosecutions and other matters, some of which, it is admitted, they are not entitled to claim. The account showed a balance of £323 4s. payable to the trustee. Although they had been requested to deliver a bill of costs to the trustee in September, 1896, they had not done so before the charging order was made. In fact they have not now delivered their bill of costs.

It was contended on behalf of the appellants that they were entitled to retain the money on two grounds—first, by virtue of the charging order; and secondly, by virtue of a lien they claimed as solicitors. As to the charging order, I think it ought not to have been made. Section 28 of the Solicitors Act, 1860, is to the effect that in every case in which a solicitor is employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or a judge before whom any such suit, matter, or proceeding has been heard or shall be pending to declare such solicitor entitled to a charge upon the property recovered or preserved. "Property recovered or preserved" means property recovered or preserved in any suit, matter, or proceeding in any court of justice. Obviously the proceeding must be in a civil court of justice. The enactment does not extend to criminal proceedings. In a criminal proceeding, instituted as it is for the punishment of the offender, no property is recovered or preserved. The only possible exception which occurs to us is an order made after conviction by the judge for restitution of the property to the owner under the provisions of the Acts relating to larceny and other similar offences (24 & 25 Vict. c. 96, s. 100; 35 & 36 Vict. c. 93, s. 30). If that be an exception—a point on which it is not necessary to express any opinion—the only costs for which a solicitor could obtain a charging order would be the costs of obtaining the order for restitution. In the case before us the money received by the appellants was not recovered or preserved in any civil proceeding in a court of justice. It was received merely by virtue of the power of attorney. It was contended that it was recovered in the proceedings in the bankruptcy. The answer is, it was not. The only colour for the argument was the order directing the prosecution. This point is covered by what we have said as to criminal proceedings, coupled with the fact that the money was not recovered by virtue of that order, although the order may have led indirectly to the recovery. To these reasons against the charging order we may add the following. The jurisdiction under section 28 of the Act of 1860 is discretionary. We entirely agree with the opinion expressed by Bowen, L.J., in *Greer* v. *Young*, 31 W. R. 930, 24 Ch. D. 545, at p. 557, where he said that "the Act gives a discretionary power to the court; the solicitor has no absolute right to the charge, but only power to ask the court in the exercise of its discretion to make the charge." Without going so far as to say that the Bankruptcy Court ought never to make a charging order in favour of the solicitor to the trustee upon the funds which belong to the creditors, we think that the cases in which the discretionary power ought so to be exercised must be rare.

In the circumstances of this case we think that the discretion was wrongly exercised. There is great force in the observations made by Wright, J., on rule 125 of the Bankruptcy Rules regulating the priority of costs and charges payable out of the estate. Still there may be occasions on which it would be right to make the order, seeing that the ordinary right of the solicitor to be paid for his services out of the estate is only through the right of the trustee to obtain the costs out of the estate, a right which the trustee may have lost by reason of his being a defaulter or by his misconduct in which the solicitor is not implicated: see *Ex parte Harper*, 30 W. R. 650, 20 Ch. D. 685. For these reasons we think that the Divisional Court were right in reversing the charging order.

The point as to the solicitor's lien, apart from the Act, does not appear to have been raised in the Divisional Court. It may be disposed of in a few words. The petition was not founded on lien; it was simply for a charging order. The solicitor to the trustee, whether in bankruptcy or in the case of an ordinary trust, has no lien on the trust estate. The trust estate in bankruptcy does not belong to the trustee; in equity it is the property of the creditors. The right of the solicitor to be paid out of the bankrupt's estate is only through the right of his client, the trustee. He has no independent right (see *Ex parte Harper*). No doubt a solicitor employed by the trustee with respect to the trust estate is not uncommonly called or calls himself solicitor to the estate, but this is a misnomer. The law on this subject is well stated by North, J., in *Staniar* v. *Evans*, 35 W. R. 286, 34 Ch. D. 470, at pp. 476, 477. Unfortunately for themselves the appellants have pursued a mistaken course. It was their duty to pay the money to the trustee and to deliver a bill of costs, and to have taken steps for the taxation of the bill at the proper time. At the conclusion of the argument their counsel stated that they would now follow this course. Nothing which has fallen from us will in any manner prejudice them on the taxation. The respondent submits that on the delivery of the bill it should be taxed, and all proper costs and charges should be allowed. There is no undertaking on either side.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Lloyd-George, Roberts, & Co.*,

Solicitors for the trustee, *Saffery, Huntley, & Son*, for *Breese, Jones, & Casson*, Portmadoc.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Jan. 18.

QUEENSLAND NATIONAL BANK v. PENINSULAR AND ORIENTAL STEAM NAVIGATION CO. (*a*.)

Ship—Bill of lading—Implied warranty—Fitness to carry particular cargo — Specie placed in bullion-room.

Gold was shipped under a bill of lading which contained exceptions from liability for loss by robbers or thieves, or from any act, neglect, or default of the master and crew. The parties entered into the contract upon the footing that the ship was provided with a bullion-room for the safe carriage of the gold. During the voyage the bullion-room was broken open and the gold was stolen.

Held, that there was an implied warranty in the bill of lading that the bullion-room was so constructed as to be reasonably fit to resist thieves.

Appeal from the decision of Mathew, J., upon a point of law raised upon the pleadings.

The action was brought to recover £5,000 damages for the loss of a box containing 5,000 sovereigns shipped by the plaintiffs on the defendants' steamship *Oceana* at Port Jackson under a bill of lading which provided that the goods were to be delivered at Lloyd's Bank, London, and contained an exception clause against loss by (*inter alia*) robbers or thieves by sea or land, defects latent or otherwise in hull or its appurtenances, or from any act, neglect, or default whatsoever of the pilot, master, mariners, or other servants or of the agents of the defendants. The box was placed by the defendants in the bullion-room of the *Oceana*, which was broken open during the voyage, and the box with the £5,000 in sovereigns was stolen.

The plaintiffs in their statement of claim alleged that there was an implied warranty by the defendants that the *Oceana* had such a bullion-room as made her a safe and fit vessel for the carriage of bullion, whereas the construction of the bullion-room was so defective that she was not a safe and fit vessel for that purpose.

It was ordered by Collins, J., at chambers that the question whether there was any warranty by the defendants under the bill of lading that the room in which the bullion was stowed was so constructed as to be reasonably fit to resist thieves should be tried before the trial of the action.

There was no mention of a bullion-room in the bill of lading, but upon the admissions made during the argument, Mathew J., in giving judgment, said: "I assume, for the purpose of my decision, that the vessel in question, the *Oceana*, like others of her class, was furnished with a receptacle for bullion and valuables, usually called the specie room; and that the contract in the bill of lading was entered into with the knowledge and upon the footing that this receptacle had been provided for the safe carriage of the gold mentioned in the bill of lading." The learned judge held that there was an implied warranty that the bullion-room was so constructed as to be reasonably fit to resist thieves. The defendants appealed.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Joseph Walton, Q.C., and *R. M. Bray, Q.C.*, for the defendants.—There is no implied warranty in this bill of lading that the bullion-room is reasonably fit to resist thieves. There is no mention of a bullion-room in the bill of lading, and there was no obligation on the shipowners to carry the gold in the bullion-room. The gold might have been carried in any part of the ship. No doubt the plaintiffs knew that this ship had a bullion-room, but the assumption made by Mathew, J., in the court below is an erroneous assumption. The only implied warranty in the bill of lading is that the ship is reasonably fit to carry the particular cargo: *Tattersall* v. *National Steamship Co.*, 32 W. R. 566, 12 Q. B. D. 297; *Maori King* v. *Hughes*, 44 W. R. 2, [1895] 2 Q. B. 550. Here the ship was reasonably fit, though there might have been negligence in the carriage, which is covered by the exceptions in the bill of lading. In *Maori King* v. *Hughes* the bill of lading was headed "Refrigerator bill," and it was held that the necessary implication was that the refrigerating chamber should be reasonably fit to carry the meat in a sound condition. Here there is no reference in the bill of lading to a bullion-room. Secondly, if there is an obligation to carry the gold in a bullion-room, there is no implied warranty that the bullion-room shall be reasonably fit "to resist thieves." The shipowners might have a weak bullion-room, and at the same time employ a man to keep guard over it.

T. E. Scrutton (*J. Lawson Walton, Q.C.*, with him), for the plaintiffs.—The decision of Mathew, J., is right. The cases of *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 26 W. R. Dig. 216; *Stanton* v. *Richardson*, 21 W. R. 71, L. R. 7 C. P. 421, L. R. 9 C. P. 390, 22 W. R. Dig. 223; *Gilroy* v. *Price*, [1893] A. C. 56, 41 W. R. Dig. 223; *Maori King* v. *Hughes*, shew that there is an implied undertaking that the ship is at its departure reasonably fit for accomplishing the service which the shipowner engaged to perform. The particular cargo must be looked at. Here there is an implied warranty that the bullion-room, in which the gold was to be placed, is reasonably fit to carry the gold. The object of the bullion-room is to keep the gold secure from thieves. There was, therefore, a warranty that the bullion-room was so constructed as to be reasonably fit to resist thieves.

A. L. SMITH, L.J.—In my opinion this appeal must be dismissed. The defendants had a bullion-room in *The Oceana* for the purpose of the conveyance of bullion and specie from Australia and other countries. The bill of lading contains large exceptions as to liability, included among them being exceptions of loss from robbers or thieves by sea or land, or from the negligence of the defendants' servants. The question now before us is whether under this bill of lading there is any implied warranty that the bullion-room in which the gold was placed was so constructed as to be reasonably fit to resist thieves. The importance of that question is obvious, because, if the plaintiffs had to rely solely upon the bill of lading, the defendants would in all probability have an answer by showing that the loss arose from thieves. The form of question was settled by my brother Collins at chambers, and the case was argued before my brother Mathew. It seems to me that the foundation of the learned judge's judgment is his statement that *The Oceana* was furnished with a receptacle, called a specie room, for bullion and valuables, and that the contract in the bill of lading was entered into with the knowledge and upon the footing that this receptacle had been provided for the safe carriage of the gold mentioned in the bill of lading. In my opinion Mathew, J., rightly made that assumption upon the admissions

before him. That assumption brings the case within the decision in *Maori King* v. *Hughes*. There was therefore a warranty that the bullion-room should be reasonably fit to carry the gold. It was said, however, that there was no implied warranty that the bullion-room should be reasonably fit to resist thieves. The parties to the contract contemplated that the gold should be carried in the bullion-room, and they entered into the contract upon that basis. Now, the object of a bullion-room is not to resist the waves or fire, but to secure the gold in it from thieves. That was what the parties had in view when they contracted on the footing of the existence of a bullion-room. Why is it wrong to draw the inference that there was a warranty that the bullion-room should be reasonably fit to resist thieves? It was said that the gold could have been carried in another part of the ship. That was not the issue before Mathew, J. The question is whether there was a warranty that this bullion-room, which was in the contemplation of the parties at the time they entered into the contract, was reasonably fit to resist thieves. Was the ship, at the time when she started on her voyage, reasonably fit to carry the gold? There are several authorities upon the subject. The first is *Steel* v. *State Line Steamship Co.* Then came *Tattersall* v. *National Steamship Co.*, followed by *Stanton* v. *Richardson* and *Maori King* v. *Hughes*. In the latter case there was a refrigerating chamber for the carriage of meat, and this court held that there was an implied warranty that that part of the ship should be reasonably fit for the carriage of the meat. So here, I think that that part of the ship in which the bullion was to be carried—namely, the bullion-room—should be reasonably fit to resist thieves. The appeal must therefore be dismissed.

CHITTY, L.J.—I am of the same opinion. The bullion-room was in the contemplation of the parties at the time when they made the contract, and the learned judge was justified in making the assumption of fact which he did. What was a bullion-room for? One great peril to which cargo of this class is exposed is loss from theft, and therefore in my opinion the proper question was whether the bullion-room was reasonably fit to resist thieves. The receptacle must not be an old packing-case, it must be a bullion-room, and in my opinion it must be reasonably fit for that purpose for which a bullion-room is ordinarily used.

COLLINS, L.J.—I am of the same opinion. When we introduce into this case the fact that both parties contracted that the gold should be carried in the bullion-room, it necessarily follows that the bullion-room should be a reasonable bullion-room. Does that imply that it should be reasonably fit to resist thieves? It is easy to put an extreme case, such as that of the packing-case. It is obvious that a packing-case is not a reasonably proper receptacle because it is not strong enough. What then is the standard of strength? In my opinion it is its reasonable capability of resisting thieves.

Appeal dismissed.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the defendants, *Freshfields & Williams.*

From Q. B. Div. (Bkcy.) (A. L. Smith, Chitty, and Collins, L.JJ.) — Jan. 21.

In re A BANKRUPTCY NOTICE. (*a*.)

Bankruptcy—Scotch judgment registered in England—Jurisdiction to issue bankruptcy notice in England—Judgments Extension Act, 1868 (31 & 32 *Vict. c.* 54), *s.* 3—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g).

A decree of the Court of Session in Scotland registered in England under the Judgments Extension Act, 1868, *cannot be made the foundation of a bankruptcy notice under the Bankruptcy Act*, 1883, *s.* 4, *sub-section* 1 (g).

In re Watson, Ex parte Johnston, 41 *W. R.* 34, [1893] 1 *Q. B.* 21, *followed.*

This was an appeal from Mr. Registrar Giffard, who refused to give leave to issue a bankruptcy notice.

On the 4th of December, 1897, the applicant obtained a decreet in the Court of Session in Scotland for £1,250. The action was brought on a bill of exchange.

On the 11th of December the applicant registered a certificate of the decreet under section 3 of the Judgments Extension Act, 1868, in the High Court in England, and on the 16th of December he applied to the registrar in bankruptcy for leave to issue a bankruptcy notice founded on this registered certificate.

The registrar held that he was bound by *In re Watson, Ex parte Johnston*, 41 W. R. 34, [1893] 1 Q. B. 21, and refused to give leave on the ground that the applicant had not obtained "final judgment" against the debtor within the meaning of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883.

By the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), it is provided as follows:

Section 3. "On production to the senior master of the Court of Common Pleas at Westminster or to the master of the Court of Common Pleas at Dublin, of the certificate of one of the forms contained in the schedule hereunto annexed, as the case may be, of any extracted decreet of the Court of Session in Scotland, which shall hereafter be obtained for the payment of any debt, damages, or expenses purporting to be signed by the extractor of the Court of Sessions. . . . Such certificate shall be registered by such master in a register to be kept in the Court of Common Pleas at Westminster and Dublin respectively for that purpose, and to be called the 'Register for Scotch Judgments,' and such certificate, when so registered, shall, from the date of such registration, be of the same force and effect as a judgment obtained or entered upon the date of such registration as aforesaid in the court in which it is so registered. . . ."

Section 4. "The Courts of Common Pleas at Westminster and at Dublin, and the Court of Session in Scotland, shall have and exercise the same control and jurisdiction over any judgment or decreet, and over any certificate of such judgment or decreet registered under this Act in such courts respectively as they now have and exercise over any judgment or decreet in their own courts, but in so far only as relates to execution under this Act."

By the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52) it is provided as follows:

Section 4, sub-section 1. "A debtor commits an Act of Bankruptcy in each of the following cases—

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

(*g*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt in accordance with the terms of the judgment . . ."

F. Cooper Willis (*C. Tindale Davis* with him), on behalf of the creditor, the applicant.—By registering in the High Court the certificate of the decreet of the Scotch Court it becomes, by section 3 of the Judgments Extension Act, 1868, of the same force and effect as a judgment obtained in the High Court. The creditor is therefore entitled to issue a bankruptcy notice as a creditor who has obtained final judgment within the meaning of section 4, sub-section 1 (*g*), of the Bankruptcy Act of 1883. The case of *In re Watson, Ex parte Johnston*, it is true, appears as an authority against this contention, but that case is not binding on this court, as there is a later case, *In re Low, Bland* v. *Low*, 38 SOLICITORS' JOURNAL 78, [1894] 1 Ch. 147, decided by the Court of Appeal, and which is not consistent with *In re Watson*.

Carrington, for the debtor.—The case of *In re Watson* is a binding authority, and covers this case.

The COURT here stopped counsel.

SMITH, L.J.—The question here is whether the registrar was right in refusing to give leave to issue a bankruptcy notice. I think he was right. The creditor who made the application obtained a decreet or judgment in Scotland for £1,250. Under the Judgments Extension Act, 1868, he registered a certificate of that decreet in the High Court of England, and then applied for leave to serve the debtor with a bankruptcy notice founded on that registered certificate.

The question is whether he can do that. I think he cannot. This question is covered by authority, and the case of *In re Watson* is binding upon us.

Section 2 of the Bankruptcy Act, 1883, enacts that the Act shall not, except so far as is expressly provided, extend to Scotland or Ireland.

Section 4, sub-section 1 (*g*), of the same Act provides that a debtor commits an act of bankruptcy if a creditor has obtained a final judgment against him —that is, a final judgment in England.

It is clear that the creditor here has not obtained a final judgment within the meaning of that sub-section. Then the creditor says that he is not confined to the Bankruptcy Act of 1883, but can fall back on the Judgments Extension Act, 1868, and he relies on section 3 of that Act, contending that the effect of that section is to make his registered certificate of the decreet as effectual as a final judgment obtained in the High Court of England. But it is impossible to construe section 3 without reading into it section 4. Section 3 says that the registered certificate shall have the same force and effect as a judgment obtained in England, but section 4 limits that provision by the words "but in so far only as relates to execution under this Act." The present case does not relate to execution but to the serving of a bankruptcy notice. The creditor, therefore, clearly cannot rely upon section 3. The case of *In re Watson* is authoritative upon that point, and I therefore am of opinion that this appeal must be dismissed.

CHITTY, L.J.—The decision of the registrar is clearly right. The words "final judgment" in section 4 of the Bankruptcy Act, 1883, mean a final judgment in a court having jurisdiction in England, and the creditor here has therefore to fall back upon the provisions of the Judgments Extension Act, 1868. *In re Watson*, however, decides that section 4 of that Act cuts down and limits the provisions of section 3 to cases only which relate to execution under the Act, and in deciding the present case we are bound by that authority. Counsel on behalf of the creditor contended that the decision in that case is inconsistent with a later case decided by the Court of Appeal—namely, *In re Low*, but I do not agree with that contention. There is no conflict between the two cases. They seem to be quite reconcilable with each other.

COLLINS, L.J.—I am of the same opinion. If it had not been for the decision of the Court of Appeal in *In re Watson* I should have liked to hear some further argument. But that case is binding on us, and on that authority I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitor for the creditor, *G. M. Folkhard.*

Solicitors for the debtor, *Hicks, Arnold, & Mosley.*

High Court of Justice.

Chan. Div. Kekewich, J. — Feb. 3.

In re DE NICOLS.
DE NICOLS *v.* CURLIER. (*a.*)

Domicil—Matrimonial domicil—French law—Contract of marriage—Movable goods acquired during coverture—Change of domicil.

Movable property acquired during coverture by French spouses, who, being married in France without any settlement, become subsequently domiciled in England, is governed by the law of their antecedent matrimonial domicil, and not by that of their subsequently-acquired English domicil.

In 1854 M. and Madame de Nicols, French subjects, were married in Paris. No contract or settlement was made by the parties on their marriage, in which case, according to French law, their rights with respect to their property was regulated by the law of "community of goods," which provides, *inter alia*, that all the movable goods which the spouses may possess at the date of the marriage, as well as all the movable goods which they may acquire during the marriage, are to be the common property of them both.

In 1863, M. de Nicols, having become a bankrupt in France, came over to England with his wife.

In 1865, they became naturalized as English subjects. M. de Nicols, with the assistance of his wife, carried on a business in England, whereby he amassed a large fortune.

M. de Nicols died on the 28th of February, 1897, having by his will dated the 22nd of March, 1895, given his residuary estate real and personal to trustees upon trust for sale and to hold the proceeds upon trust for his wife for her life, and after her death upon trusts for the daughter of the marriage and her husband and children.

This was an originating summons taken out by Madame de Nicols against the executors and trustees of the will, the daughter, and her children, which raised, *inter alia*, the question, Did the change of domicil of the parties to the marriage alter the legal rights

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

conferred on them by the French law of community of goods in virtue of their matrimonial domicil with respect to movable goods acquired during the coverture?

Renshaw, Q.C., and *Ingle Joyce*, for the plaintiff, Madame de Nicols.—The rights given by the matrimonial domicil cannot be altered by the change of domicil. They are therefore unaffected by the will, and the plaintiff is entitled to a moiety of the movable goods in the possession of the testator or of the testator and the plaintiff jointly, at the time of the testator's death. The French law is as binding as a marriage contract would be, if one had been executed, both as regards present and after-acquired movable property. It would be unfair to hold that the wife's rights are altered by the change of domicil, as she is obliged to change her domicil with her husband.

They referred to Westlake on Private International Law, 3rd ed., pp. 68, 69; *Watts* v. *Shrimpton*, 21 Beav. 97, 5 W. R. Dig. 50; Dicey's Conflict of Laws [1896], p. 648 and pp. 550 to 552; *In re Marsland*, 34 W. R. 540; 2 Bishop's Law of Married Women, s. 569; *Boyer's case*, Dalloz Jurisprudence Générale [1854], Part I., p. 61.

Warrington, Q.C., *Elgood*, and *Maugham*, for the trustees and executors of the will.

A. V. Dicey Q.C., and *Whinney*, for the daughter of the marriage and her children.—The right to movables acquired in England during the coverture ought to be regulated by the law of the English domicil, the domicil at the time of the acquisition of the property. No English case, apart from *dicta*, decides that the law of the matrimonial domicil regulates movables subsequently acquired under a changed domicil. Moreover, in this case the rights are only governed by the common law of France, and not by contract. Lord Eldon, in *Lashley* v. *Hog*, Robertson's Scotch App. Cas. 4, 1 Burge Col. and For. Law, Part I., c. 7, s. 8, pp. 623-625, says that, unless there had been in that case a nuptial contract, the law of England, notwithstanding the domicil of the parties at the time of their marriage was French, would have regulated the rights of the husband and wife who were domiciled in England when the marriage was dissolved by death: *Feaubert* v. *Turst*, Prec. Ch. 207, Robertson's Scotch App. Cas. pp. 3, 4; Story's Conflict of Laws, 7th ed., ss. 171, 171*a*, 171*b*; *In re Letts Trusts*, 7 L. R. Ir. 132, 29 W. R. Dig. 75; *Duncan* v. *Cannan*, 18 Beav. 128, 2 W. R. Dig. 31; *Gale* v. *Davis*, 4 Martin's Rep. (Louisiana) 645; *Murphy* v. *Murphy*, 12 American Dec. 475; *Saul* v. *His Creditors*, 16 American Dec. 212.

KEKEWICH, J.—Be it remembered that the only question which I am now called upon to decide is, whether as regards that property conveniently described as "moveables," although the word is not so familiar to English law as it is to text-book writers on international law, of which this testator was at the time of his death the ostensible possessor, it really belonged to him wholly, or whether his widow surviving him was entitled to some interest in that property by virtue of the French law applying to his property at the date of the marriage and continuing during their lives.

That I understand to be the question. It is admitted on both sides that there is no decision on the question, by "decision" of course being meant a decision of a court of competent jurisdiction in England by which this court is bound. There is said to be a decision in Ireland, *In re Letts Trusts*, 7 L. R. Ir. Ch. 132. I have already pointed out in that case that an order was made on an unopposed petition, and although some of the difficulties were brought to the attention of the court, there being no opposition, I cannot construe that as a decision of the Irish Court, even if that would be binding on me, which of course it would not.

There are decisions in the American courts entitled to great respect but at the same time not binding on me, and one cannot be too careful in the application of American decisions when they arise between the laws of different States, because there are many circumstances affecting questions arising between the different States which might or might not be applicable to questions arising here.

There are *dicta* of some judges. Of course the *dictum* of Lord Eldon in *Lashley* v. *Hog*, Robertson's Scotch App. Cas. 4, is entitled to the greatest consideration, but it is difficult exactly to know what Lord Eldon meant, and I think it would be too large a conclusion to say that he meant that which counsel for the respondents here have contended that he did mean.

The other *dicta* seems to me hardly to approach the subject in any way, at any rate they do not directly touch the point I have to decide.

There are plenty of *dicta* in the text-books, and some of them which we accept as weighty authorities are very distinct on the point, and, so far as I can see, they are distinctly in favour of the plaintiff; at all events, as far as any consensus of opinion may be got from them, it is not adverse to the plaintiff's claim in this case. The result is that I must decide the question on principle.

One immediately asks, on what principle? It may be that the principle which occurs to me as the governing one is not the right one, if so, no doubt I shall be corrected.

The principle, then, by which I propose to guide my decision is this: The spouses were French people and they intermarried in France. It was open to them to marry according to one or two or possibly more regulations affecting their matrimonial property, property which either of them might acquire during the coverture. It is immaterial to consider what limit of choice they had. There was some limit of choice. They might have elected expressly to marry according to the community of goods rule, or that rule might have been applied by the law of France to their proprietary rights in the absence of any express election to the contrary, and that was what, as far as we know, took place. It may be there was something more, and it is possible there may have been some evidence of an express contract between those parties, but at any rate, whether it was express or not, they did make an election according to the law of France so as to subject the property which they then had or might thereafter acquire during the coverture to the law of community of goods. It seems to me that was a contract entered into by them. A contract which in this court we do not regard as the less effectual with respect to property thereafter acquired because such property had at that time no existence and was not then in contemplation.

In a Court of Equity a contract to settle property after-acquired is as effectual as a contract to settle property in possession at the date of the contract. If I am right in considering that the parties did for all proprietary purposes enter into a contract, although not expressed, that contract was thenceforward binding so as to govern the property then in possession or thereafter acquired, even though neither of them for a moment contemplated a change of domicil affecting such property as was in fact so acquired. Why am I to consider that that contract, if properly inferred from the fact of marriage by

French spouses and by the absence of any written contract to the contrary, was altered? It may be that it was perfectly competent to them at any time to alter that contract wholly or partially. I do not know, and I am not called upon and I do not choose to inquire, how far they could have altered it during their domicil in France. But, assuming it was competent for them to do so, why should I infer it? If I am at liberty to infer it, why should I infer it at the moment of change of domicil to England rather than at any other time? If I am to infer it, say, at the moment of change of domicil to England, or at any other time, why should I infer it solely as regards property after-acquired, why should I not also infer it with regard to property acquired before. It is said that rights acquired before change of domicil cannot properly be treated as altered by the change.

If the principle which I have endeavoured to explain is right, then they had acquired rights not only respecting the property they had, but respecting the property which might come to them afterwards.

Now, that seems to me to be the principle which I ought to apply. The spouses lived here, they became domiciled here. They were to all intents and purposes an English man and an English woman, and although Mr. Dicey said he was going to rest to some extent on the fact that there was a change of nationality, that the testator became naturalized here, I have not heard the argument promised on that point, and I venture to think the real reason is that, on consideration, there is no argument to be stated. In all these matters the sheet-anchor of judicial decision must be domicil. You look to the English domicil to ascertain what are the rights under the will, to ascertain the rights of the parties as between themselves—that is, between the husband and wife and children. But you must look back to the matrimonial domicil, which in this case was undoubtedly French, actually and intended, to see what the property is and what are the rights which govern it. It seems to me to be a fallacy to talk of the domicil at the date of the death as governing rights which do not exist. It must govern rights which do exist. It governs the right of the testator to dispose of his property. It does not affect his attempt to dispose of property which was not his. For that purpose to see what was his property and what was not we must look back to his express contract and look back to that law which governs his proprietary rights.

This proprietary right in this case seems to me on principle to be fixed at the moment of his marriage by the law of the community of goods; not only as regards the property which was then in possession, but as regards the property after-acquired. I can see nothing on which I can properly, as a matter of inference, say that there is any alteration of that contract and of those proprietary rights. I can see no principle on which I can say that either at the moment of change of domicil or any time subsequent there was any giving up or surrender by the plaintiff of that to which she was entitled under the matrimonial contract. Therefore it seems to me that I must hold that, in purporting to dispose of the whole of his property to which disposition the law will give effect, he must be considered as only disposing of that which was properly his, and that it did not include that which was his wife's property under the matrimonial contract—that is, under the community of goods.

The result is that the question which I propounded, and which I think is the right one at the present moment, should be answered in this way: that the plaintiff's right under the community of goods to the movable property acquired during the coverture by the spouses, or either of them, still remains unaffected by the will.

Solicitors, *Hicks, Arnold, & Mozley; Tyrrell Lewis, Lewis, & Broadbent.*

Chan. Div. }
Kekewich, J. } Jan. 12.

In re PAGET.
In re MELLOR.
MELLOR *v.* MELLOR. (*a.*)

Power of appointment—Real estate—Power of sale—Appointment to trustees upon trust for sale—Legal estate—Proper persons to conduct sale.

A testator gave his daughter a power of appointment over certain real estate in favour of her children. The daughter by will appointed the property to trustees upon trust for sale and to stand possessed of the proceeds upon trust for the objects of the power.

Held, that the appointment was good; that in the circumstances, the legal estate was vested in the trustees of the daughter's will; and that they were the proper persons to carry out the sale.

Kenworthy *v.* Bate, 6 *Ves.* 793, *and* Cowx *v.* Foster, 1 *Joh. & Hem.* 30, 9 *W. R. Ch. Dig.* 55, *followed.*

Adjourned summons.

By his will dated the 14th of June, 1871, Charles Paget, after making certain pecuniary and specific bequests, devised unto the defendants John William Mellor and Richard Enfield, their heirs and assigns, certain hereditaments specified in the fourth schedule to his will to hold the same to the uses therein declared in favour of the testator's daughter, Ellen Mellor, and her children—namely, to the use of his said daughter for her life, without impeachment of waste, and from and after her decease to the use of such one or more of her children, and in such shares and manner as she should by will or codicil direct, limit, or appoint give or devise the same, and in default of any such direction, limitation, appointment, gift, or devise, to the uses thereby limited in favour of the child or children of his said daughter.

The testator conferred a power of leasing the said hereditaments upon his daughter and her husband (if any) while they should be entitled to the possession or receipt of the rents and profits of the same, and also upon the trustees during the minority of any child or children of hers, and he also empowered the trustees at the request and by the direction in writing of the person entitled for the time being to the possession or rents and profits of such hereditaments, if adult, and if not adult, then, at the discretion of the trustees, to sell all or any part thereof, and for that purpose to revoke the existing uses and declare and limit new uses.

By a codicil to his said will dated the 7th of August, 1871, the testator declared that the powers of sale and leasing given by his said will should be exercisable by the trustees or trustee for the time being of the moneys bequeathed by his will in trust for such daughter, and not by the persons specified in his said will.

The testator was drowned on the 13th of October, 1873, and his will and codicil were duly proved.

Ellen Mellor was twice married. There was issue of the first marriage one daughter only—viz., the defendant, the Countess Elen Teleki. By her second husband, the defendant Alfred Mellor, Ellen Mellor

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

had six daughters—namely, the plaintiffs Gertrude Elizabeth Mellor and Violet Mellor, and the defendants Margaret Ellen Mellor, Elizabeth Catherine Mellor, Evelyn Mary Mellor, and Frances Alice Mellor.

By her will dated the 24th of October, 1875, Ellen Mellor, in exercise of the power of appointment contained in Charles Paget's will, appointed the above-mentioned hereditaments to the use of her husband, the defendant Alfred Mellor, Edward Daniel Mellor, and Philip Henry Mellor, their heirs and assigns, upon trust for sale as therein mentioned; and the testatrix thereby further directed, limited, and appointed that her trustees should stand possessed of the proceeds of sale, subject to the making good of any deficiency in the amount of the share of her eldest daughter in certain other trust funds, in trust for such children or child of the testatrix's second marriage, as being sons or a son should attain the age of twenty-one, or being daughters or a daughter should attain that age or marry, to be divided equally between them if more than one as tenants in common, as portions for them respectively, but nevertheless to be subject as to daughter's portions to the provisions thereinafter contained for settlement thereof. And the testatrix thereby directed her trustees to invest the funds representing each daughter's portion and pay the income thereof to such daughter for her life for her separate use without power of anticipation, and after the death of such daughter upon and for such trusts and purposes as such daughter, should by will or codicil appoint, and in default of and subject to any such appointment in trust for such daughter absolutely.

The testatrix made a codicil to her said will dated the 21st of June, 1879, but did not thereby affect the above dispositions.

The testatrix died on the 12th of March, 1880, and her will and codicil were duly proved.

The present trustees of Ellen Mellor's will—viz., James Gilbert Shaw Mellor, Gertrude Elizabeth Mellor, and Violet Mellor, took out this originating summons against the Right Hon. John William Mellor and Richard Enfield, the present trustees of Charles Paget's will, Alfred Mellor, and the remaining children of Ellen Mellor for the determination, *inter alia*, of the following question: Who, upon the true construction of the said respective wills and in the events which have happened, are the proper persons to sell the real estate particularized in the fourth schedule to the will of the said Charles Paget, and at whose request, if any, such real estate is to be sold, and to whom the proceeds of such sale will be payable?

R. J. Parker, for the plaintiffs and the Countess Teleki.—The exercise by Mrs. Mellor in her will of her power of appointment under Charles Paget's will was good, and her trustees have power to sell the lands: *Kenworthy* v. *Bate*, 6 Ves. 793; *Cowx* v. *Foster*, 1 Joh. & Hem. 30, 9 W. R. Ch. Dig. 55

Younger, for the defendant trustees.—The exercise of the power does not transfer the legal estate to the trustees of Mrs. Mellor's will: *Busk* v. *Aldam*, 23 W. R. 21, L. R. 19 Eq. 16; *Von Brockdorff* v. *Malcolm*, 33 W. R. 934, 30 Ch. D. 172; *Scotney* v. *Lomer*, 33 W. R. 633, 29 Ch. D. 535; and *In re Tyssen*, 42 W. R. 172, [1894] 1 Ch. 56. Both in his will and codicil the testator has shown his intention clearly that his trustees should retain property in their hands, and he did not intend that the appointment by his daughter should affect their estate. They are the proper persons to sell these lands.

Cave, for the other defendants.

KEKEWICH, J.—I will only decide one question—namely, whether the legal estate disposed of by Charles Paget's will is vested in the trustees of Mrs. Mellor's will or not. The testator's real estate is settled to uses by Mr. Paget's will in favour of Mrs. Mellor's children, and one way she could have exercised the power would have been by appointing to uses, which she has not done. She has appointed to the trustees of her will, and directed them to sell and divide the proceeds among her children, who are the objects of the power, and I shall conclude that this is a good appointment and vests the legal estate in the trustees of Mrs. Mellor's will with a trust for sale, unless Mr. Younger's argument and the cases cited by him are sufficient to support the contrary view. I found my opinion upon the case of *Kenworthy* v. *Bate*, which was recognized as going that far by Wood, V.C., in *Cowx* v. *Foster*, and also upon a consideration of the general facts of the present case. It is well settled that a power of appointment in favour of children is well exercised by an appointment to trustees for the children. In *Kenworthy* v. *Bate* the question was whether a power of appointing real estate was well executed by a devise to trustees to sell and an appointment of the money produced by the sale, and it was held that the power was well executed, and that case was followed in *Cowx* v. *Foster*. In *Kenworthy* v. *Bate* the Master of the Rolls says: "Then, does not a power to give include a power to sell for the purpose of giving the money instead of the land?" I think, therefore, that the legal estate must be in the trustees, so that they can sell the land, and, therefore, the result follows that they are the proper persons to carry out such sale.

Then, is the conclusion to which I have come in any way interfered with by Charles Paget's will? Mr. Younger has referred to *Busk* v. *Aldam* and *In re Tyssen*, but those cases come to this, that where an appointment has been made to the trustees of the other settlement, it does not follow that those trustees are entitled to receive the fund from the trustees of the original settlement, but it may be that the original trustees are bound to retain the fund and distribute it themselves. That depends entirely upon the intention of the original settlement. It is necessary, therefore, to examine the original settlement in order to find out how the power is to be exercised. If the intention is that the other trustees shall distribute the fund, then that intention must prevail. If it appears that the testator intended that the trustees of his will, and only those trustees, should sell and distribute the proceeds of sale, then I should accede to Mr. Younger's argument. The testator has by his will given certain powers of sale and leasing to the trustees. They have a power of sale at the request and by the direction in writing of the person entitled for the time being to the possession or rents and profits of the hereditaments if adult, and if not adult, then they have a power of sale exercisable at their own discretion. It is obvious, therefore, that the testator contemplated fettering the power in the hands of the trustees during the lifetime of the daughter and her husband (if any), and subsequently giving them, during the minority of the beneficiaries, a power of sale for the ultimate purpose of distributing the funds. But there are no negative words in the will, and I think the power of sale must be read with the power of appointment. All the other directions must have been given so as not to interfere with the power of appointment, and when that power has been exercised properly and the new estate thereby created has intervened then one part of the intention of the testator has come into active operation and the other part fails. He has stated two intentions not incon-

sistent with each other—namely, that which now can take effect, and that which at first took effect. I think that I am carrying out this intention by holding that the legal estate was well appointed to Mrs. Mellor's trustees, and that they have the power to sell. That, in my opinion, is the right view, and therefore I hold that the legal estate is now vested in the trustees of Mrs. Mellor's will in trust for sale.

Solicitors, *Busk, Mellor, & Norris; Field, Roscoe, & Co.*, for *Enfield & Son*, Nottingham.

Chan. Div.
Romer, J. } Feb. 18, 19, 23.

In re LORD MONSON'S SETTLED ESTATES. (*a.*)

Settlement—Estates settled in strict settlement—Incumbered estates settled on identical limitations—Discharge of incumbrances by a mortgage of both estates—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* 1—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 11.

Certain lands forming estate A. were settled in strict settlement. Later, by a separate instrument, the equity of redemption in estate B. was settled on similar trusts, and, owing to subsequent events, came, subject to the mortgage, to be settled in identically the same way as estate A.

Held, that, under the powers conferred by the Settled Land Acts, the tenant for life could pay off the mortgage on estate B. by money raised on a mortgage of estates A. and B., it being to the advantage of all persons interested in the estates to do so.

In re Mundy's Settled Estates, 39 *W. R.* 209, [1891] 1 *Ch.* 399, *and* In re Byng's Settled Estates, 40 *W. R.* 457, [1892] 2 *Ch.* 219, discussed.

Adjourned summons.

This was an application by Viscount Oxenbridge, the tenant for life of the Monson settled estates.

The particulars of the property were as follows:

In 1892 the settled estates consisted of those settled under the will dated the 5th of August, 1841, of the 5th Baron Monson, and those which were conveyed to the uses of such will by a deed dated the 9th of November, 1889. These together constituted the bulk of the Monson settled estates, which were settled to the use of Viscount Oxenbridge for his life, with remainder to his first and other sons successively in tail male, with remainder to his brother Debonnaire John Monson for his life, with remainder to his first and other sons successively in tail male, with remainders over in strict settlement.

In 1892 Viscount Oxenbridge was seised in fee simple of the rest of the Monson family estates in the county of Lincoln, subject to a mortgage thereon in favour of the Law Life Assurance Society for £52,650, and also to the payment of a jointure rent-charge to his wife, Viscountess Oxenbridge, in the event of her surviving him.

By an indenture dated the 30th of January, 1892, Viscount Oxenbridge, in pursuance of a family arrangement, conveyed these last-mentioned family estates, subject to the mortgage and jointure, to the uses and trusts then subsisting of the bulk of the family estates—*i.e.*, those settled by the will of 1841 and the conveyance of the 9th of November, 1889, subject to a proviso enabling Viscount Oxenbridge to charge the portion of the estates comprised in the indenture of the 30th of January, 1892, with the payment of certain annuities in favour of his younger brothers and sisters.

The then trustees of the first-mentioned settled estates were also made trustees of the last portion thus settled, for the purposes of the Settled Land Acts.

In 1897, in consequence of the depreciation of the value of land in Lincolnshire, the Law Life Assurance Society called in their mortgage.

The present summons was an application by Viscount Oxenbridge for a declaration to enable him to raise money to pay off this mortgage by mortgaging as well the last-mentioned settled estates as a portion of those settled by the will of 1841 and the conveyance of 1889, under the power conferred by section 11 of the Settled Land Act, 1890.

Viscount Oxenbridge filed an affidavit showing that another insurance company would lend the necessary money to pay off the Law Life charge on the security of both the estates he proposed, and he offered to procure a release of his wife's contingent jointure and to release also the power of appointing annuities in favour of his younger brothers and sisters.

Viscountess Oxenbridge died pending the hearing of the summons, so that her jointure never became payable. Viscount Oxenbridge had no issue. His brother, D. J. Monson, the next tenant for life, had an eldest son, A. D. J. Monson, who was of age, and they both approved of the proposed mortgage and supported the application.

Farwell, Q.C., and *F. L. Wright*, for the applicant.—There must be considered to be one settlement within the meaning of section 2, sub-section 1, of the Settled Land Act, 1882. From the decisions in *In re Mundy's Settled Estates*, 39 W. R. 209, [1891] 1 Ch. 399, and *In re Byng's Settled Estates*, 40 W. R. 457, [1892] 2 Ch. 219, it is clear that if the first settled estates had been subject to a mortgage, that might have been paid off by a mortgage of the land settled subsequently; and the same power should be exercisable in the converse case.

Reference was also made to *Hampden* v. *Earl of Buckingham*, 41 W. R. 516, [1893] 2 Ch. 531, and *In re Freme*, 42 W. R. 119, [1894] 1 Ch. 1.

Onslow, for D. J. Monson and A. D. J. Monson.

Neville, Q.C., and *Ribton*, for the trustees.—If this application were successful, an owner in fee of incumbered estates might save himself from personal liability by settling the incumbered estates on the trusts of settled unincumbered estates, and discharging the incumbrances by a mortgage of the whole. No authority exists for the present application.

Farwell, Q.C., replied.

Cur. adv. vult.

Feb. 23.—ROMER, J.—In my opinion it would be clearly beneficial to the settled estates as a whole that this application should be complied with; and the question is whether there is power under the Settled Land Acts to do what is required. Subject to the release by the applicant of the power to charge annuities the estate settled by the deed of the 30th of January, 1892, is now subject to the same uses and is held upon the same trusts as the estate settled by the deed of the 9th of November, 1889. The applicant has offered to release the above-mentioned power, and I proceed subject to that being done.

The legal point arising may be thus stated. Estate A. is first settled, and later on by a separate instrument the equity of redemption in estate B. is settled in a similar though not identical way, and, then,

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law

owing to subsequent events, estate B., subject to its mortgage, comes to be settled in identically the same way as estate A. The question is whether under the Settled Land Acts, when the mortgage on estate B. has to be paid off by a fresh mortgage and it is advantageous to all those interested in the estates under the settlement, the fresh mortgage may not be upon both estates A. and B.

Now, it was held in *In re Mundy's Settled Estates* by the Court of Appeal that where an estate was settled by deed, and then subsequently by a will moneys were directed to be laid out in the purchase of land to be settled in the same way as the estate, the money could be applied as capital moneys under the Act in improvements on the settled estate. The strict ground for the decision being that the settlement and will constituted one settlement under section 2, sub-section 1, of the Act of 1882; and following the broad principle laid down in that case North, J., in *In re Byng's Settled Estate*, held that where land was settled by will, and then by deed money was settled in trust to purchase land to be settled on limitations identical with those of the will (though not by reference to the will), except that two terms of years were interposed, when the trusts of the terms became satisfied, the will and deed constituted one compound settlement so that capital money arising under the deed could be applied in paying the cost of improvements on the land devised by the will. It follows from these cases that in the present case if estate A. had been subject to the mortgage and not estate B., the mortgage to pay off might have been on estate B.

But it is said that the converse case does not hold good, and though estate B. might be used for the purposes of estate A., yet estate A. cannot be used for the purpose of estate B. It appears to me that this distinction is unsound. The principle on which *In re Mundy's Settled Estates* was decided appears to me to be that where you have two estates settled in the same way, though by different instruments, yet for the purposes of the Settled Land Acts the two estates are to be regarded as one, the instruments taken together being the settlement under section 2, sub-section 1, of the Act of 1882. It seems to me wrong in principle to say that if for the purposes of the Settled Land Acts in dealing with estate B. you are to regard it as one with estate A., yet in dealing with estate A. you are not to regard it as one with estate B. Take the circumstances of *In re Mundy's Settled Estates*, and suppose that after some of the moneys had been used for the purposes of the settled estate and the balance invested in land, this land wanted improvements, but had no capital money available to make them. While the former or first settled estate had such money could it be said that though the first estate had been aided by the second, yet no return could be made when the second wanted to be aided by the first. I think not; I see no sufficient reason for the distinction. The only ground suggested for making a distinction is that to allow that a second estate may be settled in the same way as a prior estate so as to become one with it for all purposes under the Settled Land Acts might lead to acts of fraud. It is suggested that a mortgagor of estate B. who is tenant for life of settled estate A. might settle the equity of redemption of estate B. and then free himself from his personal liability as mortgagor by getting estate A. to pay the mortgage debt. But in reality such a case of fraud could not practically be carried out, for apart from the difficulty of getting trustees appointed or to accept office on the settlement of worthless property like estate B. before any mortgage of estate A. could be made, notice would have to be given to the trustees under section 45 of the Act of 1882, and they would at once put a stop to the attempted fraud by obtaining an injunction as in the case of *Hampden v. Earl of Buckinghamshire*. The utility of the decision in *In re Mundy's Settled Estates* ought not be interfered with by mere suggestions that frauds might possibly be attempted. Frauds might be attempted in many ways by tenants for life under the ordinary provisions of the Settled Land Acts, but that consideration did not prevent the Acts being passed and being useful. In ordinary cases where two estates are settled in the same way it is most useful to the beneficiaries that the two should be treated together for the purposes of the Settled Land Acts, and I think it would impair the usefulness of the Acts to limit it in the way contended for before me. I therefore decide that subject to the power to appoint annuities being released, what is proposed may be lawfully done.

Solicitors, *Stileman, Neate, & Toynbee*, for *Toynbee, Larken, & Toynbee*, Lincoln.

Chan. Div. } Romer, J. } Feb. 18.

HOBSON *v.* TULLOCH. (*a.*)

Vendor and purchaser—Restrictive covenant—Conveyance of freehold—Restriction against user otherwise than as a private residence—Boarding-house.

The use of a house as a boarding-house where pupils attending a school in the neighbourhood may be taken in as paying boarders is—though such user is in no way advertised—a breach of a covenant not to use the premises otherwise than as a private residence.

Motion.

This was a motion to restrain the defendant from using a certain dwelling-house called "Whitefriars," situate on the Cotton Estate in Hampstead, for the purposes of any trade or manufacture, or for any other purpose than a private residence.

The facts were as follow: In 1886 the plaintiff sold the house "Whitefriars," which was the largest house on the Cotton Estate, to one John Saner, and in the conveyance was contained a covenant on the part of the purchaser that he, his heirs and assigns, would observe the stipulations set out in the schedule thereto. Of these the one material for the present application was "not to use and occupy, or permit to be used or occupied, the said messuage or dwelling-house for the purpose of any trade or manufacture, or for any other purpose than a private residence."

In September, 1897, the defendant purchased the fee simple of the house "Whitefriars" from the mortgagees of John Saner. The defendant had carried on for some years, and was still carrying on a girls' school on premises in West Hampstead about half-a-mile distant from "Whitefriars," and not on the Cotton Estate. The point at issue was whether the defendant's proposed user of the house "Whitefriars" as a house where pupils attending the school and governesses might be boarded was an infringement of the above-mentioned covenant. The defendant stated that she did not intend to use the house "Whitefriars" as a school, or to put up any board, or to advertise that those premises were in any way connected with her school.

Farwell, Q.C., and *T. F. Hobson*, for the plaintiff.—The proposed user as a boarding-house for pupils is part of the school business.

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

German v. *Chapman*, 25 W. R. 802, 26 W. R. 149, 7 Ch. D. 271; *Rolls* v. *Miller*, 32 W. R. 806, 27 Ch. D. 71, were relied on.

Neville, Q.C., and *H. C. Gollan*, for the defendant.—The object of such covenants is to prevent what may be detrimental to the neighbourhood. There is nothing in the proposed user to suggest this, or in any way inconsistent with user as a private residence.

ROMER, J.—The question raised in this case is a very short point—namely, whether what the defendant proposes to do will not amount to the use of the house "Whitefriars" for a purpose other than a private residence. In my opinion it would be such a use. On the facts it is clear that she intends to use it as a boarding-house for her adjacent school, and to take in there governesses and pupils on paying terms to make a profit and to use the house as an adjunct to the school. In my opinion that is practically a business and not using the house as a private residence within the ordinary acceptance of the term, any more than if it was proposed to use it as a lodging-house. It does not seem to me material as to whether or not there is any advertisement of the proposed user. The question is, aye or nay, Would the proposed user be using the house as a private residence? In my opinion it would not, and I so decide.

Solicitors, *Edwards & Cohen; William Haigh.*

Chan. Div. }
Romer, J. } Feb. 4.

BARNES v. YOUNGS. (a.)

Arbitration—Partnership—Notice of expulsion—Quasi-judicial position of co-partners.

Partners, in exercising the power of giving notice of expulsion to a co-partner for breach of partnership articles, must do so in a quasi-judicial manner, and give the person complained of a hearing. Disputes between partners involving questions of law, or where a primâ facie *case of fraud is set up, should not as a rule be referred to arbitration.*

Motion.

This was a motion by the defendants to stay proceedings in the action, and to refer to arbitration.

The action had been brought by one of the partners in a firm of brassfounders, against his co-partners. The writ claimed (1) a declaration that the partnership constituted between the plaintiff and the defendants by articles of partnership dated the 6th of January, 1896, and an agreement dated the 18th of January, 1896, had not been, and would not be effectually dissolved by a notice dated the 21st of December, 1897, expressed to be given by the defendants to the plaintiff, and that the said notice was void; (2) an injunction to restrain the defendants, their servants, workmen, licensees, or agents, from publishing any notice of dissolution of the said partnership as against the plaintiff or otherwise, and from publishing any advertisements or circulars representing that the said partnership had ceased or determined, or that the plaintiff has ceased to be a partner therein, and also from in any manner representing or doing or causing or procuring to be represented or done anything that may lead to the belief that the said partnership has ceased or determined, or that the plaintiff has ceased to be a partner therein; (3) an injunction to restrain the defendants, their servants, workmen, licensees, or agents, from excluding, or attempting to exclude, the plaintiff, or causing or procuring him to be excluded, from the partnership premises, and from doing or causing or procuring to be done any act which may obstruct or interfere with the plaintiff in the active management and conduct of the trade and business of the partnership, and from restricting the plaintiff, or causing or procuring him to be restricted, in the exercise and enjoyment of his rights as such partner.

The material articles of the partnership were as follows:

31. Provided always that if either of the said partners shall at any time during the continuance of the partnership commit or be guilty of any breach of any of the provisions or stipulations contained herein, or any other flagrant breach of his duties as a partner, or shall fail to account for and pay over or refund any moneys for which he is accountable to the partnership within fourteen days after being required so to do in writing by the other partner, or shall act in any other respect contrary to the good faith which ought to be observed between partners, or shall become subject to the bankruptcy laws, or enter into any composition or arrangement with or for the benefit of his creditors, or shall become addicted to betting or gambling of any kind, or speculating on the Stock Exchange or otherwise, or to notorious intemperance or immorality, or other scandalous conduct detrimental to the partners' business, or shall become permanently incapacitated by lunacy, ill-health, accident, or otherwise from attending to the said business, or, in the case of the said James Bernard Barnes, shall absent himself from the said business more than two months at any one time, then and in any such case the other partner may by notice in writing given to him, or (in case of his being found lunatic by inquisition) to his committee or left at the counting-house, determine the partnership and publish a notice of dissolution of the partnership in the name of and as against such partner, whereupon the same shall immediately cease and determine accordingly, without prejudice to the remedies of the other partner for any antecedent breach of any of the stipulations or agreements aforesaid. Provided that if any question shall arise whether a case has happened to authorize the exercise of this power, such question shall be referred to arbitration.

37. If at any time during the continuance of the partnership or after the dissolution or determination thereof, any dispute, difference, or question shall arise between the partners or their or either of their representatives touching the partnership or the accounts or transactions thereof, or the dissolution or winding up thereof, or the construction, meaning, or effect of these presents, or anything herein contained or the rights and liabilities of the partners or their representatives under these presents or otherwise, in relation to the premisses, then every such, dispute, difference, or question shall be referred to two arbitrators or their umpire pursuant to the Arbitration Act 1889, or any statutory modification or re-enactment thereof for the time being in force.

Certain conduct of the plaintiff having been brought to the knowledge of the defendants, his partners, they, without warning and without giving him an opportunity of explanation, served notice of expulsion on him as having committed a breach of the provisions of clause 31 giving a power of expulsion.

A motion by the plaintiff to restrain the defendants from publishing notice of dissolution was directed to stand over; and in the meantime the defendants served the plaintiff with notice of this present motion

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

to stay proceedings and refer the matter to arbitration as provided by the articles.

Neville, Q.C., and *Micklem*, in support of the motion.—The matter should be referred to arbitration in accordance with the provisions in the articles.

They referred to *Davis* v. *Starr*, 37 W. R. 481, 41 Ch. D. 242; *Renshaw* v. *Queen Anne Mansions Co.*, 45 W. R. 487, [1897] 1 Q. B. 662.

Levett, Q.C., and *T. Watson*, for the respondent, the plaintiff in the action.—The notice is bad: *Blisset* v. *Daniel*, 1 W. R. 529, 10 Hare 493; *Wood* v. *Wood*, 22 W. R. 709, L. R. 9 Ex. 190; *Cooper* v. *Wandsworth Board of Works*, 11 W. R. 646, 14 C. B. N. S. 180. A *primâ facie* case of fraud is set up, and that is a reason for not referring to arbitration: *Wallis* v. *Hirsch*, 1 C. B. N. S. 316, 5 W. R. Dig. 222; *Russell* v. *Russell*, 14 Ch. D. 471, 28 W. R. Dig. 174. Where a question of law is involved, it is not a case for arbitration: *In re Carlisle*, 38 W. R. 638, 44 Ch. D. 200.

ROMER, J.—In matters of this kind—motions to stay proceedings by reason of an agreement to refer to arbitration—the court undoubtedly has a discretion—a judicial discretion. In the present case, looking at the circumstances, I think, in exercising my judicial discretion, I ought not to make a stay of proceedings, for two reasons. In the first place, there is, to my mind, a simple or comparatively simple preliminary question which is much more fit for this court to decide than an arbitrator—a question which, if it had been referred to arbitration, the arbitrator, I think, would have been probably wise if he had referred to the court, or at any rate he might have so done. It is certainly a question which is ripe for decision, and which, it appears to me, in the interest of both parties, ought to be decided forthwith.

Now, the question arises in this way. The defendants in the action have purported to serve a notice upon the plaintiff expelling him for alleged misconduct. A power to expel of this class, as has been shown in many cases, must be exercised with the utmost good faith; and undoubtedly, to my mind, it is essential that partners exercising a power of this kind should, before they do so and peremptorily exclude a co-partner and advertise that co-partner's exclusion, give him an opportunity of knowing before they serve the notice, what the cause of complaint is, so that, at any rate, he may have an opportunity of explaining, and if possible satisfying them that no good cause of complaint exists. I think that partners are not entitled to spring a notice of dissolution on their co-partner without the slightest preliminary notice being given to him and without calling his attention in the slightest degree to any alleged cause of complaint and without giving him the slightest opportunity of meeting the case which is alleged against him. Now, that is what the defendants did in this case. It is sworn to by the plaintiff and not denied by the defendants that when they purported to serve this notice they had previously raised no cause of complaint against the plaintiff and given him no opportunity of knowing that there was a cause of complaint or of remedying that, if he knew it existed. The question then arises, at any rate, was that notice good or bad. In my opinion, under the circumstances, that notice was clearly bad. Whether a future notice may or may not be bad is not the question before me. The details even of the defendants' complaint, or what is the real complaint against the plaintiff made by them, have not yet, so far as I know, been formularized or accurately stated by the defendants. It may be that after they have given the plaintiff the opportunity of knowing exactly what is the cause of complaint against him, he may satisfy them that under the circumstances no good cause of complaint arises and they may not serve any further notice after giving the plaintiff a full opportunity of knowing what the exact cause of complaint against him is and meeting it if possible. That question will arise hereafter, but it does not, in my opinion, arise now. It appears to me, therefore, that in every respect this question, which solves matters up to the present time, ought to be decided by me rather than that it should be referred to arbitration.

There is also a further ground, that in this case there is a charge by the plaintiff that the defendants are not exercising their power of expulsion *bonâ fide*. That is a charge of fraud which I should have thought in any case was one that the defendants themselves would have preferred to have met in open court. But whether that be so or not, it appears to me that I ought not in the exercise of my judicial discretion to stop this action, and to refer to arbitration the points I have mentioned, and accordingly I refuse to do so. I therefore make no order upon the motion to stay, except that I make the costs, costs in the action.

Solicitors, *Crowder, Vizard, & Co.; Collyer-Bristow & Co.*

Chan. Div.
Wright, J. } Feb. 2.

In re LAND MORTGAGE BANK OF FLORIDA (LIMITED). (*a.*)

Company—Winding up—Scheme sanctioned by the court—Surplus assets—Management expenses—"Undistributed assets"—Joint-Stock Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104), *s.* 2—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 15 (3).

Where a scheme of arrangement, which had been sanctioned by the court, under section 2 *of the Joint-Stock Companies Arrangement Act*, 1870, *provided that the liquidator should employ any surplus he had from calls, after paying a dividend on the debentures, in payments necessary or expedient for keeping up the company's property, &c., such surplus should be retained in the hands of the liquidator for the purposes named in the scheme; and the Board of Trade is not entitled to demand that he should pay such surplus into the Companies Liquidation Account under section* 15 *of the Companies (Winding-up) Act*, 1890, *for the special legislation provided by the scheme is not to be overridden by the general legislation of that section, this surplus not being "undistributed assets" within the meaning of the section.*

Motion by the Board of Trade for an order on the liquidators of the company to pay certain surplus of calls which they had in their hands into the Companies Liquidation Account, under section 15 of the Companies (Winding up) Act, 1890.

In December, 1895, the company had gone into voluntary liquidation. In April, 1896, a scheme of arrangement was sanctioned by the court under the Joint-Stock Companies Arrangement Act, 1870. Under this scheme the uncalled capital was to be called up and thereout a dividend of 12s. 6d. in the pound was to be paid to the debenture-holders in September, 1897, the balance being payable in 1902, and the interest being kept down in the meantime.

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

Any surplus from calls, after paying the first dividend, was to be applied according to the liquidators' discretion for management and other expenses. The liquidators were also empowered under the scheme to borrow money for the purposes of protecting and developing the assets. A trust deed was executed in accordance with the scheme in which the liquidators covenanted to apply the proceeds of calls in accordance with the scheme.

In May and September the liquidators delivered to the Registrar of Joint-Stock Companies the statements of accounts required by section 5 of the Companies (Winding-up) Act, 1890. These accounts showed a surplus of calls in the hands of the liquidators. This surplus the Board of Trade directed them to pay into the Companies Liquidation Account. This the liquidators refused to do, on the ground that this surplus was not "undistributed assets" within the meaning of section 15 (3) of the Act of 1890. In consequence the Board of Trade now moved for this order.

Ingle Joyce, in support.—The Board of Trade relies on the strict words of the Act. Proceeds of calls are clearly assets. This surplus of calls has now been in the liquidators hands for more than six months. Payment in, merely places the money in proper custody, it does not interfere with the scheme—that is the very object of section 15.

Tindal Atkinson, Q.C., and *Theobald*, for the liquidators.—This is an application for handing over the payment under this scheme to officials of the Board of Trade. This surplus is money which is subject to no claim either by creditors or shareholders; it is money which is charged with certain specific payments; it is not to be distributed, but is to pay for keeping up the property. The scheme is not one of reconstruction, but is intended for paying off the debenture-holders; the liquidators are nothing more or less than receivers for the debenture-holders. It would be a breach of the covenant in the trust deed if these funds were taken away from the liquidators and given to the officials of the Board of Trade. Section 15 must mean assets capable of distribution; these are not.

Ingle Joyce replied.

WRIGHT, J.—I think this application fails. Under the Joint-Stock Companies Arrangement Act, 1870, s. 2, a scheme, on being sanctioned by the court, becomes binding on the creditors or class of creditors concerned, and also on the liquidator in the present case. The material provisions of the scheme are embodied in paragraph 9, under which, if there is a surplus after paying a dividend on the debentures, that surplus might be applied, before paying any further dividend, in the payment of wages, &c., or in "any expenditure which the company may think necessary or expedient for protecting and keeping up the company's property and assets, or of developing the same with a view to the realization thereof." The scheme further provides, by clause 20, that a proper trust deed, giving effect to the provisions of the scheme, should be prepared and executed, and under clause 23 this deed was to be settled by counsel approved by the judge. This scheme has been sanctioned by the court, and the trust deed contemplated by it has been executed, with provisions in it relating to the application of the moneys in the hands of the liquidator. Section 15 (3) of the Act of 1890 was as follows: "If it appears from any such statement or otherwise that any liquidator of a company has in his hands or under his control any money representing unclaimed or undistributed assets of the company, which have remained unclaimed or undistributed for six months after the date of their receipt, the liquidator shall forthwith pay the same to the Companies Liquidation Account at the Bank of England. Every such liquidator shall be entitled to the prescribed certificate of receipt for the moneys so paid, and that certificate shall be an effectual discharge to him in respect thereof." It is not suggested that the sums in respect of which the present application is made are unclaimed assets, but it is said that they are undistributed assets. The answer to that is, that having regard to the scheme, they are not undistributed, but that some legal event had happened which had made them distributable in another way. I must give credit to the liquidator's statement that the money is wanted for the purpose mentioned in paragraph 9 of the scheme. In my judgment the matter is governed by the provisions of the scheme. The special legislation provided by the scheme is not to be overruled by the general legislation of the Act with reference to the liquidator's duties. If the application were well-founded, it would be competent to the Board of Trade, and might perhaps even be their duty, to get in all the moneys in the hands of the liquidator, and to take the whole matter out of his hands and substitute the discretion of the board for that of the liquidator given him by the scheme. That is not the conclusion at which I ought to arrive. The question had been very properly raised, but in my judgment the Board of Trade is not entitled to displace the discretion given to the liquidator by the scheme.

The motion must therefore be dismissed with costs.

Solicitors for the applicants, *Solicitors to the Board of Trade.*

Solicitors for the respondents, *Johnson, Weatherall, & Sturt*, for *Wade, Bilbrough, Booth, & Co.*, Bradford.

Q. B. Div. (Div. Court). (Mathew and Kennedy, JJ.) Nov. 20; Dec. 1; Jan. 22.

REG. v. JUSTICES OF WEST RIDING OF YORKSHIRE. *Ex parte* SHAW. (a.)

Licensing law—Licence—Inn—House pulled down—Transfer of licence—Intoxicating Liquors Licensing Act, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4, 14—*Rule nisi for* mandamus *to justices—Costs of persons opposing rule.*

In the case of a licensed public-house which has been, or is about to be, pulled down, the person who applies under section 14 *of the Intoxicating Liquors Act*, 1828, *for a transfer of the licence of that house to a new house must be the person who is the licensed holder of the inn at the time the premises are pulled down, and the house itself must be kept as an inn at the time it is pulled down. The court has jurisdiction to grant costs to a person who successfully shows cause against a rule nisi for a* mandamus *to licensing justices, notwithstanding the decision of the House of Lords that licensing justices are not a court of summary jurisdiction* (*see* Boulter *v.* Justices of Kent, ante, *p.* 114, [1897] *A. C.* 556).

In this case a rule *nisi* had been obtained for a *mandamus* to the justices of the West Riding of Yorkshire directing them to hear and determine an application by S. H. Shaw for a transfer of a licence made under section 14 of the Licensing Act, 1828 (9 Geo. 4, c. 61).

Mrs. Toole was the licensed proprietress of a public-house known as the "Peacock Inn," in Halifax, and the corporation of that town requiring the site of the

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

inn for the purpose of enlarging the streets and market-place, bought it under the powers conferred on them by a local improvement Act, and gave her notice to determine her tenancy. This notice expired on the 30th of November, 1894. Previously to this, in the month of August, she obtained a renewal of her licence.

After the 30th of November, and just before the demolition of the inn, Mrs. Toole gave up the tenancy to Shaw, the applicant in this case.

It did not appear that he was really a tenant or that he paid rent to anybody, or that he ever actually carried on the trade in the house, though he obtained a temporary authority to continue the sale of exciseable liquors until the end of the current year of the licence to Mrs. Toole—namely, the 1st of February, 1895.

On the 7th of December he applied on behalf of another person for a transfer of the licence to some other premises, which were at some distance from the "Peacock Inn," but the application was refused.

On the 28th of December a sale of all the effects at the "Peacock Inn" took place, and immediately afterwards the house was pulled down and the site taken possession of by the corporation.

On the 1st of February, the date when his temporary licence expired, Shaw applied to the justices at the special session for a licence under section 4, and was granted one, notwithstanding the fact that the inn had already been pulled down.

This licence continued in force until the 10th of October, 1895.

The general licensing meeting was held on the 23rd of August, 1895, and prior to that date Shaw received notice of objection to the renewal of the licence. He agreed with the objectors that the matter should be adjourned until the 27th of September, the date of the adjourned annual licensing meeting.

No application was made at that meeting for a renewal of the licence, but it was stated that an application would subsequently be made on Shaw's behalf at the special sessions for the grant of a licence to another house. Notices under the Intoxicating Liquor Licensing Act, 1828, and the Licensing Act, 1872, were duly given of Shaw's intention to apply at the special session under section 14 of the former Act for a transfer of the licence from the "Peacock Inn" to another inn.

At the special session held on the 29th of July, 1896, this application was made, and it was opposed on the ground that a licence was not required in the locality, and the justices refused the application.

On the 19th of October Shaw appealed to the quarter sessions at Wakefield, when it was objected that no appeal lay to the said court, inasmuch as the application made on the 29th of July was an application for a new licence. The court of quarter sessions being of opinion that the point raised was a good one, dismissed the appeal. Shaw then obtained the above rule.

Lawson Walton, Q.C. (*T. P. Perks* with him), showed cause against the rule.

T. Roskill appeared for the justices.

Kershaw, Q.C. (*Montgomery* with him), in support of the rule.—The words in section 14, "any house being kept as an inn by any person duly licensed," are meant merely to describe the nature of the house. The person who is entitled to apply for the transfer or renewal is "the person whose house shall . . . have been pulled down." Shaw was the person whose house was pulled down since he was the then tenant of it, and the person entitled to sell exciseable liquors in it.

Cur. adv. vult.

Dec. 1.—MATHEW, J.—This was an application for a *mandamus* to the justices of Yorkshire, directing them to hear and determine an application for a licence made under 9 Geo. 4, c. 61, s. 14. The justices both at special sessions and the court of quarter sessions held that the application was not properly made under section 14, and they, therefore, refused to hear the application on its merits. Hence the rule which was obtained for a *mandamus*.

Now, the facts that gave rise to this controversy were these: A Mrs. Toole was the licensed proprietress of a public-house known as the "Peacock Inn," in Halifax, and the corporation of Halifax determined, under the powers that they possess, to take the site of the inn for the purpose of enlarging the streets and the market-place. Notice was given to Mrs. Toole to determine her tenancy, and this notice expired on the 30th of November, 1894. She had obtained a renewal of her licence in the previous August. After the 30th of November, Shaw, the present applicant, according to the affidavits, became tenant of the house. It does not appear that he paid rent to anybody, nor are the circumstances stated under which he so became tenant, but probably there was a formal occupation of the house, because of what followed—namely, that he, on behalf of a gentleman named Naylor, applied for a transfer of the licence to other premises on the 7th of December, 1894. Those other premises were at some distance from the site of the "Peacock Inn," and that application was refused. On the 8th of December a sale of all the effects at the "Peacock Inn" was advertised. On the 21st of December the sale took place and immediately after, and before the end of the year, the "Peacock Inn" was pulled down and the site taken possession of by the corporation of Halifax. On the 1st of February Shaw applied to the justices for a licence under section 4 of the Act of 1828, and, strange to say, that licence was granted. It was a nullity and a fiction because at that time the "Peacock Inn" had ceased to exist, and the licence to carry on business in the "Peacock Inn" was a licence to do that which could not be done. But probably from an oversight a licence was granted to carry on business in a place that did not exist. That licence has not been renewed, strange to say. It might just as well have been renewed later, but no application was made for the purpose. On the 29th of July, 1896, this present application was made on behalf of Shaw.

Now it appears that the corporation of Halifax had arranged that there should be a public-house upon a site near the site of the old "Peacock Inn," and Shaw, having placed himself in a proper position so far as these premises were concerned, made the present application for the grant of a licence to him under section 14 of the Act. Section 4 of the Act has to be referred to because it is that which provides for the transfer of licences, and by that section, after directing that special sessions should be appointed for the transfer of licenses, it is enacted that, "It shall be lawful for the justices then and there assembled, in the cases and in the manner and for the time hereinafter directed, to licence such persons intending to keep inns theretofore kept by other persons being about to remove from such inns as they the justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper persons under the provisions hereinafter enacted to be licensed to sell exciseable liquors by retail to be drunk or consumed on the premises." That is a section that clearly was not applicable in the case of Shaw, but it was said that under section 14 Shaw was entitled to have the licence granted to him. Section 14, as has often been

pointed out, is an extension of section 4, and it has to be read with it. Now, what are the provisions therein on which Shaw has to rely. The section runs: "If any person duly licensed under this Act shall, before the expiration of such licence, die," and then there are a certain number of instances which I need not go through, "or if any house being kept by a person duly licensed as aforesaid"—that is, duly licensed under the provisions of the Act, a description which does not apply to Shaw—"shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways or for any other public purpose, or shall be by fire, tempest, or other unforeseen and unavoidable calamity rendered unfit for the reception of travellers and for the other legal purposes of an inn; it shall be lawful for the justices assembled as aforesaid at a special session holden under the authority of this Act for the division or place in which the house so kept or having been kept shall be situate, in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt or insolvent, or to any new tenant or occupier of any house having so become unoccupied, or to any person to whom such heirs, executors, administrators, or assigns shall by sale or otherwise have *bonâ fide* conveyed or otherwise made over his or their interest in the occupation and keeping of such house, a licence to sell exciseable liquors by retail, to be drunk or consumed in such house or the premises thereunto belonging; or to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways, or for any other public purpose, or have become unfit for the reception of travellers or for the other legal purposes of an inn, and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail, to be drunk or consumed therein, provided always that every such licence shall continue in force only from the day on which it shall be granted until the 5th day of April or the 10th day of October then next ensuing, as the case may be."

Now, Shaw sought to bring himself within the terms of that portion of the Act. The Act has a double purpose. It provides for a transfer to the same person in respect of different premises, and for the transfer to different persons in respect of the same premises, and it appears to me perfectly clear that Shaw was never a licensed person within the meaning of this Act who was entitled to apply under section 14. He had no licence at any time. He did, it is true, upon going into occupation, obtain a temporary licence, which does not appear to have been acted upon, to carry on business on these premises from November in 1894, to February in 1895, but he was never a licensed person under the Act, and that seems to me to be a condition that is indispensable. Mrs. Toole might possibly have applied here with success under the Act, but Shaw obtained no such title under her as enabled him to avail himself of the powers conferred by the section. It follows therefore that the justices in petty sessions were right in refusing to go into the matter, holding that the application was really an application for a new licence, and that upon appeal quarter sessions properly confirmed that decision.

The rule must therefore be discharged.

KENNEDY, J.—I agree. It seems to me that the central point in the case which we have to deal with and to settle one way or the other is whether or not this was an application properly made under the 14th section so as to be an application as to which an appeal lay. Now, I myself am not at all satisfied on the affidavits that the applicant ever did in fact occupy these premises. The words that he uses himself in his own affidavit are that he became tenant at some time before the 30th of November, 1894. I do not see, as far as appears upon the face of any of the evidence before us, that he ever actually occupied these premises before they were pulled down, but I will assume that he did occupy them. He never occupied them as the licensed holder under this Act, and I agree with what my brother Mathew has said—that is to say, my reading of that section is in accordance with his, that in order to enable a person to avail himself of the provisions of section 14, where a house is pulled down or about to be pulled down the house must itself be kept as an inn at the time it is pulled down by some person who is duly licensed. I further think that the person mentioned in the latter part of the section as one to whom the justices may grant a licence if he keeps another inn—may grant what is called a transfer, though it is not so called in the section—is that person who, under this Act, is the licensed holder of the inn at the time that the premises were pulled down. I think that that is the natural meaning of the words apart from all considerations of public convenience or justice, and if it were not so it seems to me a difficulty would arise, because you would have a number of competing persons having a right to claim a transfer. It seemed to me that the learned counsel in support of this rule were unable to deal with that point. They suggested, very strongly as I understood, what a hardship it would be upon the landlord. But it is not the landlord who, according to this view, is applying, and the result would be that, unless you give some such interpretation as to the person "whose house as aforesaid shall have been or shall be about to be pulled down," you at once admit as competing applicants the landlord, the occupier, and the man in whose name the licence stands. To which of them, supposing they start even, should the licence be granted? It seems to me that the natural and the fair implication on that ground alone would be that you must mean a definite person, and that definite person is the person who is keeping the premises as a licensed house at the time when they are about to be pulled down or are pulled down and subsequently qualifies himself for holding a licence because he becomes the tenant of an inn, and who is the occupier prepared to carry on business in that place as an inn if he gets a licence. He is the person who, *primâ facie* at any rate, is the person injured in the interests of public convenience if the premises that he has been holding are pulled down or are about to be pulled down for a public purpose.

I think, therefore, that as that is an admitted fact, the applicant Shaw, who applies here for a rule for a *mandamus* upon the justices to hear and determine his appeal, fails because he does not bring himself within the words of the section as the person who is entitled to ask at any rate to be considered as the person to whom the licence may be properly transferred in respect of the new premises.

R. M. Montgomery, for the applicant.—The court has no power to grant costs to the opposers of the rule. In *Boulter* v. *Justices of Kent*, *ante*, p. 114, [1897] A. C. 556, the House of Lords decided that the licensing justices do not constitute a court of summary jurisdiction.

T. P. Perks, for the respondents.—Rule 61 of the Crown Office Rules, 1886, says that notice shall be given to every person who by the affidavits shall appear to be interested or likely to be affected by

the proceedings. The rule *nisi* was served upon the the respondents.

Roskill, for the justices.

MATHEW, J.—We will consider the matter.

Cur. adv. vult.

Jan. 22.—The judgment of the COURT was delivered by

KENNEDY, J.—In this case the question has been raised whether the court has jurisdiction to allow costs to the respondents, who have successfully shown cause why the rule *nisi* for a *mandamus* to the licensing justices should not be made absolute. The case of *Boulter* v. *Justices of Kent* was cited as an authority showing that we ought not to give costs to respondents who appear to show cause against a rule *nisi* being made absolute. That case was decided by the House of Lords.

We have taken time to consider whether that decision prevents us awarding costs to a successful respondent in such a case, and we have come to the conclusion that it does not. It has been the custom for the court to exercise its discretion in such cases, and the court, in exercising its discretion, has generally exercised it in favour of giving a successful respondent his costs, provided he is such a person as the court thinks is entitled to appear by reason of the interest he possesses in the matter. We do not think that *Boulter* v. *Justices of Kent* has in any way interfered with the discretion that the court has. This is not a case where a successful appellant to quarter sessions seeks to obtain an order for costs against an objector who has not appeared on the appeal; it is the case of successful respondents who are interested in the matter before the court, and who have appeared on the appeal and been heard, and who now ask for their costs in opposing the appeal.

We are of opinion that they were justified in appearing and showing cause against the rule, and we think they should be allowed their costs. We also think that the justices should have their costs.

Rule discharged with costs.

Solicitors against the rule, *Williamson, Hill, & Co.*, for *Walshaw*, Halifax.

Solicitors for the justices, *Badham & Williams*, for *Trevor Edwards*, Wakefield.

Solicitor in support of the rule, *J. R. Hall*, for *Keighley Walton*, Halifax.

Lunacy.

(Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 16; March 7.

In re CHARLES CLARKE. (*a.*)

Lunacy — Lunatic judgment debtor — Maintenance — Receiver—Execution—Seizure by sheriff—Priority—Lunacy Act, 1890 (53 *Vict. c.* 5), *ss.* 116, 117.

The Court in Lunacy cannot deprive execution creditors of a lunatic of their rights over his property not under the control of the court when seized under legal process.

The property of a lunatic, though coming within the jurisdiction of the Crown as soon as a summons in Lunacy is issued, is not withdrawn from legal process by a creditor of the lunatic until an order is made showing that the Crown has actually taken the property of the lunatic under its protection.

In re Winkle, 42 *W. R.* 513, [1894] 2 *Ch.* 519, *explained.*

This was a summons for directions before the master, and was adjourned into court, under the following circumstances:

Charles Clarke was a person of unsound mind not so found by inquisition. A judgment creditor of his issued a *fi. fa.* on the 8th of January, 1898, under which the judgment debtor's goods were seized on the 17th of January, 1898. After the judgment had been obtained—viz., on the 31st of December, 1897, a summons in lunacy was taken out in order to obtain the appointment of a receiver under section 116 of the Lunacy Act, 1890. Notice of the pendency of this summons was given to the judgment creditor before he issued the *fi. fa.* After the seizure under the *fi. fa.*—viz., on the 18th of January, 1898—an *interim* receiver was appointed and notice was given to the sheriff to withdraw, which, however, the execution creditor told him not to do.

On the 21st of January, 1898, an order appointing a receiver was made, and notice of this order was given to the sheriff, and he was again asked to withdraw, but the execution creditor directed him not to do so, and he remained in possession.

On the 28th of January, 1898, the sheriff issued a summons in lunacy asking for directions how to act, and this summons was adjourned into court and came on to be heard on the 16th of February, 1898.

H. F. Manisty, for the sheriff.

Buckmaster and *Ivor Bowen*, for the receiver in lunacy.—The receiver asks that these chattels may be sold and that the proceeds may be devoted to the maintenance of the lunatic. The master has allowed £200 a year for his maintenance, and the receiver has no funds whatever for payment of that maintenance. The property is in mortgage, and the balance of the rents over the mortgage interest was enough at the time of the order to justify the order, but the natural consequence of the order was that all the mortgagees entered into possession and there was a deficiency. We submit that the execution levied by the judgment creditor has in no way changed the ownership of the goods, which still remains in the lunatic. The only effect of the execution is to give rights as between the creditors themselves; it changes the possession but not the ownership. In one case it was held that a judgment debtor in spite of the execution might transfer the ownership in the goods and so defeat the execution creditor. Sections 117 and 120 of the Lunacy Act apply, and there is power in the court to order any property of a lunatic present or future to be sold. The creditor knew of the proceedings in lunacy before he issued his *fi. fa.* If the court has power to deal with the property of the lunatic in the way suggested, then the merits of the case are identical with *In re Winkle*, 42 W. R. 513, [1894] 2 Ch. 519. [LINDLEY, M.R.—Is not a possession and a right to possess for a particular purpose a charge?] No: there is no charge and no change of property. If the Crown can take away goods from the sheriff which he has seized and not sold, the same thing applies here and the lords justices can do the same. [LINDLEY, M.R., referred to *Ex parte Williams*, 20 W. R. 430, L. R. 7 Ch. App. 314.] If this court would interfere to oust a judgment creditor, there is no reason why it should not go one step further and oust a judgment creditor who has taken possession. [RIGBY, L.J.—Does our jurisdiction go to the extent of saying we will deprive you of any

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

security you have got?] Yes; the turning point is not seizure, but is sale.

They referred to *Giles* v. *Grover*, 1 Cl. & Fin. 72; *In re Ball*, 2 Molloy, 145; *In re Leavesley*, 39 W. R. 276, [1891] 2 Ch. 1; and *In re Farnham*, 44 W. R. 465, [1895] 2 Ch. 799, and [1896] 1 Ch. 836.]

Edward Ford, for the execution creditor.—The court has no jurisdiction to interfere, and if it has, it will not exercise it. The only difficulty is *In re Winkle*; that was a very special case in a case of a small lunacy. The *ratio decidendi* of that case was that the property was not in the hands of the sheriff. The summons in lunacy does not give the court jurisdiction; it does not acquire it until some order is made. [LINDLEY, M.R.—Is it right to let people have prior rights after the summons is issued?] Yes; because the defendant may make away with all the property, and an *ex parte* order may be necessary. If the creditor's right in this case is displaced the court will not interfere and make an order for the lunatic's maintenance.

Buckmaster replied.

[VAUGHAN WILLIAMS, L.J.—The moment the summons is issued the abstract jurisdiction enures as a particular jurisdiction in a concrete case.]

Cur. adv. vult.

March 7.—The written judgment of the court was delivered by

LINDLEY, M.R., who stated the facts as above set out, and continued: On that occasion (the 16th of February, 1898), it being obviously for the benefit of everyone that the sheriff should be got rid of, and no one objecting, the court ordered the sheriff to sell the goods and to pay the proceeds, less his expenses, into court in the matter of the lunacy. But this order was made without prejudice to any question between the lunatic or the receiver in lunacy on the one hand, and the execution creditor on the other, and the court took time to consider their respective rights and the right of the Crown as the protector of lunatics and their property. These rights have now to be determined. Unless the right of the Crown and the jurisdiction of the judge in lunacy can be regarded as arising when the summons was taken out—viz., on the 31st of December, 1897—so as to place the lunatic and his property under the protection of the Crown on and after that date, it seems plain that the proceeds of sale ought to be paid to the execution creditor, and not to the receiver in lunacy. It is very true that the property in goods seized under a *fi. fa.* remains in the execution debtor until sale (*Giles* v. *Grover*). But it is no less true that after seizure and before sale the execution creditor is as regards those goods in the position of a secured creditor: see *Ex parte Williams*, and *Slater* v. *Pinder*, 20 W. R. 441, L. R. 7 Ex. 95. He had a legal right as against the execution debtor—*i.e.*, the owner of the goods—to have the goods sold, and to be paid out of the proceeds of the sale. Further, in this case it cannot be said that the goods were ever in the possession of the receiver. Even if an order appointing a receiver related back, which it never does, the receiver has never in fact been in possession of the goods. This circumstance distinguishes this case from *In re Winkle*, where the receiver had possession and the sheriff had not, he having gone out of possession under an order of a judge at chambers. The judgment of the court proceeded entirely on this ground, and *In re Winkle* is no authority for saying that the Court in Lunacy can deprive execution creditors of their rights over property not under the control of the court when seized under legal process. The cases of *In re Plenderleith*, 42 W. R. 224, [1893] 3 Ch. 332; and *In re Farnham*, show that whilst on the one hand the court will not allow property in its custody and belonging to a lunatic to be applied otherwise than for his benefit, and will not pay his creditors out of it without first providing for him, yet, on the other hand, the Court in Lunacy has no jurisdiction to interfere with the rights of creditors to seize and sell by legal process property of the lunatic which at the time of seizure is not in the custody of the court.

It was, however, suggested that as soon as the summons in lunacy was issued the jurisdiction of the Crown exercisable by the judge or Court in Lunacy became exercisable over the lunatic's property, and that his property ought to be regarded as under the protection of the Crown from that time. In a sense this is true, for as soon as the summons was issued the judge in lunacy had jurisdiction to make orders for the protection of the lunatic's property; but until some order is made showing that the Crown has actually taken the property of the lunatic under its protection it has never yet been held to be withdrawn from legal process by a creditor of the lunatic. The Court in Lunacy has gone far even before any inquisition to protect an alleged lunatic and his property. It has punished persons entrapping an alleged lunatic into a marriage (see *Smart* v. *Taylor*, 9 Mod. Rep. 98); it has restrained an alleged lunatic from executing instruments disposing of his property (*Ridgeway* v. *Darwin*, 8 Ves. 65), and it has in quite recent times protected the property of an alleged lunatic against seizure by his creditors by appointing an *interim* receiver (*Re Pountain*, 37 Ch. D. 609, 36 W. R. Dig. 106). The statute De Prærogativa Regis, which has always been regarded as defining the power of the Crown in lunacy matters, has been very widely construed—*e.g.*, it has been held to extend to a lunatic's personal property, although land and tenements alone are mentioned. But it is quite clear from Lord Eldon's observations in *Ex parte Hastings*, 14 Ves. 182, and *Ex parte Hall*, Jac. 160, that the Court in Lunacy could not protect a lunatic from arrest under a *ca. sa.*, and could not prevent a judgment creditor from issuing execution against his property if the creditor could reach it by ordinary writs of execution without interfering with the possession of an officer of the Court in Lunacy, and this doctrine is as well settled now as it was then, as is shown by *Brockwell* v. *Bullock*, 37 W. R. 455, 22 Q. B. D. 567, and *Re Farnham*. If, indeed, the creditor has done anything to give the Court in Lunacy jurisdiction over him, it is another matter (see *In re Weaver*, 2 My. & Cr. 441, and other cases of that kind noticed by Fry, L.J., in *Brockwell* v. *Bullock*). We have looked to see whether the fact that the judge in lunacy can now sell the lunatic's real property for the payment of his debts enables the court to compel creditors to come to that court for payment and to restrain them from pursuing their legal remedies against property not actually under the protection of someone appointed to take care of it. The power to sell the real property of a lunatic for payment of his debts was first given in 1830 by 11 Geo. 4, and 1 Will. 4, c. 65 (see sections 28 and 30), and this power has been continued under later statutes ever since. But it has always been held, both before and since 1830, that the Court in Lunacy cannot compel a creditor to come in and prove his debt in lunacy by restraining him from issuing execution, if he can do so without interfering with the officers of the court. *Brockwell* v. *Bullock* and the cases cited in it show this to be the law now, as it always was. We can find no trace of the exercise by the Court in Lunacy of any such jurisdiction as we are referring to. We find a long course of decisions inconsistent with

the possession of any such jurisdiction; and we are not prepared now for the first time to assert it. It would, we think, be wrong to creditors to do so, and not necessary for the protection of infants or lunatics, for an order for a receiver or an injunction can in an urgent case be obtained very summarily, and such an order affords all the protection which is really necessary.

It was contended that under section 117 of the Lunacy Act, 1890, the court could sell the goods seized, they being the property of the lunatic. But the court could only sell the lunatic's interest in those goods; it could only sell them subject to the security of the execution creditor; and this would not benefit the lunatic in the present case. No doubt the court could have directed the receiver to redeem the execution creditor's security by paying the judgment debt and the sheriff's charges, and then to sell the goods; but the court was not asked to do this, nor did it appear that the receiver had money in her hands which she could have applied for such a purpose. As soon, therefore, as the money is paid into court it ought to be paid out to the execution creditor if the amount does not exceed his debt and costs.

An order to that effect will be made by the master. The execution creditor is also entitled sooner or later to be paid the unpaid balance of his judgment debt and his costs of these proceedings out of the lunatic's property applicable to such payment; but the creditor must apply for such payment to the master, who will give the receiver proper directions on the subject. The receiver must also apply to the master for payment of her costs.

Solicitors, *Cunliffes & Davenport; Carthew & Wheeler; Fielder & Sumner*, for *William Jones*, Cardiff.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — March 17.

BUCKWELL *v.* NORMAN. (*a.*)

Bankruptcy—Provable debt—Debt contracted after notice of act of bankruptcy—Liability of bankrupt—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 9, *sub-section* 1; *s.* 37, *sub-sections* 2, 3.

A debt contracted after notice of an available act of bankruptcy, and before the receiving order is made, is a "debt provable in bankruptcy" within the meaning of section 37, *sub-section* 3, *of the Bankruptcy Act*, 1883, *though the creditor is prevented by section* 37, *sub-section* 2, *from proving the debt; and therefore the creditor cannot, by reason of section* 9, *sub-section* 1, *sue the debtor in respect thereof.*

Appeal from the judgment of the Divisional Court (Wright and Kennedy, JJ.) affirming the judgment of the county court judge of Brighton in an action upon a bill of costs.

The plaintiff, who was a solicitor and a creditor of the defendant, was informed by the defendant that he was unable to pay his debts, and was instructed by him to file his petition in bankruptcy. The plaintiff accordingly filed the petition, and a receiving order was made and the defendant was adjudicated bankrupt.

The plaintiff carried in his bill of costs incurred in connection with the filing of the petition, and received out of the assets part of the amount thereof under rule 125 of the Bankruptcy Rules, 1886, which provides for "the taxed costs of the petitioner" being paid out of the assets, and brought this action against the defendant to recover the balance of the costs so incurred. These costs were incurred prior to the date of the receiving order. The bankrupt had not obtained his discharge.

The county court judge held that the defendant had, by informing the plaintiff, who was a creditor, of his inability to pay his debts, committed an act of bankruptcy under section 4, sub-section 1 (*h*), of the Bankruptcy Act, 1883; and he held that the plaintiff could not recover.

The Divisional Court affirmed the judgment.

The plaintiff appealed.

Firminger (*E. Bowen Rowlands* with him), for the plaintiff.—The debt was incurred with knowledge of an available act of bankruptcy, and is not therefore provable in bankruptcy: section 37, sub-section 2, of the Bankruptcy Act, 1883. Section 9, sub-section 1, deprives a creditor, after the making of a receiving order, of any remedy against the property of the debtor in respect of a debt provable in bankruptcy; and by section 30 an order of discharge only releases a bankrupt from debts provable in bankruptcy. Therefore a creditor is not deprived of his remedy against the bankrupt in respect of a debt not provable in bankruptcy. The plaintiff, accordingly, is entitled to recover.

He referred to *Ex parte Harper, In re Pooley*, 30 W. R. 650, 20 Ch. D. 685; *In re Sinclair*, 15 Q. B. D. 616, 34 W. R. Dig. 19; *In re Spackman*, 38 W. R. 368, 497, 24 Q. B. D. 728.

E. T. Holloway, for the defendant.—Section 37, sub-section 3, makes all debts and liabilities, except those specified in sub-section 1, to which the debtor is subject at the date of the receiving order, provable in bankruptcy. This debt is therefore a debt provable in bankruptcy. But by sub-section 2, inasmuch as the plaintiff had notice of an available act of bankruptcy at the time when this debt was incurred, the plaintiff is personally prevented from proving. The debt being a provable debt, section 9, sub-section 1, prevents the plaintiff from suing for it.

Firminger, in reply.—There are only two classes of debts, those that are provable and those that are not provable. There are no such debts as those which are provable but which at the same time cannot be proved. The words "save as aforesaid" in section 37, sub-section 3, include the debts mentioned in the two previous sub-sections.

A. L. SMITH, L.J.—The question before us comes to this: Is this debt, which was incurred between the date of the act of bankruptcy and the date of the receiving order, provable in bankruptcy? I have come to the conclusion that it is. The act of bankruptcy is that specified in section 4, sub-section 1 (*h*), of the Bankruptcy Act, 1883—namely, that the defendant gave notice to the plaintiff, who was a creditor, that he was about to suspend payment of his debts. The plaintiff had notice of the act of bankruptcy when this debt for costs was incurred. Section 37, sub-section 3, makes all debts and liabilities, with certain exceptions, to which the debtor is subject at the date of the receiving order provable in bankruptcy. This is such a debt as is there described, and it is therefore provable in bankruptcy. But sub-section 2 of that section creates an incapacity to prove where the person seeking to prove has notice of an available act of bankruptcy when the debt is contracted, for that sub-section

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

enacts that a person having notice of any available act of bankruptcy shall not prove for any debt or liability contracted by the debtor subsequently to the date of his having notice. This debt was contracted after the plaintiff had notice of the act of bankruptcy. The true meaning of sub-section 2 is that, though the debt is a provable debt, there is a personal incapacity to prove in the person who has notice of an act of bankruptcy at the time when the debt is contracted. This, therefore, is a provable debt, and the plaintiff by reason of section 9, sub-section 1, cannot sue for it. Any other construction would carry this extraordinary result, that if a person, after notice of an act of bankruptcy, lent a debtor a sum of money, he could stand by and claim the full amount of the loan, even after the debtor had obtained his discharge.

CHITTY, L.J.—I am of the same opinion. It seems strange that there can be a debt provable in bankruptcy which cannot be proved. I think, however, that that is the true construction of the statute. Section 168 of the Bankruptcy Act, 1883, is the definition clause which says that, unless the context otherwise requires, a debt provable in bankruptcy includes any debt or liability by this Act made provable in bankruptcy. Turning then to section 37, sub-section 3, all debts and liabilities, with certain exceptions, to which the debtor is subject at the date of the receiving order, are debts provable in bankruptcy. The debt claimed in this action is a debt to which the defendant was subject at the date of the receiving order. I turn back to sub-section 2, which in substance enacts a personal exception against a person proving who had notice of an act of bankruptcy when the debt was contracted. The words in the two sub-sections are different. The result is that the debt in the present case is a provable debt, but the personal exception applies, and prevents the plaintiff from proving. The distinction is drawn in this section between the character of the debt and the person proving. If we did not adopt this construction, the extraordinary result would follow that a person who had notice of an act of bankruptcy when the debt was contracted would in many cases be in a better position than if he had no notice.

COLLINS, L.J.—I am of the same opinion. In order to prove a debt in bankruptcy two things must concur; the debt itself must be a provable debt, and the person seeking to prove must not be under any incapacity to prove it. The same debt is or is not capable of being proved according as the person seeking to prove has or has not notice of an act of bankruptcy at the time the debt was contracted. The debt is not altered, but the personal capacity is. That gets rid of the whole difficulty, and is in accordance with the natural interpretation of the Act.

Appeal dismissed.

Solicitors for the plaintiff, *C. R. Sawyer & Ellis.*

Solicitor for the defendant, *R. Hewlett*, for *A. Miramy*, Brighton.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) March 10.

FOX *v.* STAR NEWSPAPER CO. (*a.*)

Practice—Nonsuit—Discontinuance—Ord. 26, *r.* 1.

A plaintiff can no longer claim as of right to be nonsuited so as to be at liberty to bring a second action. The right to discontinue an action is now entirely regulated by order 26, *and the plaintiff cannot discontinue at the trial without an order of the judge, who may make such terms as he thinks just with regard to the plaintiff's right to bring another action.*

Appeal from a judgment of Lord Russell of Killowen, C.J.

The action was brought for an alleged libel published in the *Star* newspaper. The plaintiff had also brought another action for a similar alleged libel published in the *Evening News*. That action came on for trial before the Lord Chief Justice and a jury, and resulted in a verdict and judgment for the defendants. This action was then called on for trial before the same jury. The plaintiff said that he did not propose to proceed further with this action, and he claimed the right to be nonsuited.

The Lord Chief Justice said he could not enter a judgment of nonsuit, and directed that judgment should be entered for the defendants.

The plaintiff appealed.

The plaintiff in person.—The Lord Chief Justice ought to have allowed me to be nonsuited, so that I might be at liberty to bring another action. I had a common law right to claim a nonsuit. The Rules of the Supreme Court of 1875, abolished the common law right to a nonsuit. Ord. 41, r. 6, of those rules said: "Any judgment of nonsuit, unless the court or a judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant." But the whole of the rules of 1875 were repealed by the rules of 1883, and that particular rule was not re-enacted. The effect of this was to restore the common law right of a plaintiff to demand a nonsuit. Ord. 72, r. 2, says: "Where no provision is made by the Acts or these rules the present procedure and practice remain in force." The intention of this rule is to keep on foot, not any repealed order, but the general jurisdiction and practice of the court: *per* Kay, J., in *Magnus* v. *National Bank of Scotland*, 36 W. R. 602; and *per* Cotton, L.J., in *In re Busfield*, 34 W. R. 372, 32 Ch. D. 123, at p. 131. As a matter of practice nonsuits are still allowed.

Blake Odgers, Q.C., and *Temple Franks*, for the defendants.—Nonsuits are still spoken of, but a plaintiff is no longer entitled to elect to be nonsuited as of right so as to be able to bring another action. The effect of ord. 41, r. 6, of the rules of 1875 was that a plaintiff who was nonsuited could not bring another action unless the judge gave him leave to do so. Although the rules of 1875 were repealed by the rules of 1883, that particular rule was kept alive by virtue of ord. 72, r. 2. The same result follows from ord. 26, r. 1, which says that, save as otherwise provided, it shall not be competent for the plaintiff to discontinue the action, but the judge may, at or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued.

A. L. SMITH, L.J.—The plaintiff contends that the Lord Chief Justice was wrong in law in holding that he was not entitled to a nonsuit. I think that this contention fails. It is true that even since the rules of 1883 we sometimes make use of the word "nonsuit." But in my opinion there is no such thing as a real nonsuit at the present day. Before the year 1875 a plaintiff was entitled as of right, if he thought fit, to demand a nonsuit—that is to say, a plaintiff, after having proceeded against a defendant through all the stages of an action up to trial, and having brought the defendant into court, if he then found that he was not prepared with sufficient evidence or had

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

not got his materials in proper order, or that for any other reason he was not likely then to obtain a verdict, might elect to be nonsuited, whereby he reserved to himself the right to bring a fresh action for the same cause. When the rules of 1875 were made, it was intended to stop a plaintiff from being able so to harass a defendant by bringing successive actions. Accordingly ord. 41, r. 6, was enacted. That rule put a fetter on the ability of a plaintiff to demand a nonsuit, and thereby harass the defendant in the way I have mentioned. It provided that any judgment of nonsuit, unless the court or a judge should otherwise direct, should have the same effect as a judgment upon the merits for the defendant. That meant that a plaintiff could not, after being nonsuited, go on with another action unless the judge expressly allowed him to do so. It is said, on the part of the defendants, that this rule still stands, but I think not. The rules of 1875 were repealed by the rules of 1883, and ord. 72, r. 2, cannot, in my opinion, have the effect, as the defendants contend, of keeping alive the old rule. It was not intended to keep on foot any repealed order; on this point I agree with what was said by Kay, J., in *Magnus* v. *National Bank of Scotland*, and by Cotton, L.J., in the case of *In re Busfield*. I think that ord. 41, r. 6, was struck out advisedly. It seems to me that the matter is provided for by order 26, which relates to discontinuance. Rule 1 of order 26, after dealing with discontinuance of an action at any time before defence, says: "Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the court or a judge; but the court or a judge may before or at or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued." That is to say, when an action has reached the stage of trial, the plaintiff cannot withdraw from it in such a way as to have the right to bring a second action, except by leave of the judge. The appeal must therefore be dismissed.

CHITTY, L.J.—I am clearly of opinion that order 26 covers the whole of what was formerly the subject of nonsuit. This order is, indeed, a code dealing with the whole subject of the discontinuance of actions. The fact seems to be that rule 6 of order 41 in the rules of 1875, when compared with the discontinuance rule, was found to be unnecessary; and so, when the rules of 1875 were repealed by the rules of 1883, that rule was not re-enacted. I cannot think it was intended, by virtue of ord. 72, r. 2, to leave open the old law on this matter. In my opinion the law under the present rules is that the plaintiff after having brought the defendant into court cannot at his own election drop the action and begin another. The plaintiff is no longer *dominus litis* in the sense in which he used to be. The substance of the matter appears to be this, that, when an action has reached the stage in which the plaintiff meets his adversary face to face in court, it is only by the discretion of the judge that he can withdraw from the action with the right of bringing another.

COLLINS, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *Lincoln.*

Solicitors for the defendants, *Harrison & Davies.*

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 4.

In re DEIGHTON AND HARRIS'S CONTRACT. (*a.*)

Vendor and purchaser of land—Conditions of sale—Right to rescind—Validity of vendor's notice to rescind—Matters of title—Matters of conveyance—Waiver of right to rescind.

A vendor who is unable to make a good title to the land sold because he cannot get in a small interest outstanding in a third person cannot be treated as having no title to the property. The rule in Bowman *v.* Hyland, 26 *W. R.* 877, 8 *Ch. D.* 588, *does not, therefore, apply to such a case, and the vendor may exercise a power given to him by the conditions of sale to rescind the contract if the purchaser insists upon an objection or requisition which the vendor is unable or unwilling to comply with.*

Matters of conveyance, as well as matters of title, are, for the purposes of such a condition, included in the words "any matter or thing relating or incidental to the sale."

A mere threat to take proceedings to enforce the contract, though made after the purchaser's requisitions have been sent in, does not necessarily amount to a waiver of the vendor's right to rescind.

Gardom *v.* Lee, 13 *W. R.* 719, 3 *H. & C.* 651, *distinguished.*

Appeal from Kekewich, J.

On the 23rd of July, 1896, certain leasehold property belonging to the vendor, Charles Samuel Deighton, was sold by auction to the purchaser, Mrs. Harris. One of the conditions of sale (No. 6) provided that if any objection or requisition should be made by the purchaser as to the title, particulars, conditions, or any other matter or thing relating or incidental to the sale, which the vendor should be unable or unwilling to comply with, the vendor (notwithstanding any treaty, discussion, or litigation in reference thereto, or any attempt to remove or comply with the same) should have full power to annul the sale, upon returning to the purchaser the amount of his deposit in full satisfaction of all his claims, and without payment of interest, costs, or compensation, and that the purchaser should thereupon return to the vendor the abstract of title and other papers which might have been delivered to him or his solicitor by the vendor; but that the purchaser might within seven days from the time of the vendor giving notice of annulment elect to waive the objection or requisition and take the property subject thereto.

When the title to the property sold came to be investigated it was found to be very complicated, and in an unsatisfactory state. In particular, there was an outstanding interest in the official receiver of one William M. Baker, which interest the purchaser required the vendor to get in. The vendor, however, found difficulty in doing this, and ultimately gave notice of annulment under condition No. 6. The purchaser did not waive her objection, but contended that condition No. 6 did not apply, and that the vendor had waived his right (if any) to annul the sale, by writing a letter, dated the 12th of October, 1896, in which he threatened to take "some steps to enforce the contract."

The purchaser took out a summons to have it declared that the vendor was not entitled to rescind, and had not shown a title to the property.

Kekewich, J., on the authority or *Bowman* v. *Hyland*, 26 W. R. 877, 8 Ch. D. 588, made the

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(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

declaration asked for, and ordered the vendor to pay the purchaser's costs of investigating the title.

The vendor appealed.

Cozens-Hardy, Q.C., and *Ashton Cross*, for the appeal.—The contract was effectually rescinded. *Bowman* v. *Hyland* does not govern this case.

Warrington, Q.C., and *R. B. Yardley*, for the purchaser.—The vendor made no title at all to that which he purported to sell, and therefore *Bowman* v. *Hyland* applies. The purchaser's objections related, not to the title, but to the conveyance, which is not mentioned in condition 6. Such a condition ought to be construed with extreme strictness. Secondly, the vendor has waived his right (if any) to rescind: *Gardom* v. *Lee*, 13 W. R. 719, 3 H. & C. 651.

They also cited *Greaves* v. *Wilson*, 6 W. R. 482, 25 Beav. 290; *Kitchen* v. *Palmer*, 46 L. J. Ch. 611, 25 *W.* R. Dig. 79; *Jackson and Oakshott*, 28 W. R. 794, 14 Ch. D. 851; and *In re Hardman and Child*, 33 W. R. 544, 28 Ch. D. 712.

No reply was called for.

LINDLEY, M.R.—This case seems to me to be a case which is really free of serious difficulty. It is a case of vendor and purchaser; and the vendor is not in a position in which he has no title at all in the strict sense. This case, therefore, is not in the least like *Bowman* v. *Hyland*, where a man who had a month's interest in some land purported to sell the land in fee. In that case, long before the time came for executing the conveyance, it was found out that the land belonged to somebody else, who in fact took possession and ejected the vendor. All that was decided, there was that the vendor could not, in such circumstances, ride off under the condition, though certainly its words were very wide. I think that decision was quite right; but it does not govern this case. I treat this as a perfectly honest case; it seems reasonable to do so. We all know that titles to land in this country are very complicated, and that a person acting quite honestly may contract to give a title, which in the end it turns out he has not got. Ordinarily that contract could be insisted upon. But here there is a special condition. [His lordship read condition No. 6, stated the facts, and proceeded:] It is plain that the purchaser was quite right in wishing to get the concurrence of the official receiver, because there was some small interest in him. But the vendor takes the view that this requirement is a mere conveyancing technicality, and he says that he cannot obtain the concurrence of the official receiver. The purchaser still insists, and the vendor says he shall rescind. The seven days mentioned in the condition expire, and the purchaser does not waive his requisition. Why, then, regard being had to the very wide words of condition No. 6, which I have read, is the vendor not entitled to rescind? It is very true that the condition does not say in so many terms "if the purchaser shall make and insist upon any objection to the conveyance"; but such an objection is plainly covered by the words which are used, "any other matter or thing relating or incidental to the sale." Those words certainly include the conveyance, which is, perhaps, one of the most important of those "matters or things." That is the appellant's case, and I can see no answer to it. I agree that it is rather unfortunate for the purchaser—I do not say that it is hard, because she had notice of condition No. 6 and bought subject to it—that she has been put to expenses which, unfortunately she will not be able to recover from the vendor or anyone else. Mr. Warrington refers to certain correspondence which took place in 1896 (after the requisition to the official receiver had been made) as evidencing a waiver of the vendor's right to rescind. In particular, in a letter of the 12th of October, 1896, the vendor says that he will take steps to enforce the contract. But then what happened after that? That letter was only a threat, and this case is not in the least covered by *Gardom* v. *Lee*, 13 W. R. 719, 3 H. & C. 651, upon which Mr. Warrington relied. After the 12th of October, 1896, the parties still go on negotiating; and I think it is quite plain that nothing which had taken place was sufficient to preclude the vendor from insisting upon this right of rescission if the purchaser insisted upon his objections. I think what I have said is quite sufficient to dispose of this case. The appeal must be allowed, with costs here and below. I do not think we ought to declare that the vendor has got a good title; that is not our function. It is enough for us to declare that the vendor is, in the circumstances, entitled to rescind.

RIGBY, L.J.—I am of the same opinion. In *Bowman* v. *Hyland* the vendor had agreed to sell certain land in fee simple. Afterwards, though there was no ground for saying that he was guilty of any fraud, it appeared that all he had at the date of the contract was the residue of a term of years; and before the contract could be completed the term had run out and determined. Therefore the question decided in that case was simply whether the vendor could ride off, as the Master of the Rolls has said, on a condition for rescission which obviously was not framed with reference to any such circumstances as those which arose there. I am assuming that *Bowman* v. *Hyland* was well decided; but in my opinion it has no bearing on the question which arises in this case.

VAUGHAN WILLIAMS, L.J.—I agree, and have nothing to add.

Appeal allowed.

Solicitors, *Godfrey & Robertson*; *F. Shirley Turner.*

From Q. B. Div. (Bkcy.) (A. L. Smith, Chitty, and Collins, L.JJ.) — Jan. 21.

In re PALMER.
Ex parte BRIMS. (*a.*)

Bankruptcy—Judgment debt—Equitable assignment of debt—Right of judgment creditor to issue bankruptcy notice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1.

A creditor who has obtained a final judgment against a debtor may issue a bankruptcy notice founded upon the judgment under section 4, *sub-section* 1 (g), *of the Bankruptcy Act*, 1883, *notwithstanding that he has made an equitable assignment of the judgment debt.*

Ex parte Dearle, In re Hastings, 33 *W. R.* 440, 14 *Q. B. D.* 184, *followed.*

This was an appeal from Mr. Registrar Brougham, who made an order setting aside a bankruptcy notice.

In 1889 the debtor, Sir Charles M. Palmer, was in partnership with one Martinez Rivas, and in that year they entered into a contract with one Brims, a contractor, and the creditor in this application, by which Brims undertook to construct certain docks in Spain.

During the construction of these docks the firm was converted into a Spanish company.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

In 1892 certain sums of money were due under the contract to Brims, and proceedings were taken by him against Rivas and Palmer to recover the amount due.

In 1893 Brims obtained judgment for £13,200. Palmer paid part of that amount.

Negotiations were subsequently entered into, and it was arranged that Brims should go to Spain for the purpose of seeing what payments he could obtain from Rivas or the company, and it was agreed that any composition he might thus be paid should not affect his claim for the balance against Palmer.

Ultimately Rivas paid Brims a composition of seven shillings in the pound, and Brims signed a receipt which stated that he had received from Rivas a certain sum in full for the purchase of all his claims against the company and (or) the original firm.

The end of the receipt was in the following words: "In consideration of the payment now made I undertake, if and when called upon, to execute a due assignment of all my claims as above to Señor Martinez Rivas or his nominee."

Subsequently to this Brims issued and served on Palmer a bankruptcy notice founded upon the judgment debt.

Palmer then applied to the registrar to set aside the notice, on the ground that, by virtue of the above document, Brims had assigned his debt to Rivas, and the registrar set the order aside on that ground.

It was admitted by Palmer that there had been no legal assignment of the judgment against him, but he contended that there had been an equitable assignment of the judgment debt to Rivas.

From this decision Brims now appealed.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-section 1 (*g*), it is provided that a debtor commits an act of bankruptcy "if a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England or by leave of the court elsewhere, a bankruptcy notice under this Act. . . ."

By section 1 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), it is provided that "any person who is for the time being entitled to enforce a final judgment shall be deemed a creditor who has obtained a final judgment within the meaning of section 4 of the principal Act."

Pickford, Q.C. (*Æneas Mackintosh* with him), for the appellant.—There was no legal assignment of the judgment debt, and even if there was an equitable assignment, which is not admitted, the appellant is not thereby disentitled from issuing a bankruptcy notice founded upon a judgment debt: See judgment of Brett, M.R., in *Ex parte Dearle, In re Hastings*, 33 W. R. 440, 14 Q. B. D. 184.

Marshall Hall (*R. E. Moore* with him), for the respondent Palmer.—Brims has equitably assigned his judgment to Rivas, and, therefore he is no longer a creditor within the meaning of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883. He is not the creditor who for the time being is entitled to enforce the judgment. He is not entitled in full possession since he has made this assignment. He is now only in the position of a trustee. This case is distinguishable from *Ex parte Dearle*. By section 104 of the Bankruptcy Act, 1883, the court has power to rescind any order that it has made on any ground that may seem fit to it, and the registrar here was quite right in setting aside this notice. It would be inequitable, moreover, for the court to allow a bankruptcy notice to issue as Palmer has a set-off against Rivas, the equitable assignee of the debt. The order of the registrar should therefore be affirmed.

R. E. Moore followed.

Pickford, Q.C., in reply, referred to *In re Keeling, Ex parte Blanchette*, 34 W. R. 538, 3 Morrell 157.

A. L. SMITH, L.J.—Palmer and Rivas carried on business together, and they employed Brims, who is the creditor here, to execute certain work for them in Spain. Whilst this work was being carried out by Brims the business of Palmer and Rivas was turned into a Spanish company. Brims completed the work, but not obtaining payment commenced an action against Palmer and Rivas. Rivas let the action go by default, but Palmer defended the action until the day of trial, when an arrangement was arrived at, and Brims obtained judgment against both defendants. He obtained from Palmer part of the money due, and then came the question whether he could get any payment from Rivas. He entered into negotiations with Rivas and Palmer with a view of seeing what payment he could get out of Rivas, and ultimately a document was drawn up and signed by Brims and other people, and on the construction of that document we have heard long arguments. It is perfectly clear that that document is not a legal assignment of the judgment debt, but it has been contended that it is an equitable assignment. I am not going to decide that point now. But whether or not it does amount to an equitable assignment, it seems to me that Brims is the person who is entitled to enforce the judgment debt and to issue the bankruptcy notice founded on that judgment. *Ex parte Dearle, In re Hastings*, clearly shows this to be the law. It was also submitted that we ought to affirm the order of the registrar, because Palmer had a set-off against Rivas, but I cannot act on that because I am by no means sure he had any set-off. In my opinion Brims is entitled, as the legal owner of the judgment debt, to issue execution upon it, and I am of opinion that he is a creditor within the meaning of both section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, and section 1 of the Act of 1890. I am of opinion that the bankruptcy notice is good, and this appeal must therefore be allowed.

CHITTY, L.J.—I am also of opinion that the bankruptcy notice should stand. Palmer is undoubtedly a debtor. Brims is the judgment creditor, and as such has the legal right to enforce the judgment. A legal document has been brought to our attention, and it is relied upon by the debtor, but at the most it can only amount to an equitable assignment. The legal estate remains vested in Brims, who still has his legal right to issue execution on the judgment. Assuming it, therefore, to be a good equitable assignment of the debt, Brims becomes a trustee for Rivas, but that affords no reason for saying that Brims is not a "creditor" within the meaning of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883. I am content to rest my judgment on those contained in the case of *Ex parte Dearle, In re Hastings*. I will only add that I do not see anything in section 1 of the Bankruptcy Act, 1890, to cut down the rights which Brims has under section 4, sub-section 1 (*g*), of the Act of 1883. There is nothing in the words of section 1 to show that a creditor who has obtained a final judgment for a sum of money, and who is trustee of it for another, has his rights under section 4, sub-section 1 (*g*), cut down.

COLLINS, L.J.—I quite agree with what has been said by my learned brothers, and it is not necessary for me to add anything.

Appeal allowed.

Solicitors for the creditor, *J. E. & H. Scott.*

Solicitors for the debtor, *Baker, Folder, & Upperton.*

High Court of Justice.

Chan. Div. } Jan. 18, 19, 28.
Stirling, J. }

JENNINGS v. JENNINGS. (a.)

Partnership—Dissolution—Sale of assets by one partner to the other—"Assets"—Goodwill—Right of vendor to canvass old customers.

After a sale by one of two partners of all his interest in the partnership assets to the other partner, the goodwill not being expressly mentioned, the vendor may not canvass the customers of the old firm.

Trego *v.* Hunt, 44 *W. R.* 225, [1896] *A. C.* 7, *considered.*

Gray *v.* Smith, 38 *W. R.* 310, 43 *Ch. D.* 208, *and* Pearson *v.* Pearson, 32 *W. R.* 1006, 27 *Ch. D.* 145, *distinguished.*

This was a motion to restrain the defendant from canvassing customers of a business formerly carried on by the plaintiff and defendant in partnership.

The partnership was entered into under articles dated the 20th of January, 1896.

In February, 1897, the present defendant commenced an action against the present plaintiff in the Queen's Bench Division claiming a rescission of the partnership and damages on the ground of misrepresentation made by the present plaintiff to the present defendant.

This action came on to be tried on the 22nd of November, 1897, but was at once compromised on the terms stated in the following certificate:

"By consent the judge directed that judgment should be entered for the plaintiff for £1,200, to include costs, on the following terms: All charges of fraud withdrawn; the plaintiff to be indemnified as to all debts of partnership, and the partnership to be dissolved, the defendant retaining the assets and all owing; the plaintiff within fourteen days to remove from the premises. The other action to be dropped; this in full settlement of all disputes."

Subsequently, the defendant issued a circular to the old customers stating that he intended to commence business, and asking for orders, and thereupon the present action was brought.

G. B. Rashleigh, for the plaintiff.—"Assets" includes goodwill, therefore *Trego* v. *Hunt*, 44 W. R. 225, [1896] A. C. 7, applies.

J. G. Butcher, Q.C., and *Daniel Jones*, for the defendant.—In general a retiring partner is under no obligation to abstain from soliciting customers of the old firm: *Kennedy* v. *Lee*, 3 Mer. 441, at p. 452; *Gray* v. *Smith*, 38 W. R. 310, 43 Ch. D. 208. In the case of a dissolution and sale of the assets by the court, and in the case of a surviving partner purchasing the interest of a deceased partner pursuant to the articles, where there is no express assignment of the goodwill, the interest in the goodwill which passes is of a limited character: *Hall* v. *Barrows*, 12 W. R. 322, 4 De G. J. & S. 150; *Johnson* v. *Hellely*, 13 W. R. 220, 2 De G. J. & S. 446; *Pawsey Armstrong*, 30 W. R. 469, 18 Ch. D. 698. If there were an express assignment of the goodwill *Trego* v. *Hunt* would apply: *Labouchere* v. *Dawson*, 20 W. R. 309, L. R. 13 Eq. 322, was overruled by *Pearson* v. *Pearson*, 32 W. R. 1006, 27 Ch. D. 145; but has been set up again by *Trego* v. *Hunt*, which interpreted goodwill to mean the full benefit of custom: *Walker* v. *Mottram*, 30 W. R. 165, 19 Ch. D. 355. [STIRLING, J.—Must you not show that "assets" does not include goodwill as defined in *Trego* v. *Hunt*?] *Cook* v. *Collingridge*, Jac. 607, applies, and is not affected by *Trego* v. *Hunt*.

They also referred to Lindley on Partnership, 6th ed., p. 438.

G. B. Rashleigh, in reply.—In *Gray* v. *Smith* and also in *Rolt* v. *Bulmer*, W. N. (1878) 119, the word goodwill was not used.

[STIRLING, J., referred to *Page* v. *Ratliffe*, 75 L. T. Rep. 371.]

STIRLING, J., stated the facts, and continued: The injunction is claimed upon the authority of *Trego* v. *Hunt*, in which it was established that when the goodwill of a business is sold, the vendor, although he may set up a rival business, is not entitled to canvass the customers of the old business, and may be restrained from soliciting any person who was such customer to continue to deal with the vendor or not to deal with the purchaser.

The obligation to refrain from canvassing the customers arises from the relation of vendor and purchaser. Thus Lord Macnaghten says: "The principle upon which *Labouchere* v. *Dawson* rests has been presented in various ways. A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant on the sale of goodwill that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different terms and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

Observations to the like effect are made by Lord Herschell and by Lord Davey.

The source of the obligation is well shown by the decision in *Walker* v. *Mottram*, where it was held that a bankrupt, the goodwill of whose business had been sold by the trustee in his bankruptcy, could not be restrained from canvassing the customers—not because goodwill sold by a trustee in bankruptcy differs from that sold by a solvent man, but simply because the bankrupt was not the vendor, and consequently was under no liability to the purchaser.

The first inquiry, therefore, must be whether the relationship of vendor and purchaser exists between the plaintiff and defendant; and in my judgment this question must be answered in the affirmative. The judgment is one which amounts to a sale by the defendant to the plaintiff. It is expressed to be a judgment for the £1,200 by consent upon terms, one of which is that the present plaintiff should retain all the assets, and that the defendant should retire from the business. The case is not to be treated as one of compulsory dissolution by the court, but a voluntary agreement by mutual consent upon the terms expressed in the certificate. I think, therefore, that the case is substantially one in which the defendant sold all his interest in the assets of the partnership for £1,200; and indeed this was not disputed by the defendant.

The next point to be considered is whether the defendant is to be regarded as the vendor of goodwill. He sold, as I have said, all his interest in the assets of the partnership. Goodwill is not expressly mentioned. It was not disputed that the word "assets" includes goodwill so far as it constitutes property, but it was contended that the defendant was not such a vendor as to give rise to the obligation

(a.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

on which the plaintiff's title to an injunction rests. Now, the word "assets" is a compendious expression for the aggregate of the several items of property belonging to the partnership. An agreement for the sale of such assets would in most cases bear the same construction and have the same effect as if the several items of property were specifically enumerated either in the body of the agreement or in a schedule annexed to it.

There are, however, two cases binding upon me which are said to establish that this is not so in every case, and on them the very able and earnest arguments addressed to me were rested, and they must be carefully examined.

The first is *Gray* v. *Smith*. There, three partners named Gray, Smith, and Bennitt, carried on business under the style of Gray, Smith, & Bennitt. A memorandum of agreement in the following terms was signed by Bennitt: "Rough draft memorandum from Gray, Smith, & Bennitt. This is to record that in consideration of William Gray or his executors paying H. C. Bennitt or his assigns the sum of one hundred pounds on the 1st of January, 1890, and the sum of one hundred pounds on every 1st of January for the nine succeeding years, H. C. Bennitt agrees to withdraw from the firm of Gray, Smith, & Bennitt." It was held that that memorandum contained all the essential terms of an agreement for a dissolution of the partnership, including a stipulation that the retiring partner should assign his share in the assets. It was nevertheless held that the plaintiff had no right to continue the name of Bennitt in any way which might subject him to further liabilities. The judgment of the Court of Appeal on this point is to be found in the judgment delivered by Cotton, L.J., and he puts it in this way: "The appellant says, 'I take all the property of the firm; the goodwill is part of that property, and includes the use of the name of the firm.' We must look to the contract and see whether there is any stipulation to assign the goodwill. A contract to retire from the firm has not the same effect as a contract expressly bargaining for the assignment of the goodwill. The agreement by Bennitt to withdraw from the firm entitles the plaintiff to an assignment of Bennitt's share of the stock, but does not imply that the plaintiff is to be at liberty to continue to use Bennitt's name." Then he refers to *Levy* v. *Walker*, 27 W. R. 370, 10 Ch. D. 436, where there was an agreement for the sale of the leasehold premises, trade fixtures, stock-in-trade, goodwill, and business as a going concern, and says: "That was quite different from the present case, where there is only an agreement by a partner to retire from the firm. In that case it was held that the contract for sale of the goodwill included a right to use the name of the firm. Here there is no such contract." Bowen and Fry, L.JJ., concurred. That decision was certainly based on the ground that a contract for the sale of assets had not the same effect under the particular circumstances as if the goodwill had been specifically mentioned. The other is the case of *Pearson* v. *Pearson*, in which it was decided by the majority of the Court of Appeal that the vendor of goodwill cannot be restrained from canvassing his former customers. So far as the decision was rested on this ground *Pearson* v. *Pearson* is now overruled by *Trego* v. *Hunt*, but the decision was partly based on another ground in which all the members of the court agreed, and this ground is said to apply to the present case. There the plaintiff and defendant were interested in a business respecting which an action and a cross-action were pending between them. An agreement for a compromise of these actions was entered into, of which the following were the material clauses: "1. Theophilus Pearson shall pay to James Pearson £2,000 for the purchase of his estate and interest in the property and businesses to which these actions relate, £500 to be paid on the signing hereof and £1,500 on completion." "3. Nothing in this agreement shall be deemed to restrict or prevent the said J. Pearson carrying on and exercising the business of a potter and earthenware manufacturer or any other businesses at such place as he thinks fit and under the name of J. Pearson."

Subsequently J. Pearson issued a circular to the customers of the business. An application was made for an injunction, and it appears to have been held by all the members of the Court of Appeal that whether or not the doctrine now established by *Trego Hunt* was well founded, the defendant was entitled to canvass the whole of the customers by virtue of the stipulation contained in clause 3 of the agreement. It is necessary, however, to look somewhat closely at the judgments which were delivered on this point. Baggallay, L.J., says: "If the first clause of the agreement . . . stood alone, I should be of opinion that the sale included the defendant's interest in the goodwill, and I will first deal with the case as if that clause stood alone. Treating the case as a simple sale of the defendant's interest in the goodwill, then, if *Labouchere* v. *Dawson* is to be treated as laying down the law correctly, the plaintiff is entitled to retain his injunction." The lord justice then went on to discuss *Labouchere* v. *Dawson*, and came to the conclusion that it did not lay down the law correctly. The passage, however, which I have just quoted is an expression of opinion by the lord justice that if the contrary view were correct (and it is now established to be correct), the plaintiff was entitled to his injunction. Later on he adds: "But assuming the first clause, taken *per se*, to amount to a sale of the goodwill, are not its consequences modified by clause 3? That clause, which expressly gives the defendant a right to carry on any business wherever he pleases under the name of James Pearson, appears to me to have an important bearing on the case; and having regard to its terms, I think that, even assuming *Labouchere* v. *Dawson* to be right, the defendant has done nothing which would entitle the plaintiff to the second branch of the injunction." This expression of opinion rests, it will be observed, on the terms of clause 3 of the agreement. Cotton, L.J., says: "There is no express covenant not to solicit the customers of the business, but it is said that such a covenant is to be implied. . . . From what is this implied covenant to be inferred? It is said that there was a sale of the goodwill, and according to the proper meaning of the word 'goodwill,' I think that there was." Then he refers to *Cruttwell* v. *Lye*, 17 Ves. 335, and continues: "But the word 'goodwill' is not used, and when a contract is sought to be implied, we must not substitute one word for another. Such a right as is here contended for might be inferred from a contract to sell the 'goodwill,' and yet not be inferred from such a contract as we have here." I think that the lord justice did not agree with the view expressed by Baggallay, L.J., as to the effect of clause 1 of the agreement standing alone. He then came to the conclusion that *Labouchere* v. *Dawson* ought not to be followed, and added: "But the present case is less favourable to the plaintiff than that case, for not only have we no contract against carrying on the business, but clause 3 shows it to have been in the minds of the parties that the defendant should carry on business, and I think that this stipulation entitles him to get customers in any fair way of managing his trade." Lindley, L.J., says: "By the agreement James Pearson gives up all his interest in the business for

£2,000. Pausing there, although the goodwill is not in terms mentioned in the agreement, I think that it is included, for a man who sells all his interest in a business cannot retain any interest in the goodwill." He then refers to clause 3, and continues: "That is an important stipulation, which obviously was introduced for the benefit of James Pearson. By it he says, in substance, 'Though I have sold to you all my interest in this business, I am to have liberty to carry on business in my own name where I please.' That means 'I am to be as free to carry on business as if I had not sold to you.' I think, therefore, that this case is not governed by *Labouchere* v. *Dawson*, and that the defendant, assuming *Labouchere* v. *Dawson* to have been rightly decided, may yet solicit the custom of anybody." Although the lord justice does not expressly say so, I read his judgment as showing that he was in agreement with Baggallay, L.J., as to the effect of clause 1 if it had stood alone.

In point of decision neither of these cases governs that before me. *Gray* v. *Smith* does not, for it related to the use of a trade name, and not to the canvassing of customers. It is, however, an authority in favour of the defendant to this extent, that it decides that a contract for the sale of assets generally does not always confer on a purchaser the same rights as one in which goodwill is specifically mentioned. Neither, again, does *Pearson* v. *Pearson*, for all the learned judges relied on the terms of the clause, no equivalent to which is to be found in the agreement with which I have to deal. It appears, however, to be an authority in favour of the plaintiff, in so far as it contains expressions of opinion by the majority of the court that under a clause not substantially differing from the agreement before me the defendant was not entitled to canvass customers, while the third (Cotton, L.J.) apparently was not of that opinion.

It appearing, therefore, that in some cases a contract for sale of assets does not confer on a purchaser the same rights as if the items of which the assets consist, and in particular the goodwill, were specifically enumerated, it becomes of importance to inquire in what cases this happens.

Now, on a sale of property the parties do not in general contemplate the possibility of personal liabilities on the part of either contracting party arising otherwise than out of the contract itself. If, then, the purchaser tries to use some part of the purchased property (as the trade name) in such a way as to throw on the vendor a liability not directly arising from the relation of vendor and purchaser, it may well be that he could not be allowed to do so unless he can point to something in the contract which justifies his act over and above the mere description of the subject-matter of the sale in general terms as "assets," "interest," "property," and the like. On the other hand, if a vendor seeks to exonerate himself from a liability which would be the ordinary consequence of a sale of property comprised in the contract, I think that he ought not to be allowed to do so unless he can point to some express stipulation in the contract for sale. This view appears to be consistent with both *Gray* v. *Smith* and *Pearson* v. *Pearson*, as I understand them. This is to be observed —that the obligation enforced in *Trego* v. *Hunt* is one which is not confined to goodwill, but extends to other kinds of property. If, for example, the assets sold by the defendant to the plaintiff had included a house which adjoined land belonging to the defendant, he could not after the sale build on his own land so as to obstruct the access of light to the house which he had sold. It is true that if the house commanded a sea view the defendant could not be restrained from building so as to shut out from the house the view of the sea, but the reason is that the law does not recognize any property in such a view, although it does recognize a right to the access of light to a window. As the law recognizes a property in goodwill, I think that the defendant by selling it came under an obligation not to do any act which would impair it, and amongst such acts is included canvassing the old customers.

It was also contended on behalf of the defendant that the word "assets" ought not to be held to include more than would be ordered to be sold if the court were directing a sale for the purpose of winding up the partnership. In such cases it has been the practice ever since the decision in *Johnson* v. *Hellely* to introduce into the particulars of sale a form of words similar to those framed by Turner, L.J.—namely, that the "sale will not prevent any of the persons heretofore interested in the business, or those who may represent them, from carrying on the like business." It was said that under such words a person interested in the business sold might canvass the old customers. My first impression was that he would only be entitled to carry on the business in such a way as not to injure the goodwill sold, but I find it difficult to draw any satisfactory distinction between the words sanctioned in *Johnson* v. *Hellely* and the terms of clause 3 of the agreement which is discussed in *Pearson* v. *Pearson*, and it may be that they authorize the carrying on of the business in the same way as if no sale had been made. If this be so, the reason may be that on a compulsory sale by the court the persons interested are not vendors any more than a bankrupt is when a trustee in bankruptcy sells the goodwill of his business. These are points on which I express no further opinion, leaving them to be decided when the case arises. My present decision rests on the finding that the sale with which I have to deal is not a compulsory one made by the court, but was the subject of a voluntary agreement containing no express stipulation reserving to the defendant any right to carry on the business. I think, therefore, that the defendant is subject to the ordinary obligations of a vendor.

It was said, however, that, even if this were so, an interlocutory injunction ought not to be granted because the defendant entered into the agreement under a mistake in respect of which he may be entitled to relief at the trial. I do not think that there is a case of mutual mistake, and a mistake on the part of the defendant alone would not entitle him to relief unless it was induced in some way or other by the plaintiff: see *Wilding* v. *Sanderson*, 45 W. R. 675, [1897] 2 Ch. 534. On this I cannot hold it as conclusively established that the defendant's mistake was so induced, and I must therefore treat the agreement for the present as binding.

In my judgment, therefore, an injunction ought to be granted.

Solicitors, *Rashleigh, Son, & Hall; Boyce & Son.*

Chan. Div. } Feb. 25.
Kekewich, J. }

In re MAYNARDS (LIMITED). (*a*.)

Company—Fully paid-up shares—Registered contract—Statement of consideration—Particularity—Rectification of register—Order—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

The contract to be registered under section 25 *of the*

(*a*.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

Companies Act, 1867, *prior to the issue of shares as fully paid, must, in order to comply with that section, describe with some degree of particularity the consideration given for the shares. A mere recital in the filed contract to the effect that, by a previous unfiled agreement, it was agreed to allot the shares in consideration of the sale to the company of "the businesses and property mentioned in the first part of the schedule" to the previous agreement and "the leasehold hereditaments, short particulars of which are set out in the second part" of the same schedule, does not describe the consideration with sufficient particularity.*

Form of order for rectification of register.

Motion.

By an agreement dated the 4th of March, 1896, the applicant, Charles Riley Maynard, had agreed to sell, and the above-named company, when incorporated, had agreed to purchase the businesses and property specified in the first part of the schedule thereto, and the leasehold premises specified in the second part of the same schedule, at the price of £40,000, to be paid partly in cash and partly in fully paid-up shares.

On the 13th of March, 1896, that contract was duly adopted by the company, and a supplemental agreement for the issue of the fully paid-up shares forming part of the consideration for the purchase was subsequently filed under section 25 of the Companies Act, 1867, with the Registrar of Joint-Stock Companies. This last-mentioned agreement contained a recital of the principal agreement, setting forth the parties to it and the nature and extent of the consideration to be paid in cash and fully paid-up shares, but only referring to the property which was the subject-matter of the sale as "the businesses and property mentioned in the first part of the schedule" to the principal agreement and "the leasehold hereditaments, short particulars of which are set out in the second part" of the same schedule. No further description of the businesses, property, or leaseholds was given.

In consequence of the subsequent decision of the Court of Appeal in *The Kharaskhoma Exploring and Prospecting Syndicate*, *ante*, p. 37, [1897] 2 Ch. 451, doubts had arisen concerning the sufficiency of the filed contract in respect of the statement of the consideration therein contained, and with a view to testing its validity the applicant had instituted the present proceedings, and now moved for the rectification of the company's register by cancelling his name, and an order directing the execution and filing of a proper contract and the re-issue to him of fully paid-up shares.

The affidavit in support of the motion, after setting forth the doubt which had arisen, went on to state that the company was solvent and that none of the shares in question had been dealt with, and the balance-sheet was exhibited showing a balance of profit after providing for the various debts.

Warrington, *Q.C.*, and *Whinney*, for the applicant, referred to *The Kharaskhoma Exploring and Prospecting Syndicate*, and submitted the question to the court.

Vernon, for the company.—The company has agreed with the applicant for the allotment to him of fully paid-up shares, and is willing to submit to such order as your lordship shall think fit.

Kirby, for the committee of shareholders.

KEKEWICH, J.—It has been suggested that I should be content to say, as I might say, that there is a doubt whether this contract is sufficient or not and where the court has felt a difficulty, such a course has sometimes been pursued—but I do not think that that would be a satisfactory way of dealing with this case, notwithstanding that I am at a serious disadvantage in not having heard any argument on behalf of the company. The question which I have to determine has arisen in consequence of the recent decision of the Court of Appeal in the *Kharaskhoma case*, a decision which is very much in the hands of the profession, and especially of that branch of it chiefly concerned with company law. The judgments in that case left undecided one point which has given rise to the question now before me, and I do not think I should be doing my duty if I rectified the register without deciding the question which has been raised.

The question is, Is this a sufficient contract within section 25 of the Companies Act, 1867? The objection being that the consideration for the issue of the fully-paid shares is not sufficiently stated. Now, it may be said that this is not a contract at all, and in one sense it is not, for it is not an original but only a confirmatory contract, but to my mind it is hard to say that a confirmatory contract is not a contract, and that the only contract is the original contract. There is, however, no doubt that a short confirmatory contract is sufficient for the purposes of the Act, and it is convenient and advantageous that it should be so. Whether you call it a confirmatory contract, or whatever you call it, it must have all the elements of a contract; that is how I understand the decision in the *Kharaskhoma case*. For the present purpose Chitty, L.J., puts the matter more plainly than the other lords justices, he says: "Now, what is the object of the section? Publicity; to give information by registering the contract to any person who proposes to deal with the company either by way of becoming a shareholder, or lending money or the like. He is to go to the register to find—what? To find the contract. He goes to the register in this case, but he does not find the contract; he finds part—half as it were—of the contract. He has no right to see the unregistered part—that is, the document of the 17th of August, and he would be at the mercy of the company whether they showed it or not." You must, therefore, show the essentials of a contract; you have not got a contract if you omit the name of the vendor, or the name of the purchaser, or a description of the thing to be purchased, or the price to be paid for it. You must have all these four essentials—the vendor, the purchaser, the price, and the thing for which the price is given, or else you have not got a contract.

Now, in the present case you have got the first three, but have you got the property for which these shares are to be allotted? Before deciding that question I shall refer to what Chitty, L.J., says about the particularity with which the consideration must be stated; he says: "This judgment of ours will not in any way affect the question with what degree of particularity the consideration must be stated in the contract. If the consideration is, for instance, a concession in South Africa, the person who reads the registered document will see that it is a concession in South Africa and will form his own opinion about it." That is rather wide, but I do not understand the lord justice to mean that a reference to a conconcession in South Africa without more would be sufficient. Then follows what is very instructive: "So if it is furniture supplied to an hotel company, he may be able to go at once and see what that furniture is, or he may not, because after a lapse of time the furniture may be worn out. Again, if it is the sale of a goodwill and stock-in-trade, the consideration stated being the goodwill and the stock-in-trade, he sees the nature of the consideration and he sees it stated." In either case the lord justice is speaking

of the furniture in a particular hotel, or the goodwill of a particular business referred to in the contract. Now turn to the recitals in the confirmatory contract in the present case. What have you? There is a recital that the vendor has agreed to sell and the company to purchase "the businesses and property mentioned in the schedule" to the principal contract. The contract does not go so far as to say that the property is in South Africa even, or where it is. Then again, the leaseholds are only referred to in the recital as being "the leaseholds specified in the schedule" to the principal contract. Any person who read this confirmatory contract would not know whether there was one leasehold house or fifty houses, or whether there was ground-rent or rack-rent payable in respect of them, or in fact anything at all about them. It seems to me idle to say that the property is properly described by reference to the contents of a schedule which is not part of the document itself and which you cannot find out. Chitty, L.J., indicated in his judgment that there must be some particularity of description, but he did not say what degree of particularity was necessary; but here there is no particularity whatever, and I therefore do not think this is a good contract within the section of the Act.

Now, that being so, the register must be rectified, and on this point there is in Mr. Chadwyck Healey's book a reference to a case which I have followed for years. In a case like the present it seems to me that the court must only rectify the register by striking off the applicant's name, for he has been put on the register for so many shares which, in consequence of my decision, are not fully paid up, and that, of course, was not the contract. It has been suggested that the order should direct that after the applicant's name has been cancelled a new and sufficient agreement should be executed and filed and new shares issued and delivered to the applicant. It does not seem to me to be a proper form of order to direct that on something being done which has not yet been done the register should be rectified. I think that what Mr. Chadwyck Healey says in reference to the course adopted in the Court of Appeal in the case of *In re The New Eberhardt Co.*, 38 W. R. 97, 43 Ch. D. 118, which is unreported on this point, is right, and that the only order which the court should make is an order directing the applicant's name to be struck off the register.

Solicitors, *Rawlings & Butt; Vernon, Son, & Stephens; Harries, Wilkinson, & Raikes.*

Chan. Div. }
Kekewich, J. } Feb. 17, 18.

In re VERNEY'S SETTLED ESTATES. (*a.*)

Settled land—Improvement rent-charges—Reduction of interest—Redemption—Application of capital money—Authorized improvements—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 25 (6) (20)—*Settled Land Act,* 1887 (50 & 51 *Vict. c.* 30), *s.* 1.

The trustees of a settled estate are not authorized under the Settled Land Act, 1887, *s.* 1, *to apply capital money in recouping a tenant for life a sum of money paid by him to the holders of improvement rent-charges in order to obtain a transfer of the charges, by which a reduction of interest upon the charges was effected.*

The replacing of thatch with galvanized iron roofing, and, semble, *the erection of new fences partly in place of old fences and partly to divide a park, are improvements within the Settled Land Act,* 1882, *s.* 25, *sub-sections* 6 *and* 20, *upon which capital money may be expended.*

In 1896 Sir Edmund Hope Verney, tenant for life in possession of the Claydon estates in Buckinghamshire, under a settlement of the 13th of January, 1868, procured an assignment of certain terminable improvement rent-charges existing on the estates, from the then holders to the trustees of the Clerical, Medical, and General Life Assurance Society. By this transfer he obtained a reduction of that portion of the charges which represented interest—the rate of 4½ per cent., at which the interest was originally calculated, being reduced to 3½ per cent. In order to get the consent of the former holders of these charges to the transfer, the tenant for life paid them £915 out of his own moneys.

On the 20th of December, 1897, certain capital moneys having come into the hands of the trustees of the settlement, the tenant for life gave them formal notice requiring them out of the capital moneys (1) to redeem the rent-charges as they then stood; and (2) to repay him the £915.

This was a summons asking for such redemption and repayment, taken out by the tenant for life in which he alleged that the payment by him of the £915 was a partial redemption of the rent-charges. The trustees of the settlement, the defendants to the summons, objected to two items in the rent-charges as not being improvements upon which capital money might be expended under the Settled Land Act, 1882, s. 25—viz., one item of £300 raised for "new fences partly in place of old fences become rotten with age, and partly to divide park for grazing purposes," and another of £109 "for re-roofing farm buildings with galvanized iron in place of thatch." The trustees also objected that the £915 was not expended in "redeeming a rent-charge" or "otherwise providing for the payment thereof" within the Settled Land Act, 1887, s. 1, which provides that: "Where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882.

Warrington, Q.C., and *W. C. Druce*, for the tenant for life.—The trustees ought to redeem the charges as they stand. The first item for new fences is within the Settled Land Act, 1882, s. 25, sub-section 6, which provides for "inclosing, straightening of fences; re-division of fields." That sub-section is really identical with the Improvement of Land Act, 1864, s. 9, sub-section 4, which provides for "the inclosing of lands and the straightening of fences and the re-division of fields." The second item for re-roofing is within section 25, sub-section 20, of the above Act, which provides for "re-construction, enlargement, or improvement." These charges have been allowed by a competent tribunal, the Inclosure Commissioners, whose decision ought to be accepted by the court. The £915 also should be repaid out of capital money, on the authority of *Lord Egmont's Settled Estates*, 38 W. R. 762, 45 Ch. D. 395, where the Court of Appeal disapproved of *In re Lord Sudeley's Settled Estates*, 36 W. R. 162, 37 Ch. D. 123.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

W. H. Coltman, for the trustees.—The trustees ought not to redeem the rent-charge for new fences: *In re The Duke of Marlborough's Settlement*, 8 Times L. R. 201; nor the rent-charge for re-roofing: *In re Newton's Settled Estates*, [1890] W. N. 24, 38 W. R. Dig. 183. They cannot recoup the tenant for life the £915, as it only reduced interest, and did not affect the principal sum charged. It is not therefore partial redemption: *In re Dalison's Settled Estate*, 41 W. R. 15, [1892] 3 Ch. 522.

KEKEWICH, J.—I think I must treat all these rent-charges as being made in respect of improvements contemplated by section 1 of the Settled Land Act, 1887. In order to arrive at that conclusion I must be satisfied that the rent-charges were created in respect of such improvements as are authorized by the Settled Land Act, 1882. If they were in fact authorized by the Improvement of Land Act, 1864, but not by the Settled Land Act, 1882, then the first section of the Settled Land Act, 1887, has no application at all. I have a list of these rent-charges and of the improvements made in respect of them, and they are on the face of them improvements within the Settled Land Act, 1882, with the exception, possibly, of £300 raised for "new fences partly in place of old fences become rotten with age, and partly to divide park for grazing purposes," and another item of £109. Taking the first item, I should have doubted whether it came within the Settled Land Act, 1882, s. 25. I think it can only come under sub-section 6 of that section, which provides for "Inclosing, straightening of fences, re-division of fields." It is suggested that it does not come under any one of the heads in that sub-section, that it is not for inclosing the park, or straightening the fences, nor for re-division of fields. I should, if I had had no assistance from the decision of the Inclosure Commissioners given under the Improvement of Land Act, 1864, have required more evidence to satisfy me that this money was properly expended in improvements within the meaning of the Settled Land Act, 1882, s. 25, sub-section 6, but when it appears that the words of section 9 (4) of the Improvement of Land Act, 1864, are substantially the same, and that the Inclosure Commissioners were satisfied with the improvement it is impossible for me to say, the money having been granted by a competent tribunal, and the words of the two sub-sections being practically the same, although there is some slight difference, that that money was improperly expended. I don't therefore allow the doubt to arise. I fall back upon the decision of the commissioners. Then another item is £109 16s., "for re-roofing farm buildings with galvanized iron in place of thatch." If that is to be justified at all it would be under the Settled Land Act, 1882, s. 25, sub-section 20, which provides for "reconstruction, enlargement, or improvement." It is obvious re-roofing would not come under the head of "reconstruction" or "enlargement" of farm buildings, and there are authorities to that effect which I ought to follow, and which commend themselves to my judgment; but in this case galvanized iron is used to replace thatch. Now, although thatch has great advantages, it has also great disadvantages, and although the same may be said of galvanized iron, yet, on the whole, one could not deny that galvanized iron is an "improvement" on thatch. I think therefore I must allow that item.

But a more important question remains, in the consideration of which I should have liked some more assistance and looking into the authorities.

It appears that some time ago, in 1896, and before the 20th of December, 1897, when the notice was given by the tenant for life upon which the right to have this charge paid off depends, all the rent-charges were vested in certain mortgagees of the original holders, and the tenant for life arranged a transfer of them to new mortgagees on the terms that the future payments should be reduced in such manner as to make the interest 3½ per cent. instead of as originally 4½ per cent. That was a great advantage to the tenant for life and to his successors if they succeed him while these rent-charges still remain, but in order to get it he had to pay £915 13s. 11d., and he wants that sum also paid to him out of the capital moneys in the hands of the trustees. That is a new point which is not covered in terms by any authorities. What is he entitled to under the Settled Land Act, 1887, s. 1? He is entitled to have capital moneys "expended in redeeming" rent-charges; well, this is not a case of actually redeeming the rent-charges. Redemption is the paying the principal, interest, and costs to the mortgagees, and they are in this case the Clerical, Medical, and General Life Assurance Society.

It is not they, however, who would receive this £915; that has been paid to the former holders. The society, if it were paid off, would only receive what is now due with interest calculated at 3½ instead of 4½ per cent. The payment of the £915 cannot, then, be redemption. Was it expended in "otherwise providing for the payment thereof" within section 1 of the Settled Land Act of 1887. In one sense I think it was. The £900 which he paid was applied in the reduction of interest, and if it had not been paid he would have had to continue paying these rent-charges calculated on 4½ per cent. instead of 3½ per cent., but I apprehend that under section 1 the only alternative you have is that capital money may be expended in "redeeming" a rent-charge or in "otherwise providing for the payment thereof," and shall then be deemed to be applied in payment for an improvement authorized by the Act of 1882. That does not seem to me to point towards recouping a tenant for life payments which he has made out of his own moneys for reduction of interest. That is not the right construction of the Act, nor is it justified by authority: *vide In re Dalison's Settled Estate*, a case decided by Stirling, J., and also other cases supporting the view there taken. Then there are cases going the other way. In the case of *In re Lord Egmont's Settled Estates* the Court of Appeal took the view, disapproving of Kay, J.'s, decision in *In re Lord Sudeley's Settled Estates*, that the trustees of the estate were authorized by section 1 of the Act of 1887 in making a payment out of capital in respect of a bonus which the tenant for life was bound to pay in order to redeem. But take the ordinary case of a mortgage; suppose you are authorized to redeem it, you do so with interest and costs, but if the mortgagee says, "I have a covenant in my mortgage deed by which the mortgage was to last for five years, and therefore I am not bound to be redeemed at once"; then if you wish to redeem at once, you must pay the mortgagee for the purchase of his right against you, and unless you pay you are not able to redeem at all. That would fairly come within redemption, and so with respect to a bonus paid in order to obtain redemption, it is necessary to pay the bonus, and therefore the payment of it comes fairly within the words of section 1, "money expended in redeeming." But that does not apply to money paid by the tenant for life for the reduction of interest, which is no part of redemption, but is a voluntary payment made by the tenant for life partly for his own benefit before the date at which his right to call upon the trustees to pay off the charges

accrued to him. Therefore, on both these grounds it seems to me that the applicant fails. But there is a third ground. It is only a payment of interest. When you come to redeem no doubt you pay principal, interest, and costs, but you do not recoup the tenant for life the payments made by way of interest, except from the date when he has given notice. From that time forward his right accrues. But you do not recoup him what he as tenant for life has paid, and on no possible ground could he call upon the trustee to recoup him interest he has already paid as tenant for life. That is not capital money as between the tenant for life and the remaindermen. I know that although he has paid this money for his own benefit, still he has paid it for the benefit of the estate as well, but it was paid as interest and not as capital. I think it would be wrong to allow this payment of the tenant for life of £915.

There will be a declaration that the tenant for life is entitled to require the trustees to redeem the rent-charges as they stood on the 20th of December, 1897, the date of his notice.

Solicitors, *Twisden & Co.*, for *Hearn & Hearn*, Buckingham; *Western & Sons.*

Chan. Div.
Kekewich, J. } Feb. 8.

BAXTER v. MIDDLETON.

(*In re* MIDDLETON AND BAXTER AND THE VENDOR AND PURCHASER ACT, 1874.) (*a.*)

Practice—Lis pendens—*Dismissal of action for specific performance — Order vacating registration — Lis Pendens Act*, 1867 (30 & 31 *Vict. c.* 47), *s.* 2.

Upon the dismissal of an action for specific performance, which has been registered as a lis pendens, *the successful party may, in addition to the usual judgment, have an order to the effect that the registration shall be vacated unless an appeal is set down within a certain specified time.*

Action and summons.

This was an action by a purchaser against the vendors to enforce specific performance of a contract for the sale of a business together with the business premises and goodwill.

Subsequently to the issue of the writ the defendants, the vendors, took out a summons under the Vendor and Purchaser Act, 1874, to have it declared that the contract was not binding upon them.

Immediately after the issue of the writ the plaintiff registered the action as a *lis pendens.*

Upon the action and summons coming on by order for trial and hearing together, the action was dismissed with costs, and no order was made on the summons.

Warrington, Q.C., and *Ingle Joyce*, for the defendants.—The defendants ask for an order under section 2 of 30 & 31 Vict. c. 47, vacating the registration of the *lis pendens.* The section provides that the order may be made in a summary way on petition or motion in court, or by summons in chambers. The time allowed for appeal should be short, and the order should be made absolute if there is no appeal within that time. The defendants ask for an order *nisi* as in *Pooley* v. *Bosanquet*, 26 W. R. 587, 7 Ch. D. 541.

[KEKEWICH, J., referred to *Strousberg* v. *M'Gregor*, 34 SOLICITORS' JOURNAL 180.]

Renshaw, Q.C., and *Martelli*, for the plaintiff, asked that sufficient time should be given for appeal.

KEKEWICH, J.—I make an order that if by this day fortnight an appeal is not set down, the registration will be vacated.

Solicitors, *Poole & Robinson; Donald Macmillan.*

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

Q. B. Div.
(Day and Lawrance, JJ.) } Jan. 27.

ROGERS (*Appellant*) v. MANCHESTER PACKING CO. (*Respondents*). (*a.*)

Factory Acts—"Factory"—Bleaching and dyeing works —Processes of hooking, lapping, and making up and packing cloth—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *s.* 93, *Schedule IV., Part I.* (2).

By section 93 *of the Factory and Workshop Act*, 1878, *the expression "non-textile factory" in that Act means "any works, warehouses, . . . or places" named in Part I. of the* 4*th Schedule to the Act, which includes "bleaching and dyeing works—that is to say, any premises in which the processes of* (inter alia) *hooking, lapping, and making up and packing any cloth, . . . or any one or more of such or any process incidental thereto, are or is carried on."*

The respondents carried on at their premises the above-named processes as a separate business, and not as incidental to the business of bleaching and dyeing.

Held, that the respondents' premises were a "non-textile factory" within the definition in section 93 *of the Act.*

Case stated by a stipendiary magistrate of Manchester.

An information was preferred against the respondents by the appellant, a factory inspector, charging them with employing a young person in their factory after 8 p.m., contrary to the provisions of the Factory Acts.

The magistrate held that the respondents' premises were not a factory within the Acts and dismissed the information subject to this case.

The facts were as follows: The respondents carried on at their premises the business of making-up and packing, which consisted exclusively of the hooking, lapping, making up, and packing of cloth for exportation. In the course of their business the respondents received cloth from their employers, the shipping merchants, in the finished condition in which it was received from the manufacturers. The respondents measured and cut the cloth into lengths in accordance with their instructions from the merchant owner of the cloth. These lengths were then folded in different ways by the respondents, according to the instructions of the shipping merchants. After binding or stitching the ends of the folds together in order to keep them straight, the cloth was made up into parcels, and labels descriptive of the contents were affixed thereon. A number of parcels were then placed together and hydraulic pressure was applied to reduce the bulk. All these processes were essential processes in the respondents' business, and were properly called "hooking, lapping, making up, and packing," and mechanical power was used by the respondents in aid of some of them, but none of the processes were carried on by the respondents as incidental to bleaching or dyeing.

All the processes enumerated in Schedule IV.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Part I., section 2, of the Factory and Workshop Act, 1878, are frequently carried on together in works which are commonly called bleaching and dyeing works; but some of the processes, and in particular "hooking, lapping, making up, and packing," are also carried on as separate trades by different employers. One or more of these processes is and are carried on in all bleach and dyeworks.

It was admitted that if the respondents' premises were within the Factory Act, 1878, a young person was employed there contrary to the provisions of the Act.

The question for the court was whether, upon these facts, the respondents' premises were a factory within section 93 of the Factory and Workshop Act, 1878.

By section 93 of the Factory and Workshop Act, 1878, the expression "factory" includes both textile and non-textile factories. Bleaching and dyeing works shall not be deemed to be textile factories.

The expression "non-textile factory" means:

"(1) Any works, warehouses . . . or places named in Part I. of the fourth Schedule to this Act.

"(3) Also any premises wherein . . . any manual labour is exercised . . . in or incidental to the following purposes, or any of them: (c) . . . The adapting for sale of any article and wherein . . . steam, water, or other mechanical power is used in aid of the manufacturing process carried on there."

Fourth Schedule, Part I., non-textile factories. (2) "Bleaching or dyeing works—that is to say, any premises in which the processes of bleaching, beetling, dyeing, calendaring, finishing, hooking, lapping, and making up and packing any yarn or cloth of any material, or the dressing or finishing of lace, or any one or more of such processes, or any process incidental thereto, are or is carried out."

Sir Richard Webster, A.G. (*H. Sutton* with him), for the appellant.—Four of the processes mentioned in the clause in Schedule IV., Part I., which defines bleaching and dyeing works, are carried on in the respondents' premises, and the premises are therefore a factory to which the Act applies, and the magistrate ought to have convicted the respondents.

He referred to *Howarth* v. *Coles*, 12 C. B. N. S. 10, 11 W. R. C. L. Dig. 78.

Lazarus Langden, for the respondents. — The decision of the magistrate was right. The respondents' premises are not bleaching and dyeing works. It may be that the processes carried on in the business of the respondents are also carried on in bleaching and dyeing works, but in the respondents' case those processes constitute the entire business which is quite distinct from the business of bleaching and dyeing. The words on the Schedule "any one or more of such processes, or any process incidental thereto" show that it is only when the particular process is carried on as incidental to bleaching or dyeing that the premises came within the definition of a "factory."

DAY, J.—I am clearly of opinion that the contention urged on behalf of the appellant in this case is right, and that the appeal must be allowed. Section 93 says that the expression "non-textile factory" in the Act means "any works, warehouse, places, mills, foundries, or places" mentioned in Part I. of the fourth Schedule to the Act. I am inclined to think that the respondents' premises are not a warehouse in the ordinary sense of the word, but they are certainly "works" and also a "place." And when you turn to the Schedule in question, you find bleaching and dyeing works defined as any premises where certain named processes are carried on. Now, four of these processes are in fact carried on in the respondents' premises. To my mind that is quite sufficient to bring the respondents' premises within the definition of bleaching and dyeing works. The case must go back to be dealt with by the magistrate.

LAWRANCE, J.—I entirely agree.

Appeal allowed; case remitted to the magistrates.

Solicitor for the appellant, *Solicitor to the Treasury.*

Solicitors for the respondents, *Pritchard, Englefield, & Co.*, for *Hill & Doughty*, Manchester.

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — Dec. 7, 13.

In re GILBERT.
Ex parte GILBERT. (*a.*)

Bankruptcy—Insolvent testator—Debt due to executor—Retainer in specie—Administration order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-sections* 1-9.

Where an executor is a creditor of the testator for a larger amount than the whole value of the estate, he is entitled to retain the whole estate (with the possible exception of outstanding book debts), without realizing it, in satisfaction of his claim.

Motion by Mrs. Laura Gilbert, the widow and executrix of H. F. Gilbert, for an order that the trustee of the estate of the said H. F. Gilbert, under an administration made pursuant to section 125 of the Bankruptcy Act, 1883, do deliver up to the applicant all the property of the deceased taken possession of by him as trustee under such administration order.

At the time of his death H. F. Gilbert owed Mrs. Gilbert £870, and owed other creditors about £800. Mrs. Gilbert proved his will as executrix and valued the estate, which consisted of the goodwill and stock-in-trade of a business and some book debts, at £292, and exercising her right as executrix she retained the whole estate in specie to go towards the satisfaction of her debt.

Subsequently to such retainer a creditor presented a petition against the estate of H. F. Gilbert under section 125 of the Bankruptcy Act, 1883, upon which an order was made for the administration of the estate in bankruptcy. A trustee was appointed under this order who took possession of the estate, whereupon Mrs. Gilbert launched the present motion.

T. M. Stevens, for Mrs. Gilbert.—This property was already retained by Mrs. Gilbert, and notice of such retainer was given to the petitioning creditors before they presented their petition, therefore it did not form any part of the assets of the deceased insolvent at the date when the petition was presented. The total estate being smaller than the debt due to Mrs. Gilbert she was entitled to retain it in specie without realization: Williams on Executors, 9th ed., p. 568; *Woodward* v. *Darcy*, 1 Plowden 184; *Elliott* v. *Kemp*, 7 M. & W. 306.

Carrington, for the trustee.—Mrs. Gilbert had no right to retain in specie, she should have sold the goods and paid herself with the money arising from the sale: *Chapman* v. *Turner*, 9 Mod. 268. Book debts not collected by a testator in his lifetime cannot be retained by his executor: *In re Compton*,

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Norton v. *Compton*, 30 Ch. D. 15, and I submit that the stock-in-trade and lease of the business premises should be on the same footing.

T. M. Stevens, in reply, stated that Mrs. Gilbert made no claim to the book debts.

WRIGHT, J.—This is a curious question to decide, and it is strange that there is so little authority upon it. The testator died in September, 1897, owing his wife about £870. After his death his wife, who was his executrix, took possession of his house and stock-in-trade, and carried on the business as before as her own. She kept possession of the furniture and collected some of the book debts, and the value of the whole estate is stated by her at an amount far less than the sum owing to her, and that statement is not challenged by the trustee. Whilst she was in possession of the estate some of the other creditors put questions to her, and she went to her solicitor, and was advised by him that she was entitled to retain the estate in payment of her debt; and it seems to me that if she had a right to retain, her solicitor's letter of the 21st of September is sufficient evidence of her election to retain. Three weeks afterwards the trustee appointed under the administration order came and claimed possession of the house and business, and after some demur she gave up possession to him. But this makes no difference, because, according to the authorities collected in Williams on Executors, 9th ed., p. 568, if the intention to retain is declared before possession is taken by the trustee, such possession does not affect the executor's right of retainer.

The question therefore is reduced to one of law. First it is said on behalf of the executrix that, on the death of the testator, she being both executrix and creditor, the result was that the estate vested in her by operation of law, and the ancient case of *Woodward* v. *Darcy* is cited as an authority for that proposition. That case is mentioned in Williams on Executors, 9th ed., p. 568, with approval. But I do not think it necessary in this case to decide that point, nor do I think it desirable. I doubt whether it is the law now that the property in the assets is absolutely altered without something showing assent or appropriation by the executor. But, as I said, I do not think it is necessary to decide that point, and I am glad to be relieved from doing it, because on the point of retainer I think the executrix here is entitled to all the estate. It is said she cannot retain the assets in specie, but must realize the assets—that is, sell them before she can pay herself by exercising her right of retainer. If the assets had been of a greater value than her debt, it might very well be that she was not entitled to retain them before she had realized, or unless she had clearly appropriated some specific assets in payment of her debt. But here the assets are of much less value than the debt; and it seems to me, in the absence of authority, it would not be reasonable to hold that she was bound to go through the form of selling them before she could pay herself. There is no authority that she ought except the statement in *Chapman* v. *Turner*. But that report is most unsatisfactory, and does not accord with the same case as reported in Vin. Abr. Exor. D. p. 72, which is the only report referred to in Williams on Executors. In the absence of such authority, therefore, I think I ought not to hold that the executrix is bound to realize before she can exercise her right to retain. My judgment is confined to the case where the value of the whole assets is less than the debt due to the executor. I should have felt some difficulty as to the outstanding book debts in the face of the judgment of Cotton, L.J., in the case of *In re Compton*, but I am relieved from that because the executrix does not press her claim to them. I think she is entitled to all the rest of the estate. I see no reason to separate the lease of the premises from the rest of the assets. I think she took possession of the leasehold premises and business generally, including the furniture and stock-in-trade. Under the circumstances there will be no order as to costs.

Solicitor for the executrix, *W. R. Millar*.

Solicitors for the trustee, *J. N. Mason & Co.*

Q. B. Div.
(Wright and Bruce, JJ.) Jan. 18.

In re COLE.
Ex parte ATTENBOROUGH. (a.)

Bankruptcy—Practice—Application to set aside bankruptcy notice—Adjournment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g)—*Bankruptcy Rules*, 1886 *and* 1890, *rr.* 138 (2), 139, *Form* 8

No adjournment of an application to set aside a bankruptcy notice can be granted if the debtor does not, in his affidavit in support of the application, rely on the statutory grounds for setting aside a bankruptcy notice—viz., "that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

Appeal against an order for the adjournment of an application to set aside a bankruptcy notice made by His Honour Judge Bagshawe in the county court at Brentford.

A bankruptcy notice in the usual form was served upon the debtor upon the 20th of December, 1897, and he filed an affidavit intended to operate as an application to set aside the bankruptcy notice. This affidavit contained no allegation that the debtor relied on the statutory grounds for setting aside a bankruptcy notice—viz.: "That he has a counter-claim, set-off, or cross-demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained." The only material contention in the affidavit was, that friends of the debtor were willing and had offered to pay the judgment creditor the amount of his debt on receiving from him certain securities which he held, and which they were willing to hold for the benefit of the persons from whom the creditor took the security; and that they would undertake not to deal with the security pending the decision in a certain Chancery action. The debtor further stated that he was personally unable to pay the judgment creditor until the security held by the creditor was realized, when he could pay all his debts in full.

On reading this affidavit the judge granted the debtor an adjournment of his application to set aside the bankruptcy notice.

The judgment creditor appealed.

Herbert Reed, Q.C. (*C. L. Attenborough* with him) for the appellant.—This application ought not to have been adjourned, but should have been dismissed, for the affidavit disclosed none of the grounds on which alone a bankruptcy notice can be set aside. *In re Easton, Ex parte Dixon*, 10 Morr. 111.

Muir Mackenzie (*Bonsey* with him), for the respondent.—By section 105 (2) of the Bankruptcy Act

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

1883, "the court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose." This is really an attempt to interfere with the discretion of the judge.

He referred to *In re Lord Thurlow, Ex parte The Official Receiver*, 43 W. R. 403, [1895] 1 Q. B. 724, and *In re Kelday, Ex parte Meston*, 36 W. R. 585.

Herbert Reed, Q.C., was not called upon to reply.

WRIGHT, J.—This appeal raises a very important point of practice. In my opinion the safer course is to adhere to the literal construction of the Bankruptcy Act and Rules. It is agreed that the bankruptcy notice in the present case was a good one. The application to set it aside does not come within section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, nor within the terms of rule 138 (2), or of rule 139, or of form 8; nor is the application made on the ground that the bankruptcy notice is informal and does not comply with the requirements of the Act; nor on the ground that injustice will be done if the creditor is allowed to proceed under the notice, but only on the ground that it would be fair and right if indulgence were granted to the debtor, so as to allow him time to make the proposed arrangement. But that is not enough to justify the court in supporting this order for an adjournment. The power to set aside a bankruptcy notice is confined to the grounds mentioned on the Act: see *In re Easton, Ex parte Dixon*, and *In re Kelday, Ex parte Meston*. The expressions used by the Court of Appeal in the latter case go a long way to show that there ought not to be an adjournment, unless some good ground is suggested for setting aside the bankruptcy notice, and that ground ought in all cases to be shown on the affidavit to the court to which the application is made. I am therefore of opinion that this order was wrongly made and ought to be set aside.

BRUCE, J., concurred.

Solicitor for the appellant, *S. J. Attenborough*.

Solicitor for the respondent, *G. E. Bucknill*.

House of Lords.

From C. A. (England). Nov. 26.

ST. MATTHEW, BETHNAL GREEN, VESTRY v. LONDON SCHOOL BOARD. (*a*.)

Metropolis—Drain—Sewer—Liability to repair—Approval of vestry and Metropolitan Board of Works—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 74, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 47, 48, 61.

In 1866 *the owners of a block of houses laid down a certain system of drainage, whereby the houses were drained into a pipe which was connected with a sewer belonging to the vestry. No order was made by the vestry for this purpose, nor had the approval of the Metropolitan Board of Works been obtained.*

Held, that the pipe was a sewer vested in the vestry, and repairable by them.

Decision of the Court of Appeal, ([1896] 2 *Q. B.* 319, 45 *W. R. Dig.* 99) *affirmed.*

This was an appeal by the Vestry from a decision of the Court of Appeal (Lord Esher, M.R., and A. L. Smith, L.J.), affirming an order of the Queen's Bench Division.

In 1866 the owner of certain houses in Tyrrell-street, in the parish of St. Matthew, Bethnal Green, laid down a system of drainage which discharged the sewage from the several houses into a pipe which was connected with a sewer belonging to the vestry in Turin-street. There was no evidence of any notice by the owner to the vestry for permission to construct the works, or that the Metropolitan Board of Works had given their sanction thereto.

The school board acquired the site in 1894, and called upon the appellants to repair the pipe. The vestry declined to do so, whereupon the school board obtained a rule *nisi* for a *mandamus* ordering the vestry to repair. This rule was made absolute by the Queen's Bench Division, and affirmed by the Court of Appeal.

Sir E. Clarke, Q.C., and *Asquith, Q.C.* (*Beven* with them), for the appellants.

Bosanquet, Q.C., and *R. Cunningham Glen*, for respondents.

Lord HALSBURY, L.C.—I cannot help saying that I think the circumstances under which this case comes before your lordships are a little unsatisfactory in this respect, that I think we have not all the facts we might have had, and all the light which might have been thrown on the position of affairs by a more accurate description of the premises in respect of which this subject-matter arises. The parties, I think, do not seem to have sufficiently regarded the importance of having the whole drainage system before your lordships, and have confined their attention to a plan which, looking at it by itself, is I think, a little misleading. But now that the matter has been explained and the affidavits carefully looked into, the fact appears to be very clear that, apart from the definitions which are contained in the Acts referred to, this is undoubtedly what everybody understood to be and called a sewer. Assuming, in the nature of things, there is a distinction between a sewer and a drain, apart from that which the Act of Parliament has made, I have always understood that a gutter was a private thing, but that a sewer was a public thing, to serve the purposes of the public; but the word "drain" appears to have been selected under the statute in order to make that distinction. Now, as a matter of fact, this is some contrivance which, apart from the technical meaning of the word drain, is an artificial construction which carries the sewage of a very large number of houses into a pre-existing sewer in Turin-street; and, first of all, as to a question of fact, I cannot entertain the smallest doubt that when that was made, by whomsoever it was made, everybody in the neighbourhood—certainly the surveyor of highways, the proper officer of the vestry—must have perfectly well known of its being done. It is not a small operation, it is one which must have been done certainly with public notice to everybody; some part of the public highway must have been taken up, and there must have been considerable work, I should think, done for the purpose of connecting that with what is admitted on all hands to be an old sewer in Turin-street. I am therefore clearly of opinion that the inference to draw is that that must have been known to the local authorities.

We come back now to the Act of Parliament. If this is a sewer apart from what has been described as the artificial system of a combined drain, it is impossible to avoid on the construction of the language of the Act of Parliament saying that it is vested in the vestry, and must be repaired by them. There are two states of things only, so far as I see, which can

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

prevent its being vested in the vestry, and which, if they were established, would, I think (not in favour of the private proprietor, but rather against his will), subject to certain restrictions, make things which may to some extent serve a public purpose be nevertheless repairable by the private owner at his own expense. One, of course, is, naturally and justly, where the work only applies to the drainage of a single house. The proprietor, of course, must connect his private property with the public sewer, and must make and maintain that which is a drain into the public sewer from a single house. Then, secondly, comes an additional provision, that if a particular block of houses—a certain number of houses—may be more conveniently and economically drained by one combined system or operation, then not in aid of the proprietor, but rather as imposing an additional burden on him (although it is in one sense a sewer draining more than one house), nevertheless, if an order is made by the vestry that there shall be a combined operation for draining, notwithstanding that it does to some extent fulfil what I will call a public function, it is to remain a drain, and therefore be repairable by the private proprietor.

It is not denied here that there is no evidence of any such order making this by combined operation into a drain and not a sewer, and inasmuch as undoubtedly the fact that it drains more than one house gets rid of the ordinary meaning of the word "drain," or any meaning of the word "drain," even under this Act of Parliament, except by such an order, it is manifest that those who insist on its being a drain and not a sewer must establish as a matter of proof that such an order of the vestry has been made; and I know of nothing which can avoid the exigency of the Act of Parliament impressing upon property that particular burden, unless an order of the vestry be properly made. It cannot be denied that there is no such order, and I for one decline to draw the inference of fact that any such order was made, because I do not believe it was made, and no one, I think, ought to draw an inference contrary to what they believe to be the fact.

Then it is said the vestry themselves would have no authority to complete this drain without the sanction of the Metropolitan Board of Works. As to that, it depends, to my mind, on totally different considerations to those which I have been putting, because in that case the vestry, if they did it, would be in one way neglecting the duty cast upon them by the Act of Parliament. From the description of these houses which has been given by some of the witnesses, they were, in their former condition, certainly calculated to be very deleterious to the health of the inhabitants generally. The cesspools were immediately behind these houses, the liquid slops drained into the street, and no one could doubt that, invested as the vestry were with the power of insisting on what was necessary for the health and comfort of the inhabitants, it was their duty in some way or other to provide for the drainage of these different houses.

Now, what we know as a fact is, that the drainage was altered from the system which had been previously pursued, and that at a date which is variously stated as from thirty to forty years ago, the cesspools were filled up, and this long line of conduit constructed, which got into the sewer in Turin-street. I should myself draw the inference that that was done either by the vestry itself or by some other person, very likely by agreement between the vestry and the proprietor, each of them desirous, the one of making the house convenient and habitable, and the vestry, in fulfilment of their duty to provide for the health and sanitation of the inhabitants of their district, and by whomsoever it was done it was done. It is said the vestry themselves would not have the power to do that without the authority of the board of works. I will assume for this purpose that as a regular and proper course of procedure they ought to have received the sanction of the Metropolitan Board of Works; but if they did not receive it, I think it cannot be said, although they were not fulfilling their strict ministerial duty, that it was unlawful. They were providing for a duty which they ought to discharge, and they ought to have given notice and got the sanction in that sense of the Metropolitan Board of Works. I should have supposed it would be necessary to presume they did get the sanction of the authority, but perhaps not in the regular way; but the fact remains that something or other was done. Now, what was done at a distance of between thirty and forty years ago, if it were done by the vestry and by the authority of the Metropolitan Board of Works, was lawfully and properly done; and inasmuch as there were ample powers of interference, as counsel for the respondents has shown, to prevent its being done if it was unlawful in the sense in which I have described the word "unlawful," and no such interference was ever suggested, though from the nature of the thing done it was necessarily a thing which must have been known and publicly known to the authorities, I should come to the conclusion that it was done with the sanction and authority both of the vestry and the Metropolitan Board of Works.

It seems to me, therefore that one has exhausted the whole ground. It must be either a sewer or a private drain. I have pointed out what appears to me to be a fatal blot in the effort to make it a private drain. Therefore the only other alternative is that it must be a sewer, and, if so, it follows that it must be repairable by the proper local authority.

I think, therefore, a *mandamus* ought to issue, and that this judgment ought to be affirmed.

Lord HERSCHELL.—I am of the same opinion. The sewer as to which this question arises clearly comes within the definition of a sewer contained in the Act of 1855 unless it be shown that it is taken out of that definition by being within the definition of drain. That can only be shown if it be shown that it was constructed by reason of an order of the vestry under the provisions of section 74. How far, if the construction of a sewer had been illegal unless by virtue of such order—how far, in that case, in view of the time that has elapsed, it would be right to presume an order, it is not necessary to inquire. It is perfectly manifest that such an order is not the only way by which this sewer could be legally made. I think there is strong evidence that no such order was made, because the order is a thing of which necessarily a record would almost certainly have been kept. Therefore I think it is not shown, and there is no ground for assuming, that this combination was made by any order of the vestry. If so, it is a sewer within the meaning of the Act. Then section 68 provides that all sewers thereafter to be made shall be vested in the vestry. It is not disputed that if the sewer is vested in the vestry it is repairable by the vestry. Therefore, the only question is whether it is so vested. The words are absolutely wide and unlimited—"All sewers thereafter to be made"; and it is only sought to cut that down by suggesting that it must mean all sewers lawfully made. First of all, it is said that this sewer could not be lawfully made without the sanction of the vestry to its connection with their drainage system, and further without the approval of the Metropolitan Board of Works. The only evidence on the subject of whether there was sanction and approval is an affidavit by a gentleman

who has been vestry clerk since 1884, in which he says he can find no record either of sanction or application to the Metropolitan Board of Works in the vestry records. I do not think that that is sufficient to justify a conclusion that this drainage arrangement connecting with the Turin-street sewer was constructed without any such sanction or approval as the statute refers to.

I think that when you have such a sewer as this draining this street, existing for thirty years and more, and especially in view of the fact that there is power in the vestry for the health of the neighbourhood to compel owners having houses within a hundred feet of the sewer to drain into that sewer, and that, therefore, there was power in the vestry to insist on the owners of these houses in Tyrrell-street, or at all events such of them as were within a hundred feet of Turin-street, draining into the Turin-street sewer, each by a separate drain, which obviously under the circumstances would be very inconvenient, there is every reason for supposing that the vestry would sanction a combined system of drainage, which could drain not only the houses in Tyrrell-street, which they could have compelled the proprietors to drain into the Turin-street sewer, but also the general row of houses, which it might well have been thought it was to the advantage of the neighbourhood should be so drained, and which, perhaps, there were no means of compelling the drainage of, in so far as they were beyond a hundred feet of the Turin-street sewer, so far as we know. I therefore think there is in this case good ground for presuming that the connection of this sewer draining the houses in Tyrrell-street with the sewer in Turin-street received the sanction of the vestry, and in the absence of any distinct evidence to the contrary, received the sanction of the Metropolitan Board of Works. But even if that could not be made out, I do not think it would follow, if the sanction of the vestry was given, that the sewer could be held not to be a sewer within the meaning of section 68, merely because the vestry had failed to perform their statutory duty of first submitting the plans to the Metropolitan Board of Works, and obtaining their sanction. It is quite true that the statute of 1855 says that no new sewer is to be made. I think that means "made by the vestry" without the sanction of the Metropolitan Board of Works. But the Act of 1862 carries it further, and says that no person other than the vestry shall make a sewer without the sanction of the vestry, and the vestry shall not sanction the construction of such sewer without the approval of the Metropolitan Board of Works. But it does not follow that because the requisite sanctions have not been obtained the construction is not a sewer. The statute does not say, "all sewers hereafter constructed with the sanctions and approvals required by this Act." If it did, of course the matter would have been clear, that unless such sanction or approval had been given, or was to be presumed to have been given, the construction could not be termed a sewer within the meaning of the Act. But the Legislature has not said that. Of course there are many instances in which certain assents are requisite, and the failure to procure those assents may be a wrongful act on the part of those who ought to have obtained them; but, nevertheless, the thing when done is none the less done and regarded as a matter which cannot be treated as absolutely void and a nullity because the requisite assents have not been obtained. So here, I think, when one looks at the very words of the Act of 1862 itself, it speaks of the thing as to which the assents are to be obtained as a sewer, and in the language of this legislation I think that it is none the less a sewer within the meaning of the Act, even although that sewer may have come into existence without certain assents and approvals which as between public bodies the statute requires. For these reasons I think the judgment appealed from ought to be affirmed.

Lord MORRIS.—I agree.

Lord SHAND.—I also concur.

Appeal dismissed.

Solicitor for the appellants, *R. Voss.*

Solicitor for the respondents, *C. E. Mortimer.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 9.

SOUTH HETTON COAL CO. (LIMITED) v. HASWELL, SHOTTON, AND EASINGTON COAL AND COKE CO. (LIMITED). (a.)

Contract—Sale by private treaty—Tender—"Highest net tender."

The liquidator of the H. Co. (in liquidation) offered for sale certain royalties on coal measures, and undertook to accept the "highest net tender" he received. The S. Co., by their agents, offered such a sum as would "exceed by £200 the amount offered by the other intending purchaser."

Held, that such an offer did not amount to a tender at all, and was therefore not binding on the liquidator.

Appeal by the plaintiff company from a decision of North, J.

The action was brought for specific performance of an alleged contract by the defendant company (which was in liquidation) by its liquidator, Mr. Holmes, for the sale to the plaintiff company of the Easington and Undersea royalties on coal measures which were leased to the defendant company. The defendant company was also lessee of the Pespool royalties. The defendants were the company, the liquidator, and Mr. Barwick, a rival purchaser. The liquidator was in negotiation both with the plaintiff company and Mr. Barwick for the sale of these royalties, and proposed that sealed tenders should be sent in to be opened in the presence of the chairman and directors of the defendant company; his letter concluded: "And the highest net tender I receive (all other things being equal and satisfactory), that tender I will at once accept."

Mr. Barwick's tender was as follows: "I hereby offer you the sum of £31,000 for the company's interest in the Easington and Undersea royalties, and in addition I agree to indemnify you and the company against all claims and liabilities under the Pespool lease, taking an assignment of the same as from May, 1896, and repaying the £1,000 already paid by the Messrs. Lamb." The tender by the plaintiffs' agents was: "Referring to previous negotiations, we, on behalf of the South Hetton Co., offer for these royalties such a sum as will exceed by £200 the amount to-day offered for them by the other intending purchaser, coupled with a transfer of the Pespool lease, if the other offer be on that footing." The liquidator accepted Mr. Barwick's offer.

The plaintiff company thereupon brought this action on the ground that they had made the highest money tender, and claimed specific performance of their alleged contract, an injunction to restrain the completion of the contract with Mr.

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Barwick, and damages. North, J., on motion by the two defendants to strike out the plaintiffs' statement of claim on the ground that it showed no reasonable cause of action, came to the conclusion that the plaintiffs' offer, even if it could be considered a valid tender, did not fulfil the condition, "all other things being equal and satisfactory," and accordingly struck out the statement of claim and dismissed the action.

The plaintiff company appealed.

Swinfen Eady, Q.C., and *Clare*, for the appellants.—North, J., was wrong in treating the statement of claim as demurrable, and striking it out. If a person invites tenders only, he is not bound to accept the highest, but if he agrees to accept the highest, then as soon as a tender is sent in a binding contract is at once made. The object of tenders is to get the highest price any purchaser will give; they are not necessarily intended to be the means of getting independent valuations. [LINDLEY, M.R.—Supposing Mr. Barwick's offer had been a ridiculously small one, then you would have got the property at an absurdly low figure.] [VAUGHAN WILLIAMS, L.J.—Suppose a man instructs an auctioneer at a sale, and says, "I want so-and-so, and will give £1 more than the highest bidder for that article"; if the autioneer knows his business, he will refuse any such instructions, and will say, "No, give me a limit and I will accept your instructions." If he took the first instructions, it would be a fraud on everybody in the room, and the penultimate bidder would be the real purchaser.] The fair meaning of our letter is, "We are prepared to take over the Pespool lease on the same terms as Mr. Barwick has offered, if he has offered any."

Cozens-Hardy, Q.C., *Vernon Smith, Q.C.*, and *Micklem*, for the defendant company and the liquidator, and *Younger*, for Mr. Barwick, were not called upon.

LINDLEY, M.R.—Looking at this case as a suit for specific performance I confess that I am rather startled. I think that it is a little grotesque, but looking at it as an action for damages, perhaps there is more in it. The plaintiffs claim specific performance, and, if they cannot get it, damages. It appears to me that there are two very short answers to their case. With regard to the correspondence I lay aside all questions of the Statute of Frauds. I assume that these letters written to Mr. Barwick and shown to the plaintiffs' agents are to be treated as letters signed by Mr. Holmes and addressed to the plaintiffs themselves, and I will deal with it entirely on that footing. [His lordship stated the facts shortly, and continued:] Then I will assume, to cut it short, that the correspondence to which I have referred results in a letter written by the liquidator to the present plaintiffs, saying that the liquidator will accept the highest net money tender which he receives, all other things being equal and satisfactory. I do not gather that it was part of the bargain or arrangement that nobody else should be at liberty to tender. I suppose that anybody might have tendered, and the liquidator would hardly be discharging his duty as liquidator if he ignored tenders which were beneficial to the company. Mr. Barwick sends in a tender, an offer of £31,000 for the company's interest in the Easington and Undersea royalties, and in addition says, "I agree to indemnify you and the company against all claims and liabilities under the Pespool lease, taking an assignment of the same as from May, 1896," and repaying a sum of £1,000, which was arrears of rent and royalties. That is definite enough.

Now, the plaintiffs write this letter—I will not call it anything for the present but a letter—to Mr. Holmes, the liquidator: "Referring to previous negotiations"—there had been negotiations, and those negotiations related not only to the sum to be paid down, but also to taking over the Pespool property as from May, 1896—"referring to previous negotiations, we, on behalf of the plaintiffs, offer for these royalties (that is, the Easington and Undersea royalties) such a sum as will exceed by £200 the amount to-day offered for them by the other proposing purchaser"—who is Mr. Barwick, not any third, fourth, fifth, or twentieth person who might make a proposal—"coupled with a transfer of the Pespool lease if the other offer be upon that footing." Now, what does that mean? I have not the slightest doubt that if the liquidator had accepted this offer it would have been open to him to do so, and the plaintiffs would have been bound by that acceptance of their offer. I say nothing about what Mr. Barwick might have said, but, as between the liquidator and the plaintiffs, the liquidator might have accepted that. But now we have to consider whether he was bound to accept it. That raises two questions: Does it fairly answer the description of what the liquidator had bound himself to accept? In other words, does it answer the description of being "the highest net money tender I receive"? It appears to me obviously not. Whether it was a tender at all depended entirely not upon the construction of the letter, but upon whether other people tendered. That is not what the liquidator wanted, and that is not what he bound himself to accept at all. He says: "Give me your highest net money tender, and I will consider it." The plaintiffs' offer is merely illusory. It does not answer the description in a business sense or in a legal sense. I do not think that the liquidator was under the slightest obligation to accept it, although he might have accepted it. I think that we should be encouraging trickery and making a very bad precedent if we held that that was in any sense of the word the highest net money tender which the liquidator had bound himself to accept. I do not accuse these gentlemen of trickery, but if it is said that this letter answered the description, it should open the door to the grossest frauds, not only on purchasers but on vendors too. [His lordship then dealt with another point, which does not come for a report, and continued:] I think that both points are absolutely fatal, that there is no contract at all, and that North, J., was perfectly justified in dismissing the action. The appeal will be dismissed with costs.

RIGBY, L.J.—I am quite of the same opinion. I will not repeat what the Master of the Rolls has said. The only observation that I will make is that it appears to be reasonably clear that they were not renewing the offer as to the transfer. I do not know what the reference to the "previous negotiations" means, but they intended to get rid of that, if they could. If their competitor had not offered to take transfer they did not offer a transfer. If the competitor had offered to take a transfer as from a date, expressly repudiating the past liabilities (£1,000 or whatever they might be) their offer meant that. I do not see how it is possible for them on these ambiguous words, referring to "previous negotiations" to say "We meant that if anything was said about a transfer we would include in our offer that we would take a transfer as from a day mentioned."

VAUGHAN WILLIAMS, L.J.—I have nothing to add.

Appeal dismissed.

Solicitors, *Crossman, Prichard, Crossman, & Bl*[illegible] for *Dees & Thompson*, Newcastle-on-Tyne; *Butler Roche; E. Flux & Leadbitter*, for *Ryott & S*[illegible] Newcastle-on-Tyne.

From Chan. Div.
(Lindley, M.R., and Chitty and Vaughan Williams, L.JJ.) } Nov. 30; Dec. 2.

In re ROWE.
PIKE *v.* HAMLYN. (*a.*)

Will—Construction—Erroneous recital of indebtedness—Legacy "in addition to sums owing."

A testatrix, who was sole devisee and legatee of her husband, bequeathed to her grandniece "the sum of £300 in addition to the sums owing to her from my late husband's estate." In fact there were no "sums owing" by the husband other than two sums represented by an I O U and a promissory note, which, as the testatrix knew, he had given to the grandniece without consideration.

Held, that having regard to the fact that the testatrix was the universal legatee of her husband, the words of her will amounted to an additional bequest of those two sums.

Decision of Romer, J., *reversed.*

Construction of wills containing an erroneous recital of indebtedness discussed.

Appeal from Romer, J.

The defendant, Miss Margaret Ann Hooper Hamlyn, had for nine years prior to 1895 resided with her grandaunt, Mrs. Mary Ann Rowe, the testatrix, and Mr. Rowe, the husband of Mrs. M. A. Rowe. Mr. and Mrs. Rowe had no children. They were old and of infirm health, and the defendant, who was treated as one of the family, attended to their wants, and received a salary of £8 a year for so doing.

Mr. Rowe died in March, 1895, having by his will devised and bequeathed all his real and personal property to Mrs. Rowe, whom he appointed sole executrix. He left some real estate and personal property of the value of about £3,000. Subsequently Mrs. Rowe made her will, which contained this bequest: "I bequeath to the said Margaret Ann Hooper Hamlyn the sum of £300 in addition to the sums owing to her from my late husband's estate." The will contained no residuary gift, and no direction to pay debts.

The testatrix died in April, 1895, and the defendant, who was one of the executors appointed by her, proved her will in June, 1895. The estate included almost no property other than that left to the testatrix by her husband.

The transactions between Mr. Rowe and the defendant to which the testatrix referred were as follows:

In February, 1894, Mr. Rowe had given the defendant an I O U for £500. In January, 1894, he had given her a promissory note for £500, and in February, 1895, a deposit note for £500. The defendant had some difficulty in cashing the deposit note owing to its defective endorsement by Mr. Rowe; but afterwards he corrected this defect, and she got the money. The promissory note and the I O U were still in the defendant's hands, and had not been cashed. The testatrix when she made her will knew how matters then stood. It was admitted that both documents had been given as gifts and without consideration. There was no evidence that there were any "sums owing" to the defendant from Mr. Rowe's estate, unless those words were taken as referring to the sums represented by the I O U and the promissory note. In April, 1895, the plaintiff, who, as one of the testatrix's next-of-kin, was entitled, if the two instruments were not validly given, to one-twelfth of the money comprised therein, took out an originating summons, by which he nominally claimed administration of the testatrix's estate, but in substance sought only to have it determined whether the defendant could treat the sums of £500 and £500 as validly bequeathed to her by the testatrix.

Romer, J., decided, with reluctance, that those two sums could not be so treated, and the defendant appealed.

Neville, Q.C., and *Jenkins, Q.C.*, for the appeal, cited *Aird* v. *Quick*, 27 W. R. 882, 12 Ch. D. 291; *Farrer* v. *St. Catherine's College*, 21 W. R. 643, L. R. 16 Eq. 19; and *Hall* v. *Lietch*, 18 W. R. 423, L. R. 9 Eq. 376.

Farwell, Q.C., and *Stewart Smith*, for the plaintiff, referred to *Adams* v. *Adams*, 1 Hare 537; Jarman on Wills, chap. xvii. (5 ed., vol. 1, pp. 491, 493); *In re Taylor's Estate, Tomlin* v. *Underhay*, 22 Ch. D. 495, 31 W. R. Dig. 153, 220; and *Quihampton* v. *Going*, 24 W. R. 917.

Jenkins, Q.C., replied.

[VAUGHAN WILLIAMS, L.J., referred to *Whitfield* v. *Clemment*, 1 Mer. 402.]

Cur. adv. vult.

Dec. 2.—LINDLEY, M.R.—This is an appeal from a decision of Romer, J., and the question turns entirely upon the construction of a very short passage in a very short will, and of course, on the application of the language there used to the circumstances with which we have to deal. [His lordship stated the facts, and proceeded:] Now the question arises, What is, first, the true construction, and afterwards the effect, of this short bequest?

Romer, J., said in his judgment: "I cannot see, in this will, that there is any bequest or legacy of these two sums"—that is, the two sums of £500—"nor do I find that it amounts to more than this: 'I, the testatrix, being under the erroneous impression that these are binding debts on my testator's estate, give Margaret Hamlyn a less legacy than I otherwise would.' I cannot remedy that." Now, with great deference to the learned judge, I cannot adopt that view. It appears to me that when the facts are known we can find here language which amounts to a clear legacy of £300 and these two sums of £500. It is a legacy in the form of a legacy of A. *plus* B.—A. in addition to B. Now, if a testator makes a legacy in that form, and is in a position to pay legacy B. as well as legacy A., it appears to me that that is a legacy of A. and B., and of B. as much as A. Of course, if the testator is not in a position to pay legacy B. then the legacy cannot be extended beyond legacy A. In this case, if this testatrix had not been the paymaster—if she had not succeeded to her husband's assets, and was not in a position to make this legacy of these two sums—of course this would be a legacy of £300 only. You could not read it as a legacy of anything more. But being the person to pay, having the whole property in her own hands, when she says that she gives her grandniece £300 "in addition to" the sums owing to her from Mr. Rowe's estate, the intention is perfectly plain to my mind, and you cannot miss it. What she intends is that out of her estate, which she has obtained from her husband, and which she calls his estate, her grandniece shall have those two sums *plus* the £300. It is, in other words, a gift of £300 *plus* what she erroneously describes as "the sums owing to her from my late husband's estate." That is a mere *falsa demonstratio*. It is perfectly plain that the testatrix intended to treat these sums as debts. She so describes them. She treats them as debts, but she says that they are to be paid out of her estate. That is the legal effect of this clause when you come to look

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

at it, and bear in mind what is the key to the whole position—namely, that she is the person to pay.

Now, Mr. Farwell made a point about the deposit note being a satisfaction of one of these sums. I do not think that there is anything in that, because it is a mere question what is the true inference to be drawn from the facts as they are known to us. I do not dispute that *primâ facie* if I send a person a cheque or give him a promissory note I am supposed, if nobody knows anything more about it, to pay him a debt or to constitute a loan, or even possibly to make him a present. But we have a great deal more than that here. Not only have we a man who is making presents to this lady, the defendant, but we have the very important circumstance that when he gave the deposit note he never asked for either the I O U or the promissory note for £500. If you take her version, and I see no reason to discredit it, it is quite obvious there was in effect a gift intended.

It appears to me, therefore, that Romer, J.'s, judgment must be reversed. As regards the costs, I do not see that there is any controversy at all between these parties, except as to whether the defendant is entitled to these sums or not. Under these circumstances I think that the appeal ought to be allowed and the summons ought to be dismissed, and dismissed with costs, and that the appellant ought to be at liberty to deduct the costs, including the costs of the appeal, from the share, if any, of the estate which comes to the plaintiff.

CHITTY, L.J.—I agree. [His lordship stated the facts, and proceeded:] Now, I think that, as the Master of the Rolls has said, the cardinal point in this case is that the testatrix was herself the paymaster. She seems to have been under an error as to the law, as is shown on the face of her own will when she speaks of the two sums of £500 as owing by her husband's estate. The legacy of the £300 is in addition to the sums owing to her, the grandniece, "from my late husband's estate." "The sums" obviously means the two sums comprised in the promissory note and the I O U.

Now, her intention seems to me to be apparent upon the face of this will, if one bear in mind the circumstances which may be legitimately given in evidence, that the grandniece should have the £300 in addition to the £1,000, which is referred to under the words "the sums owing to her from my late husband's estate." Her intention was that the £1,000 should be paid out of her late husband's estate, which was her own. This is not the case of an attempt to set up a gift by an erroneous recital of an independent title; there is no such recital. There is the statement, but it is a statement that the £300 is given in addition to the sums mentioned. Now, a gift of a legacy by a codicil "in addition to" a legacy stated as given by the testator in his will, is a gift of the legacy stated to have been given, where the testator has, in fact, not made any such gift by his will. The present is not exactly that case, but it is, in my opinion, analogous to it. There was no reason for mentioning the two sums as owing for the purpose of any rule as to satisfaction of a debt by a legacy. The rule which has been very much canvassed in *Talbot* v. *Shrewsbury*, Prec. Ch. 394, is that a legacy is a satisfaction where the legacy is of a sum of money as great or greater than the debt. I revert to the words, and my opinion is that the words themselves are sufficient to show the intention of bounty in regard to the sums owing from the testatrix's husband's estate, which was her own, and which she knew to be her own, at the time she made her will. I therefore hold that the two sums are legacies given by her in her will.

VAUGHAN WILLIAMS, L.J.—I entirely agree, and I should add nothing if it were not—first, that we are differing from the decision of Romer, J.; and, secondly, that this is a case of the construction of a will which, in a sense, raises a question of frequent occurrence, and I think it is very desirable that one should state clearly the grounds upon which one finds a bequest or legacy in a will in which there are no express words of bequest or legacy. Therefore I will state what my view of this matter is.

In the present case the question is whether, by express words or by implication from the whole will, you find an intention by the testatrix to bequeath as a legacy the sums spoken of as owing by her late husband to Margaret Hamlyn. Assuming that you find that intention, a second question arises as to whether the fact that no sums were due — that is, legally due — from the husband of the testatrix to Margaret Hamlyn will prevent the legacy from taking effect. Now, as to the first question, if there are in the will no words amounting to a gift, or such a direction to pay as indicates an intention to confer the bounty of the testatrix, but merely words of erroneous recital or recognition of indebtedness, no intention of giving a legacy will be disclosed by the will. That is all. I do not understand the case of *Adams* v. *Adams*, which was so much relied upon, to go beyond that proposition. The mere recital that someone named in the will as a legatee in respect of another legacy has an interest independent of the will in an estate or fund under the control of a testator, will not be a sufficient indication of an intention to make a gift by will of that interest, even though such recital may be accompanied by a direction to pay. If that is a true proposition it is, *a fortiori*, a true proposition where the interest recited is an interest of a creditor to whom the estate is indebted. To infer the intention to confer a bounty you must, in my judgment, find in the will, in addition to the direction to pay, an evidence of the intention to confer a bounty. Now, in *Whitfield* v. *Clemment*, a direction to pay an overstated debt on a bond was held by Sir William Grant, M.R., to sufficiently indicate an intention to give a legacy of that amount by reason of the implication arising from the general scope of the will. On the other hand, in *Wilson* v. *Morley*, 25 W. R. 690, 5 Ch. D. 776, Fry, J., failed to find sufficient in the will to disclose an intention to make the recited debt the subject of the testator's bounty. I mention those two cases as being at each end of the line, because in the judgments the sort of reasons which will induce a court to find, or to refuse to find the intention to confer a bounty, seem to me very clearly and forcibly set out. Now, in the present case you have no express words of gift; you have no express direction to pay, unless you read the words "in addition" as referring to the word "bequeath." This seems to be a possible though not a necessary construction of this will. That being so, I think one ought to look at the whole will to find the answer to the question whether one ought to adopt this possible construction. I think that one ought to adopt this construction, and for two or three short reasons which I am going to give. The first of these is that in the present case, it really seems difficult, if not impossible, to suggest any reason for mentioning the indebtedness of the estate of the testatrix's husband unless the purpose was to include these sums in a bequest by the testatrix. Secondly, the mention of these sums is part and parcel of a clause introduced into the will for the purpose of giving a legacy to Margaret Hamlyn. It will be found that that is one of the reasons which is relied upon by Sir William Grant in *Whitfield* v. *Clemment*. Lastly, the whole will

deals only with legacies by the testatrix. It does not deal with debts at all, and contains no reference to the obligations of the testatrix as personal representative of her husband. These are the reasons which induce me to adopt this, which is a possible construction of the will.

Now, I have only to add this to what I have been saying, that, of course, if you once find the intention to give a legacy, the *falsa demonstratio* causes no difficulty whatever, provided you are assured of the identity of the subject-matter, the legacy. And, in my judgment, there can in the present case be no doubt as to the identity of the subject-matter, it being to my mind perfectly clear that the testatrix was referring, by these words, "sums owing to Margaret Hamlyn from my husband's estate" to the sums mentioned in the unenforceable promissory note and I O U.

Appeal allowed.

Solicitors, *Taylor, Hoare, & Pilcher*, for *J. & S. P. Pope*, Exeter; *Mear & Fowler*, for *Dunn & Baker*, Exeter; *E. & J. Mote*, for *Carter & Carter*, Torquay.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) Feb. 24.

FURNESS *v.* BERESFORD.
YORK ELECTION PETITION. (*a.*)

Election law—Parliament—Election petition—Claim of seat—Scrutiny—Particulars—Election Petition Rules, 1868, *rr.* 6, 7.

Where the petitioner in a parliamentary election claims the seat on the ground that he had a majority of lawful votes at the poll, rule 6 *of the Election Petition Rules,* 1868, *does not apply, but rule* 7 *applies exclusively. The respondent, therefore, has no right to an order for particulars, as in the case of a petition where an election is sought to be avoided on the ground of corrupt and illegal practices, but is only entitled to a delivery of the list of the votes intended to be objected to and the grounds of objection, six days before the day appointed for trial.*

Munro *v.* Balfour, 41 *W. R.* 143, [1893] 1 *Q. B.* 113, *approved.*

Appeal by the petitioner from an order of Lawrance, J., for the delivery of certain particulars.

The petitioner and the respondent were the candidates at a parliamentary election for the City of York, at which the respondent was declared by the returning officer to be duly elected.

The petitioner presented a petition against the respondent's return, in which he alleged, *inter alia*, that certain persons voted at the election who had been guilty of corrupt and illegal practices, illegal payment, illegal employment, and illegal hiring, or who had been employed for the purposes of the election for reward by or on behalf of the respondent, or who had voted more than once, or who had been guilty of personation, or who were disqualified by legal incapacity from voting; and that certain ballot papers had been erroneously received by the returning officer, and that certain others had been erroneously rejected, and that the majority of votes declared by the returning officer in favour of the respondent was an apparent and colourable majority only, and that the petitioner had a majority of valid and lawful votes. The petitioner prayed that a recount might be had of the ballot papers counted at the election, and that a scrutiny might be allowed of the votes given and tendered, and that it might be determined that the petitioner was duly elected.

On the application of the respondent, Lawrance, J., made an order that the petitioner should within four days deliver to the respondent's agents particulars of the corrupt and illegal practices, illegal payments, illegal employment, and illegal hiring mentioned in the petition, and he gave the petitioner leave to appeal.

Rule 6 of the Election Petition Rules, 1868, is as follows: "Evidence need not be stated in the petition, but the court, or a judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to insure a fair and effectual trial in the same way as in ordinary proceedings in the Court of Common Pleas, and upon such terms as to costs and otherwise as may be ordered."

Rule 7 is as follows: "When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of or defending the election or return shall, six days before the day appointed for the trial, deliver to the master, and also at the address, if any, given by the petitioners and respondent, as the case may be, a list of the votes intended to be objected to, and of the heads of objection to each such vote, and the master shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the court or judge, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered."

Dickens, Q.C., and *Willoughby Williams*, for the petitioner.—The learned judge had no jurisdiction to make this order. He purported to act under rule 6. That rule is in its terms a general rule, and, if it stood alone, would be applicable to all election petitions. Rule 7 is a specific rule applying to the case of a petition where the petitioner alleges that he has a majority of lawful votes, and demands a scrutiny. Here the petitioner does not seek to avoid the election on the ground of corrupt or illegal practices, he merely claims to have had a majority of lawful votes; and he alleges, among other things, that certain persons voted at the election who were guilty of corrupt and illegal practices, and he claims that their votes should be struck out on a scrutiny. It was decided in *Munro* v. *Balfour*, 41 W. R. 143, [1893] 1 Q. B. 113, that rule 6 does not apply to a case to which rule 7 applies. The respondent in this case, therefore, is not entitled to particulars otherwise than in accordance with the terms of rule 7—that is to say, delivery of a list of the votes objected to and of the grounds of objection six days before the day appointed for the hearing of the petition.

Jelf, Q.C., and *Lewis Coward*, for the respondent.—The respondent ought not to be kept in ignorance of the petitioner's case till immediately before the hearing. He is entitled to some particularity of information at an earlier stage, even though the petition is only brought for a scrutiny.

A. L. SMITH, L.J.—This is a petition arising out of the recent parliamentary election for the city of York. The respondent was declared at the close of the poll to have been duly elected by a majority of eleven votes. The petitioner seeks to have it declared that he was duly elected by a majority of votes, and he seeks to have it so declared solely on a scrutiny. He does not ask to have the election avoided on the

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

ground of corrupt and illegal practices, but the object of his petition is the ascertainment of where the true majority lies. He accordingly sets out in his petition a number of allegations to the effect that various persons voted at the election who had been guilty of corrupt and illegal practices, or who were otherwise disqualified from voting, and he asks to have their votes struck off the poll. The respondent seeks for particulars of the corrupt and illegal practices alleged, and he has obtained an order for the delivery of such particulars within four days. The giving of particulars is regulated by rules 6 and 7 of the Election Petition Rules of 1868. I am of opinion that rule 6 applies where the seat is not claimed but where it is sought to avoid the election, and that rule 7 applies where the petitioner only claims a recount and scrutiny. I agree with the decision in *Munro* v. *Balfour* that rule 6 does not apply to the case to which rule 7 applies. There was, therefore, no jurisdiction to order the petitioner to give particulars except six days before the hearing. The order of Lawrance, J., must be reversed, and the appeal allowed.

CHITTY, L.J.—The learned judge in ordering these particulars acted on rule 6. But in my opinion *Munro* v. *Balfour* was rightly decided, and, where a petitioner claims that he has the majority of votes, rule 7 alone applies. In such a case the petitioner and the respondent are put on the same footing, and neither has the right to obtain information from the other till six days before the trial of the petition.

COLLINS, L.J., concurred.

Appeal allowed.

Solicitors for the petitioner, *H. P. & J. H. Cobb.*

Solicitors for the respondent, *Sharpe, Parker, Pritchards, & Co.*

High Court of Justice.

Chan. Div. } Jan. 12, 13; Feb. 16.
Stirling, J. }

In re PERRY ALMSHOUSES. (*a.*)

Charity—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *ss.* 70, 75—"*Ecclesiastical charity*"—*Member of Church of England as such.*

The founder of a charity required that the objects of it should be selected from persons who should have (1) *regularly attended Divine service at the parish church for a fixed period;* (2) *been partakers of the Holy Communion;* (3) *lived a godly, righteous, and sober life, to the glory of God's holy Name; and that the trustees should be members of the Church of England.*

Held, that this was a charity for the members of the Church of England as such; and was therefore an ecclesiastical charity within the meaning of section 75 *of the Local Government Act,* 1894.

This was a petition by the present trustees of a charity known as the Perry Almshouses, in the parish of Winterbourne, in the county of Gloucester, presented under section 70, sub-section 2, of the Local Government Act, 1894, by way of appeal from a decision of the Charity Commissioners, that the charity was not an ecclesiastical charity within the meaning of the Act.

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

The charity was founded by an indenture dated the 31st of July, 1851, whereby Mrs. Mary Ann Jones conveyed to the Rev. W. B. Allen, rector of Winterbourne, H. Marsh, W. Tanner the younger, and W. C. Fox, a piece of land and ten cottages then in the course of erection, situated in the said parish and county, upon the following trusts:

"Upon trust that they, the said W. B. Allen, H. Marsh, W. Tanner, and W. C. Fox, and the survivors and survivor of them, and the heirs of such survivor, or their or his assigns, do and shall, from time to time and at all times hereafter, permit and suffer such poor men and women of sound mind who shall have attained the age of sixty years, or be incapable of wholly maintaining themselves respectively by the manual labour of themselves respectively, and who, having been born within the limits of the parish of Winterbourne aforesaid, shall have resided within such limits for the last five years of their respective lives, or, having been born elsewhere, shall have resided within the limits aforesaid for the last ten years of their respective lives, and who (not being let by sickness or some other urgent cause) shall have attended divine service at the church of the parish of their respective residences for the time being every Sunday for the last five years of their respective lives, and have been partakers of the Holy Communion and lived a godly, righteous, and sober life to the glory of God's holy Name, as the trustees for the time being of the charity hereby established or any three of them shall from time to time select to occupy the said cottages or dwelling-houses with the appurtenances thereto respectively belonging rent-free during their respective lives, if they respectively shall so long conform to and abide by such rules and regulations as the trustees for the time being of the said charity or any three of them shall from time to time make for their comfort and well-being. . . . Provided always and it is hereby declared that every future incumbent of the rectory of Winterbourne aforesaid, shall, by virtue of his office of rector thereof, be a trustee of the said charity, and that when and so often as the same rectory shall become void by the death, resignation, or deprivation of the said W. B. Allen or any future incumbent thereof or otherwise, and any other clerk shall be instituted and inducted into the same, the said piece or parcel of ground and cottages or dwelling-houses, or other hereditaments and premises hereby granted, with their appurtenances, shall be conveyed so and in such manner that the same may become vested in the new incumbent of the same rectory jointly with the laymen who shall for the time being be trustees of the said charity upon the same trusts and subject to the same provisoes as are hereinbefore declared or expressed and contained of or concerning the same; and that when and so often as the place of any of them, the said H. Marsh, W. Tanner, and W. C. Fox, or any other laymen in the trusteeship of the said charity shall become vacant by his death, ceasing to be a member of the United Church of England and Ireland, or resignation, or otherwise, the surviving or continuing lay trustees for the time being of the said charity, or, if they shall neglect or fail so to do within three calendar months next after the occurrence of such vacancy, then the incumbent for the time being of the rectory of Winterbourne aforesaid, shall by writing under their or his hands or hand appoint some other layman, who shall be a member of the United Church aforesaid, to be a trustee of the said charity in the room of the layman whose place in the said trusteeship shall have so become vacant as aforesaid" with consequential directions.

All the existing and past trustees and beneficiaries

under this deed were members of the Church of England.

A question having arisen, or being about to arise, as to the appointment of trustees of the charity, the existing trustees applied under section 70 of the Local Government Act, 1894, to the Charity Commissioners to determine the question, and the commissioners decided that this charity was not an ecclesiastical charity.

The trustees of the charity presented a memorial to the Attorney-General, desiring to appeal against this order, and the Attorney-General, on hearing the memorial, and at the request of the Charity Commissioners, sanctioned the appeal.

Swinfen Eady, Q.C., and *Danckwerts*, for the petitioners.—This is an ecclesiastical charity within the meaning of section 75, sub-section 2 (*e*), of the Local Government Act, 1894. Under the deed the objects and also the trustees must all be members of the Church of England. The requirement as to participation in the Holy Communion shows clearly the founder's intention that the objects of the charity should be members of the Church of England.

They cited *Taylor* v. *Timson*, 20 Q. B. D. 671, 36 W. R. Dig. 73; *Attorney-General* v. *Calvert*, 23 Beav. 248, 5 W. R. Dig. 13; *In re Ross's Charity*, *ante*, p. 27, [1897] 2 Ch. 397; *Shore* v. *Wilson*, 9 Cl. & F. 355; *Baker* v. *Lee*, 8 H. L. Cas. 495, 9 W. R. H. L. Dig. 2; *Attorney-General* v. *Clifton*, 32 Beav. 596, 12 W. R. Ch. Dig. 24; *Attorney-General* v. *St. John's Hospital, Bath*, 24 W. R. 913, 2 Ch. D. 554.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the Charity Commissioners.—This is not an endowment for the benefit of members of the Church of England "as such" within section 75. So long as the objects of the charity conform to the requirements of the trust deed the court has no power to inquire into their religious views. Every parishioner has a *primâ facie* right to partake of the Holy Communion at the parish church. A parishioner cannot be excluded merely because he is a member of another religious community: *Jenkins* v. *Cook*, 24 W. R. 439, 1 P. D. 80. The founder of this charity intended conformity and not membership to be the test as to the fitness of the objects. The decision of the Commissioners is correct.

Swinfen Eady, Q.C., replied.

STIRLING, J., after stating the facts, continued as follows: The question is whether the endowment of this charity is held for the benefit of any members as such of any particular church or denomination within the meaning of section 75, sub-section 2 (*e*), of the Local Government Act, 1894. It may be remarked, with reference to this clause—first, that all churches and denominations are for the purposes of it placed on the same footing, and consequently that the present case must be dealt with according to the same principles as would apply if the charity were for the benefit of any church or denomination other than the Church of England; secondly, that the words "as such" are important, the meaning being that in order to bring a church within the definition of an ecclesiastical charity those for whose benefit it is intended must be limited to a class of persons having the *status* of members in a particular church or denomination. The charity is eleemosynary in its nature and the rules of law with reference to religious qualification for the enjoyment of the benefit of such charities were laid down by Lord Romilly in the case of *Attorney-General* v. *Calvert*, and were accepted by counsel on both sides as applicable to the present case. I read therefore a few sentences from the judgment by way of general statement of the law. He says: "The first principle which is applicable to all these charities without exception, is that the intentions of the founder are to be carried into effect so far as they are capable of being so, and so far as they are not contrary to law using the word in its proper and widest signification as including the precepts of religion and morality. If therefore the founder has directed that only persons conforming to the Church of England shall be recipients of his bounty, his will must be followed." After discussing the application of this rule to religious and educational charities, his lordship passes on to eleemosynary charities, and says this: "When the charity in question is one of a purely eleemosynary character, a wholly different class of consideration arises. No doctrine of law, no precept of religion, establishes that the act of relieving a fellow-creature from the privations or calamities which have befallen him ought to be preceded by ascertaining that he holds opinions in accordance with the true doctrine of Christ as promulgated in the Gospel, or with those which the donor believes to be such. The duty of relieving his fellow-creature in distress is imposed on the Christian, irrespective of religious doctrines and tenets, and notwithstanding that the object of charity may worship God in an erroneous manner, but in that which he believes to be most acceptable to his Creator. In these charities therefore I consider that the presumption that all classes were intended to participate in the bounty bestowed is so strong that it requires a clear and distinct expression of unequivocal import to exclude any class of dissenters from the benefits of the original foundation; where such clear expressions are used the court must follow them because the rule of the court is, as I have already stated, to carry the will of the founder into effect when it violates no rule of law or morality, but in such a case it requires strict proof that such was the will of the founder, and all evidence as to the peculiar tenets and opinions of the founder are inadmissible as evidence of his intention. His intention must be found to be expressed in the instrument itself, the burden of proof being thrown on those who seek to exclude."

The question, therefore, is whether, upon the true construction of the instrument of foundation there is found a clear expression of intention that the benefits of the charity should be limited to the members of the Church of England.

Although the deed prescribes that the trustees shall be members of the Church of England it does not in terms declare that membership of that Church shall be a necessary qualification of those who are to benefit under it. The religious qualification required is threefold. The first qualification is regular attendance at the parish church; the second is participation in the Holy Communion; the third is expressed in familiar words drawn from the Prayer-book, "living a godly, righteous, and sober life to the glory of God's holy Name." It has, therefore, to be determined whether the possession of these qualifications does or does not involve membership of the Church of England, and though regard must be paid to all three, the most important from this point of view is the second.

It was contended on behalf of the respondent that the requirements of the deed were satisfied by conformity to the Church of England without membership of it. If by conformity is meant a mere external conformity such as was the fruit of the legislation of the time of King Charles 2, now repealed, I think that such a construction is excluded by the third of the qualifications to which I have referred. The language in which that qualification is expressed appears to me to show that the objects of the founder's

charity were intended to be not mere outward conformists but honest and sincere worshippers at the parish church. The argument, however, was mainly directed to show that the first and second of the religious qualifications might be truly possessed by persons who are not members of the Church of England. As regards attendance at church I think that this might be so. By law the parish church is open to every parishioner who desires to enter for the purpose of attending the ordinary services: *Taylor* v. *Timson*. Those services have been so framed that members of other religious denominations can and do honestly and sincerely join in them from time to time, and might under special circumstances do so with regularity. Participation in the Holy Communion, on the other hand, is not open at all. The rubric at the end of the Office for Confirmation in the Prayer-book prescribes that "there shall none be admitted to the Holy Communion until such time as he be confirmed or be ready and desirous to be confirmed." The rubrics are incorporated in the Act of Uniformity (13 & 14 Chas. 2, c. 4)—see *Escott* v. *Mastin*, 4 Moo. P. C. 104—and so far as that statute remains unrepealed must, I conceive, be duly regarded by a court of law. It seems to me that the effect of that rubric is to prevent anyone from claiming as of right to partake of the Communion in the Church of England unless he has been confirmed or is ready and desirous to be confirmed. Confirmation implies baptism, which, however (as was established by the case of *Escott* v. *Mastin*, above cited) may validly be administered by a layman.

Whatever difficulty there may be in giving a strict definition of what constitutes legal membership of the Church of England, I think that a person who has been baptized has been confirmed or is ready and desirous to be confirmed and is an actual communicant does hold the status of a member of that Church, and would be ordinarily regarded and spoken of as such.

It was urged that a person not a member of the Church of England might honestly and sincerely partake of the Communion although not confirmed. It is said that as a matter of history persons who do not possess this qualification have been admitted to the Communion by clergymen who were well aware of the fact, and cases were put which are not of impossible occurrence with reference to persons who might seek the benefit of this charity. Still, even if this be admitted to the full, the participation would be granted as a matter of grace and not as of right. All such cases appear to me to be in their nature of such an exceptional character that they could not fairly be regarded as within the contemplation of the framer of an instrument such as that with which I have to deal. The partaking of the Communion there spoken of is, I think, such as takes place in the ordinary and rightful course, regard being had to the rules of the Church.

The conclusion at which I arrive on the construction of the instrument is that the persons intended to take the benefit of the charity were to possess qualifications which imply that they should be members of the Church of England. On any other view, I fail to see how the founder of a charity intending to confine its benefits to the members of any church or denomination as such could do so except by using those very words; and, indeed, the argument was carried to that extent. I cannot think that this is a reasonable intention to ascribe to the Legislature.

I understand that the Charity Commissioners rested their decision on a passage in Lord Romilly's judgment which I have not hitherto cited. It runs as follows: "After fully considering the will and all the directions contained in it, and having regard to the principles laid down on the subject by which I have stated that I consider myself to be governed, I am unable to see anything in this will which should exclude any dissenters from obtaining the benefit of the charity created by it, who can conscientiously comply with the directions laid down by the founder, modified, as they are, by the change produced by the Reformation and the statutes which have since passed. Whether the dissenter can do so or not is an affair between God and his own conscience, but as I conceive the duties imposed upon the trustees, it is not an affair on which they are called upon to judge. They are bound to see that the rules prescribed by the founder, so far as by law they are in force, are complied with by the almspeople, but beyond this their duties cease. All that I found in this will is a direction that certain rules shall be complied with. The person who cannot conscientiously comply with these rules must decline becoming one of the almspeople, or, if elected, must resign; but I repeat my opinion, that if he do so conform to these rules, the trustees can go no further, and that it is not open to them to examine whether he does so sincerely or whether, having regard to his other religious observances, and his expressed opinions, he be or be not properly a member of the Church of England."

I do not differ from anything there laid down, nor from the application made of it by the Master of the Rolls in the case before him. In the present case, however, the founder has gone much further than in the instruments which were considered in *Attorney-General* v. *Calvert*, and has imposed upon his trustees the duty of inquiring and determining (so far as human judgment permits) whether the qualifications with which I have been dealing do or do not exist.

For the reasons which I have given I am unable, with the most sincere respect, to agree with the decision of the Charity Commissioners.

Swinfen Eady, Q.C.—I ask that the costs of the hearing may follow the event. The court has power to deal with the costs of this appeal under section 8 of the Charitable Trusts Act, 1860, which is incorporated in section 70, sub-section 2, of the Local Government Act, 1894.

Cozens-Hardy, Q.C., said that he knew no case in which costs had been given against the Charity Commissioners.

STIRLING, J., declined to establish a new precedent, though he thought it a hard case. There would be no order as to the costs of the commissioners, and the trustees would be at liberty to retain their costs out of the charity fund.

Solicitors for petitioners, *Tatham & Procter*, for *Abbott, Pope, Brown, & Abbott*, Bristol.

Solicitor for Charity Commissioners, *Clabon*.

Chan. Div. } Feb. 8, 15.
Kekewich, J. }

WEST v. WILLIAMS. (a.)

Mortgage—Equitable interest—Subsequent mortgage and settlement of equity of redemption—Notice—Priority.

Although an assignment of an equitable interest is, as between assignor and assignee, perfect without notice to the trustees holding the trust property under a will or settlement, yet as between assignees notice is necessary to confer priority, and so long as the first assignee in point of date omits to give notice, it is competent to the assignor

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

to make a title to a more diligent stranger. Accordingly, where the first mortgagee of an equitable interest does not give notice of his mortgage to the trustees of the fund, his security will be postponed in favour of a subsequent mortgage by the mortgagor and a settlement subject thereto of his equitable interest, notice whereof has been duly given to the trustees of the fund by the respective assignees.

The first mortgage, moreover, will operate to effect a forfeiture under the trusts of the settlement of the mortgagor's life interest thereunder, determinable on his charging or assigning the same.

Semble, *that, if the subsequent mortgage and settlement formed in effect one transaction, and the trustees of the settlement had thereby covenanted to make further advances as part of the consideration for the mortgage, the element of obligation to make further advances so introduced would render inapplicable the doctrine of* Hopkinson *v.* Rolt, 9 *W. R.* 900, 9 *H. L. Cas.* 514.

Manning *v.* Chambers, 1 *De G. & Sma.* 282, *and* Seymour *v.* Lucas, 8 *W. R.* 599, 1 *Dr. & S.* 177, *followed.*

Action.

By his will dated the 25th of February, 1889, Walter Williams, the elder, after appointing George McPherson, Alfred Charles Lyon, and James Edward Underhill his trustees and executors, and making certain specific and pecuniary bequests, devised and bequeathed to his trustees all his real and personal estate upon trust as to the ultimate residue thereof to invest the same and pay the income and dividends thereof to his son, the defendant Walter Williams, during his life, and from and after his decease to stand possessed of the residuary estate upon the trusts therein declared in favour of the issue of the defendant Walter Williams, and in default of such issue to such person or persons as the defendant Walter Williams should by will or codicil appoint.

By a codicil to his will, dated the 5th of May, 1890, the testator revoked the appointment of Alfred Charles Lyon as executor and trustee, but did not otherwise alter his will.

The testator died on the 5th of March, 1892, and his will and codicil were duly proved by George McPherson and James Edward Underhill.

By an indenture of mortgage, dated the 24th of December, 1895, the defendant Walter Williams thereby assigned to the plaintiff, F. W. West, all that the part share, right, or interest of the defendant Walter Williams of, in, and under the said will of the said testator, and of and in all moneys to be or become payable thereunder, by way of mortgage to secure the payment to the plaintiff by the defendant Walter Williams of the sum of £600 and interest thereon at the rate therein mentioned. And the defendant Walter Williams thereby covenanted with the plaintiff that he, the said Walter Williams, would not at any time during the continuance of that security charge, incumber, assign, convey, release, or otherwise deal with his interest under the will of the said testator in any manner howsoever, and would not do or suffer anything whereby the said policy might become void or voidable. And it was further thereby agreed and declared that until the 24th of December, 1896, or until there had been some breach of any of the covenants and conditions expressed or implied therein on the part of the mortgagor, the plaintiff or any person claiming under him should not give any notice of those presents to the trustees of the will of the said testator.

By a memorandum of charge also dated the 24th of December, 1895, under the hand and seal of the defendant Walter Williams he charged all his right, share, part, and interest of, in, and under the estate of the said testator, with the repayment to the defendant Frederick Temple of the sum of £150 on the 24th of December, 1896, with interest after that date at the rate of £20 per cent. per annum until repayment, subject, nevertheless, to the above-mentioned indenture of mortgage of the 24th of December, 1895.

By an indenture of mortgage dated the 2nd of April, 1896, and made between the defendant Walter Williams (thereinafter called the mortgagor), of the one part, and the defendants Philip Addison Williams and Joseph William Williams (thereinafter called the mortgagees), of the other part, after reciting the will, and also that the mortgagor had applied to the mortgagees to advance to him the sum of £2,297, and also an annual sum of £200, during a period of five years, from the 15th of February, 1896, for his personal maintenance, which the mortgagees had (subject, however, as to the said annual sum of £200 to the conditions or limitations expressed in the indenture of settlement thereinafter recited) agreed to do upon having repayment thereof, with interest secured in manner thereinafter appearing, and on condition of the mortgagor's executing the said indenture of settlement, and also reciting that by an indenture of settlement already prepared and intended to bear even date with, but to be executed immediately after those presents, the mortgagor had assigned his equity of redemption in his interest under the will of the said testator to trustees upon certain trusts, and that the mortgagees had by such settlement covenanted with the mortgagor for payment to him, in the events therein mentioned, of the said annual sum of £200, it was witnessed that in pursuance of the said agreement and in consideration of the sum of £2,297 then paid by the mortgagees to the mortgagor, the mortgagor covenanted with the mortgagees to pay to them on demand the sum of £2,297, with interest thereon in the meantime at the rate of £4 per cent. per annum, and also any further sum or sums of money which, prior to such demand, should have been advanced by or become due to the mortgagees (other than for interest) under the said covenant in the said settlement, together with interest thereon at the rate aforesaid, and also, so long as any principal sum should remain due under the present indenture after such demand as aforesaid, to pay to the mortgagees interest thereon at the rate aforesaid half yearly, and it was also witnessed that for the considerations aforesaid the mortgagor, as beneficial owner, thereby assigned to the mortgagees all his interest under the said will, subject to a proviso for redemption on payment to the mortgagees of the sum of £2,297 and interest, and of such further sum or sums (if any) advanced by the mortgagees under their said covenant in the said settlement or the present indenture with interest.

Prior to the advance of the moneys secured by the last-mentioned mortgage the defendants P. A. Williams and J. W. Williams had made inquiries of the trustees of the will, and were informed that no notice of any incumbrance had been received.

The settlement of even date was made between the defendant Walter Williams of the first part, the defendants Philip Addison Williams and Joseph William Williams of the second part, and the defendants Lewis William Taylor and John Evans Miére of the third part, and after reciting the said will, and that the defendant Walter Williams being pressed for money to discharge certain debts which he had contracted, and charges which he had created on his interest under the said will, had applied to the defendants Philip Addison Williams and Joseph William Williams, brothers of his late father, to assist

him, which they had agreed to do upon (*inter alia*) his executing the settlement thereinafter contained and also reciting the mortgage of even date, and that, except as thereinbefore recited, there was no incumbrance affecting the life interest of the defendant Walter Williams under the said will, and that the defendants Philip Addison Williams and Joseph William Williams had agreed to enter into the covenant on their part thereinafter contained, it was thereby witnessed that, in consideration of the premises and of the said covenant on the part of the defendants Philip Addison Williams and Joseph William Williams thereinafter contained, the defendant Walter Williams, as settlor, thereby assigned his life and other interests under the said will to the defendants L. W. Taylor and J. E. Miére in trust for the defendant Walter Williams during his life or until he should assign, charge, or incumber the same or affect so to do, and after the determination of that trust during his life in trust during the remainder of his life, or during such shorter period as the trustees should in their absolute discretion think fit to apply the same for the maintenance, support, or benefit of the settlor, his wife (if any), and children or remoter issue, and his sisters and their children or remoter issue. And the defendants P. A. Williams and J. W. Williams thereby covenanted with the defendant Walter Williams that if he should within eight weeks after the 15th of February, 1896, leave England and proceed to some other country out of Europe, of which the covenantors should approve, and should remain in such country for a period of five years, from the date of the present settlement and should not assign or charge his said interests under his father's will and should not be a party to any proceeding for administering his said father's estate without the consent in writing of the trustees of the settlement, then the covenantors or the survivors of them would pay to him for the said period of five years the annual sum of £200 by quarterly payments to be made by bankers nominated by the covenantors.

On the 7th of July, 1896, notice of the indentures of mortgage and settlement of the 2nd of April, 1896, was given to the trustees of the will, but at that time neither of the defendants P. A. Williams and J. W. Williams, nor the defendants Taylor and Miére, had any notice of the plaintiff's mortgage of the 24th of December, 1895, and it appeared from the evidence at the trial that the trustees of the will did not receive notice from the plaintiff of his mortgage until the 8th of January, 1897.

On the 15th of February, 1897, the plaintiff wrote to the defendants P. A. Williams and J. W. Williams offering to redeem the mortgage of the 2nd of April, 1896, but the offer was refused.

The defendant Temple gave no notice of his charge to the trustees of the will.

The defendants P. A. Williams and J. W. Williams had made several payments to Walter Williams on account of his annuity in pursuance of their covenant in the settlement.

The plaintiff brought the present action claiming—(1) That his mortgage might be enforced by foreclosure or sale; (2) all necessary accounts and inquiries; (3) a declaration of the priorities of the plaintiff and defendants; (4) a declaration that the interest of the defendant Walter Williams under the settlement was subject to the plaintiff's mortgage; (5) redemption of either of the mortgages of the defendants P. A. Williams and J. W. Williams, and of the defendant Temple which might be, and so far as they might be, entitled to priority over the plaintiff's mortgage; and (6) incidental relief.

The plaintiff admitted the priority of the mortgage of the defendants P. A. Williams and J. W. Williams so far as it was a security for the £2,297 therein expressed to be advanced and for all sums advanced under the covenant in the settlement of even date until the receipt on the 15th of February, 1897, of notice of the plaintiff's mortgage and his offer to redeem; but contended that his mortgage had priority over that of these defendants in respect of any sums advanced by them under the covenant after that date.

The defendant Temple admitted the priority of the plaintiff's security.

Bramwell Davis, Q.C., and *Gatey*, for the plaintiff.—The plaintiff's mortgage is a perfectly good mortgage of a *chose in action*. We admit that the mortgage of the 2nd of April, 1896, is a good mortgage for the original advance, but so far as the subsequent advances are concerned, the question will arise whether such payments were provided for by the deed. The defendants P. A. Williams and J. W. Williams could not as from the 15th of February, 1897, increase the amount of their mortgage debt, and they have priority over the plaintiff's mortgage only in respect of those sums advanced before they received notice of his mortgage, *Hopkinson* v. *Rolt*, 9 W. R. 900, 9 H. L. Cas. 514. The contemporaneous settlement was a voluntary settlement on the part of the defendant Walter Williams. The only consideration that can be suggested is the covenant for the further advances, but there was no consideration to make that covenant binding. The covenant cannot prevent this from being anything else than a voluntary settlement.

Sargant, for the defendants Philip Addison Williams and Joseph Walter Williams.—In *Hopkinson* v. *Rolt* it was held that the mortgagee was under no obligation to make advances to the mortgagor, but here they are bound to go on paying these sums. The defendants are entitled by virtue of the family settlement as well as under the mortgage. This is not an ordinary commercial mortgage. The mortgage and settlement were contemporaneous and formed part of the same transaction, and there is an express bargain contained on the face of these two documents. The further advances were part of the obligation which the mortgagees primarily undertook, and why should they be in a worse position in respect of them than they are in respect of the original mortgage debt? The advances were a matter of legal obligation and not of choice. The plaintiff is not entitled to priority over the debt due to these defendants: *Webster* v. *Webster*, 10 W. R. 503, 31 Beav. 393; *Dearle* v. *Hall*, 3 Russ. 1. The plaintiff expressly agreed not to give notice of his mortgage, and he must therefore be taken to have sanctioned the mortgagor's dealing as he pleased with his life interest in the interval, the case therefore falls within the doctrine of *Perry-Herrick* v. *Attwood*, 6 W. R. 204, 25 Beav. 205, 2 De G. & J. 21.

A. R. G. Jennings, for the trustees of the settlement.—The plaintiff contends that if the settlement stands then the life interest under the settlement is subject to his mortgage; but that is not so, for the trust in favour of Walter Williams was determined by reason of the mortgage, *Manning* v. *Chambers*, 1 De G. & Sma. 282, followed in *Seymour* v. *Lucas*, 8 W. R. 599, 1 Dr. & S. 177. The principle of those cases is applicable to the present state of affairs, and even if the settlement has priority to the mortgages, the life interest is not subject to the mortgage.

A. J. David, for the defendant Temple.

Hugh Pollock, for the defendant Walter Williams.

Bramwell Davis, Q.C., in reply.—Walter Williams has done no act since the date of the plaintiff's mortgage which could work a forfeiture of his life interest under the settlement, and the discretionary trust, therefore, has not yet arisen. The settlement can have no effect as against the preceding mortgage of the plaintiff. The defendant's mortgage and settlement are distinct and independent transactions, and there is nothing to prevent the plaintiff's mortgage from attaching to the earlier part of the settlement. None of the advances made after notice of the plaintiff's mortgage are good as against him.

Cur. adv. vult.

Feb. 15.—KEKEWICH, J.—It was necessarily admitted on behalf of the plaintiff that his mortgage of the 24th of December, 1895, must be postponed to that of the defendants Philip Addison Williams and John William Williams, of the 2nd of April, 1896, as regards the sum of £2,297 then advanced by them and such other sums, if any, as were advanced by them on the same security at a later date, but before they received notice of the plaintiff's mortgage. It was contended that as regards any sum advanced after the receipt of that notice, the plaintiff's mortgage has priority, and in support of this contention counsel relied on the authority of *Hopkinson* v. *Rolt*. There is much in the report of that case depending on the conduct of the respondent, on the pleadings, and the supposed authority of *Gordon* v. *Graham*, 2 Eq. Cas. Abr. 598, pl. 16, which was then finally overruled, but the point really decided is briefly but accurately stated in the first branch of the headnote to the report, which runs as follows: "A first mortgagee whose mortgage is taken to cover what is then due and also future advances (within a fixed amount) cannot claim the benefit of such advances in priority over a second mortgagee of whose mortgage he had notice at the time of its execution and before he made these new advances." The doctrine there laid down not merely has never been questioned, which, of course, it could not be, but has been largely applied to cases of a similar character which, though I have referred to some of them, there is no occasion here to specify.

Neither in *Hopkinson* v. *Rolt* nor in any of the cases which have followed it has there been, so far as I am aware, any obligation on the first mortgagee (whose position by reason of the omission of the plaintiff to give notice of his charge is here filled by the defendant Williams) to make further advances, and in *Hopkinson* v. *Rolt* the mortgage was created in favour of bankers and to secure a current account. It seems to me that if once you introduce the element of obligation to make further advances the authority of *Hopkinson* v. *Rolt* becomes inapplicable, and that view is supported by more than one passage in the judgments of the Lord Chancellor and Lord Chelmsford in the House of Lords. I do not myself see any substantial difference for this purpose between a present advance and a covenant to make certain advances at a future time on which the covenantee may maintain an action not to be answered by a plea that in the meantime the mortgagor has created another charge on the mortgaged premises.

But when the facts of this case are examined the question between the parties does not or need not turn on the application of *Hopkinson* v. *Rolt*. The deed of the 2nd of April, 1896, already mentioned, is, standing alone, merely a mortgage, and, although it contemplates further advances and the security is extended to them as well as to the £2,297 then advanced, there is not in this deed any covenant to make such or any further advance. But it refers to a settlement of even date containing such a covenant, the execution of which is expressly stated to be part of the consideration of the mortgage. To that settlement I must now turn. It recites the will creating Walter Williams' life estate and the mortgage of even date, which we are now told was made in favour of two brothers of the testator, and, therefore, uncles of the mortgagor, and then as part of the terms of the advances, actual and prospective, Walter Williams assigns his life interest to the defendants Taylor and Miére, upon trusts which may be briefly described as for his benefit until alienation, and afterwards at the discretion of the trustees for the benefit of himself, his wife, and children. By the settlement the two uncles covenant for the payment to Walter Williams, provided he leaves the country and remains abroad, an annuity of £200 for five years.

It is clear that these two documents really represent one transaction and that it is only expressed in two documents for the sake of convenience. It is also clear that the settlement was made for valuable consideration, and there is no suggestion that all was not done in good faith. Why should not the transaction operate as a settlement of the equity of redemption arising out of the mortgage of even date so as to entirely oust the plaintiff's claim? The rule of law, or rather of equity, is that, although as between assignor and assignee an assignment of an equitable interest is perfect without notice to the trustee for the time being, of the trust property under a will or settlement, yet as between assignees notice is necessary to confer priority, and so long as the first assignee in point of date omits to give notice it is competent to the assignor to make a title to a more diligent stranger. This of course applies as much to absolute assignments as to assignments by way of mortgage, and the result is that what was assigned to the plaintiff has by his own default ceased to exist. The covenant to make further advances is of importance in proving the settlement to be made for valuable consideration, but as regards the point just mentioned, it is unimportant, because the settlement affects the equity of redemption, whatever it is, without reference to the question whether further advances were made or not.

It was argued on behalf of the defendants Williams, and I take the argument to have been adopted by the other defendants, that the case might be brought within the doctrine of *Perry-Herrick* v. *Attwood* on the ground that the plaintiff in his mortgage of the 24th of December, 1895, expressly agreed not to give notice to the trustees of the will until the 24th of December, 1896, and that he must be taken to have sanctioned the mortgagor's dealing with his life estate as he pleased in the interval. There is no occasion to canvass this argument at length, because I have already expressed an opinion adverse to the plaintiff's claim, but as at present advised I do not think that the case falls within *Perry-Herrick* v. *Attwood*, the short point of which was that mortgagees who had expressly sanctioned their mortgagor's raising money in priority to themselves could not, as against subsequent mortgagees, complain that he had taken advantage of the sanction to raise more than they had intended. My judgment proceeds not on express sanction, but on the omission to give notice, and on the priority consequent on that, where the assignments are of equitable interests. One point remains. The plaintiff is the assignee of Walter Williams' life interest under the will, and now that he has given notice, is entitled to a charge on whatever remains vested in Walter Williams of such life interest, and the plaintiff says that the entire life interest is really in effect vested in Walter

Williams because, though he no longer takes it directly under the will, he takes it under the first trust of the settlement. That trust is for the said Walter Williams during his life, or until he shall assign, charge, or incumber, or affect to assign or charge the same or some part thereof, &c.

No assignment subsequent to the date of the settlement has been proved or suggested, and the question is whether those words are strictly words of futurity, or can be construed to extend to the assignment to the plaintiff, of which, be it remembered, the mortgagees of the 2nd of April, 1896, and the trustees of the settlement were ignorant. In this connection it may be as well to mention that the settlement contains a recital that there was no incumbrance of the life interest except the mortgage of even date. This point is, I think, covered by the two cases cited by Mr. Jennings of *Manning* v. *Chambers* and *Seymour* v. *Lucas*, and there are others to the same effect.

The plaintiff therefore is entitled to no relief as against the mortgagees of the 2nd of April, 1896, or the trustees of the settlement of even date, and there must be judgment for them with costs. The defendant Temple is a mortgagee subsequent to the plaintiff and standing in precisely the same position. He did not agree not to give notice of his charge, but, as a matter of fact, he omitted to give it. It is an idle form to say that he may add his costs to his security, but that is all to which he is entitled.

Solicitors, *Weekes & Co.; Mackrell, Maton, Godlee, & Quincey*, for *Wragge, Holliday, Godlee, Barrow, & Horton*, Birmingham; *Day & Son*, for *Ivens & Morton*, Kidderminster; *Mann & Taylor; Maurice Moseley*.

Chan. Div. } Feb. 5, 12.
Byrne, J. }

In the Matter of AN ACTION OF DUNMORE *v.* WHARAM, IN THE COURT OF CHANCERY OF THE COUNTY PALATINE OF LANCASTER. (*a.*)

Practice — Palatine Court — Order for attachment— Defendant out of jurisdiction—Court of Chancery of Lancaster Act, 1850, *s.* 15—*Court of Chancery of Lancaster Act*, 1854, *s.* 7—*Order made order of High Court.*

Where a defendant in an action in the Chancery Court of Lancaster appears to the action, but resides out of the jurisdiction, and after judgment an order is made in the Palatine Court for leave to issue a writ of attachment against him, that order will be made an order of the High Court under section 15 *of the Court of Chancery of Lancaster Act*, 1850.

Motion.

Wharam and Broughton were defendants in an action of *Dunmore* v. *Wharam*, brought in the Court of Chancery of the County Palatine of Lancaster, in respect of trust funds under an indenture of settlement.

The defendants both appeared, and by judgment of the court made on the 8th of July, 1897, they were ordered to pay a sum of £2,275, which represented part of the trust funds, into court within seven days after service of the judgment.

Judgment was served, but the order was not complied with.

The defendant Broughton resided at Bishop Auckland, in the county of Durham, out of the jurisdiction of the Palatine Court of Lancaster.

On the 31st of January, 1898, an order was obtained from the Palatine Court of Lancaster for leave to issue a writ of attachment against him.

The present application was made *ex parte* that this latter order should be made an order of the High Court under section 15 of the Court of Chancery of Lancaster Act, 1850 (13 & 14 Vict. c. 43).

T. R. Hughes, for the motion.—[BYRNE, J.—Ought not this motion have been made to the Court of Appeal under section 7 of the Court of Chancery of Lancaster Act, 1854 (17 & 18 Vict. c. 82)?] I submit not; that Act was intended to apply to cases where the defendant is in contempt of the court, as by marrying one of its wards or the like, and where he had never submitted to the jurisdiction of the court, and being out of its jurisdiction could not be punished, but not to cases like the present, where the Palatine Court had jurisdiction to make the original order in consequence of the defendant having appeared to the action.

BYRNE, J., made the order.

Solicitor, *H. S. Mather*, Liverpool.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Q. B. Div. (Div. Court.) } Feb. 15.
(Mathew and Wright, JJ.) }

MANDER *v.* RIDGWAY. (*a.*)

County court—Practice—Stamp on document—Appeal—Application of High Court rule—County Courts Act, 1888 (51 *&* 52 *Vict.* c. 43), *s.* 164—*R. S. C.*, 1883, *ord.* 39, *r.* 8.

The ruling of a county court judge at the trial of an action, that a document offered in evidence is properly stamped, is not subject to appeal in the High Court.

This was an appeal from a decision of a county court judge, and the question raised was whether there is a right of appeal from the decision of a judge of such a court as to the sufficiency of a stamp upon a document tendered in evidence.

In this case the instrument on which this action was brought was produced and tendered in evidence by the plaintiff, and it was then found to be stamped with six penny postage stamps. The defendant objected to its admission, on the ground that it was not properly stamped. The learned judge overruled the objection.

From this decision the defendant now appealed and asked for a new trial, on the ground that the document being improperly stamped, had been wrongfully admitted in evidence.

By section 164 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), it is provided as follows: " . . . In any case not expressly by this Act or in pursuance thereof provided for, the general principles of practice in the High Court of Justice may be adopted and applied to actions and matters."

By ord. 39, r. 8, of the Rules of the Supreme Court it is provided that "a new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp."

W. Graham, for the appellant.—The question raised in the county court was whether the instrument on which the action was brought was properly stamped. The learned judge in that court held it was properly stamped, and the question now raised is whether there is any appeal from such a decision. Section 120 of the County Courts Act, 1888, provides

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

that if any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, such party may appeal to the High Court. That section gives a general right of appeal, subject to certain exceptions, of which this case is not one. The learned judge should not have admitted this document in evidence. It was not properly stamped: *Neptune Steam Navigation Co.* v. *Sclater, The Delano*, 43 W. R. 65, [1895] P. 40.

Macaskie, for the respondent.—There is no right of appeal in this case, and there is no authority showing that there is such a right. Section 31 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), provides that no new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is insufficient, or that the document does not require a stamp; and ord. 39, r. 8, of the Rules of the Supreme Court is taken from that section. It is clear that there is no appeal from the decision of a judge of the High Court in such a matter. His decision is final: *Siordet* v. *Kuczynski*, 4 W. R. 153, 17 C. B. 251; *Blewitt* v. *Tritton*, 41 W. R. 36, [1892] 2 Q. B. 327. The practice of the High Court applies in such a matter to the county courts. This is provided for by section 164 of the County Courts Act, 1888.

MATHEW, J.—I am clearly of opinion that there can be no appeal in such a case as this. The learned county court judge has held that a certain document tendered in evidence by the plaintiff in this action was properly stamped. There is no appeal to this court from such a decision. Section 164 of the County Courts Act, 1888, provides that the general principles of practice in the High Court are applicable to the county courts in matters not otherwise provided for. Now, in the High Court it is expressly provided by ord. 39, r. 8, that a new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp. It is clear, therefore, that there is no right of appeal in such a case in the county court, and this appeal must be dismissed.

WRIGHT, J.—I am entirely of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Digby & Riddell*, for *H. & E. H. Small*, Birmingham.

Solicitors for the respondent, *Field, Roscoe, & Co.*, for *W. L. Whitehorne*, Banbury.

Q. B. Div.
(Wright and Darling, JJ.) March 4.

REG. v. SHARMAN AND OTHERS (JUSTICES). *Ex parte* DENTON. (a.)

Licensing law—New licence—Certiorari *to quash—Objections by one of the public—Refusal of justices to hear statements of fact except upon oath*—Mandamus *—Discretion of justices—Practice.*

At a meeting of the licensing justices D. desired to make statements of fact in opposition to the granting of a licence for new premises.

The justices decided that they would not hear him unless he was sworn as the other witnesses who had given their evidence had been.

D., after the provisional licence had been confirmed, obtained a rule for a certiorari *to bring up the provisional licence to be quashed, but as it appeared doubtful if that was the proper remedy, a rule for a* mandamus *was also obtained.*

Held, discharging both rules, that as the granting of a licence was not a judicial order, the remedy by certiorari *was inapplicable; and, as to the* mandamus, *that it was in the discretion of the justices to impose, if they thought fit, the obligation of an oath, and that in the exercise of their discretion they had jurisdiction to refuse to hear the objector unless he was sworn.*

This was a motion for a *certiorari* to quash the grant of a licence by the justices of the Wellington division of the county of Northampton, on the ground that the justices ought before granting the provisional licence to have heard statements of fact which an objector to the licence, who had obtained this rule, desired to make.

The justices refused to hear his evidence unless he was sworn, being of opinion that they had power to impose that condition upon a person who desired to offer evidence for or against the granting of a licence.

The objector declined to be sworn, asserting that he had a right to be heard as one of the public resident within the district, and alleged as his reason for refusing to be sworn that on the authority of *Boulter* v. *The Justices of Kent, ante*, p. 114, [1897] A. C. 556, a licensing meeting not being a court of summary jurisdiction the justices had no power to impose any such condition upon him.

It being doubtful whether the proper procedure in such a case was by way of *certiorari*, the objector at a subsequent date obtained a rule *nisi* for a *mandamus* in respect of the same matter.

George Denton, the applicant, was one of the objectors to, and had signed a petition against, the granting of the licence to new premises applied for by Mr. William Knight and P. Phipps & Co. at the annual licensing meeting.

The application was opposed by a temperance society, whose solicitor called several witnesses, all of whom were put on oath, as well as the witnesses called in support of the application. After the case for the temperance society was closed, Mr. Denton rose and stated that as a resident and owner of property in the parish and a large employer of labour in his business of bootmaker in the town, he desired as a member of the public interested in the matter to oppose the application for the licence and was proceeding to state the grounds of his objection, when the solicitor for Mr. William Knight objected to his being heard unless he was sworn.

The justices, upon the advice of their clerk, decided that Mr. Denton could not be heard except upon oath, and as Mr. Denton declined to be sworn, the justices refused to hear him, and granted the provisional licence.

At a subsequent meeting for the confirming of provisional licences, Mr. Denton again appeared and acted as before with the same result, and the licence being confirmed, he subsequently applied for and obtained the two rules above mentioned.

Lawson Walton, Q.C., and *E. H. Pollard*, for the holder of the licence, showed cause against the rule for a *certiorari*. The justices had a discretionary power to compel witnesses to be sworn. If they decided that they would only hear Mr. Denton's statement on the same terms as the other witnesses they were justified in doing so. The decision in *Boulter* v. *The Justices of Kent, ante*, p. 114, [1897] A. C. 556, had nothing to do with the present question; *The Royal Aquarium* v. *Parkinson*, 40 W. R.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

450, [1892] 1 Q. B. 431; *Reg.* v. *The London County Council, In re the Empire Theatre*, 71 L. T. Rep. 638, 43 W. R. Dig. 101; *Reg.* v. *The Court of the Company of Watermen*, [1897] 1 Q.B. 659, 45 W. R. Dig. 22; *Reg.* v. *The Justice of Surrey*, 52 J. P. 423. The question whether a statement which a witness desired to make, must be on oath, was in each case a question for the discretion of the justices. Section 16 of the Evidence Act, 1851 (14 & 15 Vict. c. 99). It would be monstrous to say that a person who desired to offer evidence to set aside sworn testimony should have a right to do so, except he were sworn. Section 42, sub-section 3, of the Licensing Act, 1872, directed that the justices shall not hear evidence except on oath against the renewal of a licence, but did not limit their discretion in the case of a new licence which, *a fortiori*, ought to be on oath. At any rate, Mr. Denton's remedy, if he had any, was not by *certiorari*.

H. H. Asquith, Q.C. (with him *Blaiklock*), for the applicant, in support of the rule.—It was immaterial for Mr. Denton's purpose whether he succeeded on the *certiorari* or the *mandamus*, and he did not feel disposed to contest very strenuously the question of *certiorari*. [WRIGHT, J.—We are clear that this is not a case for *certiorari*.] Perhaps their lordships would decide that point first.

WRIGHT, J.—We think this is certainly not a case in which a rule for *certiorari* should ever have been granted. The grant of a licence is not a judicial order. There has been no want of jurisdiction. In fact almost every kind of objection could be successfully raised against it. The rule must be discharged.

G. Candy, Q.C., and *W. Ryland Adkins*, for the justices, showed cause against the rule for a *mandamus*.—The justices, although not a court of summary jurisdiction, had power to order, if they thought fit, evidence to be given on oath. [WRIGHT, J.—Is there any obligation on the licensing magistrates to hear casual objectors?] The practice at licensing meetings throughout the country was not to require a man to be sworn who merely desired to make a statement. It was different if a person intimated he desired to oppose a licence and to tender evidence, which would give a right to cross-examine him to the other side. [WRIGHT, J.—Must not this case be argued exactly as if the justices had issued a notice in their court that no one should be allowed to speak on a licensing matter unless he was sworn?] Certainly not. The justices would be acting in that case *ultra vires*. It was a question in each case in which discretion ought to be properly exercised. He thought Mr. Denton had not understood the decision of the House of Lords in *Boulter* v. *The Justices of Kent*, which was outside the present question altogether. [WRIGHT, J.—Yes; that case is no authority on the present question.] At the meeting, petitions both in favour of and in opposition to the grant (including the petition signed by the applicant) were put in and considered, and the evidence of the witnesses called by each side was taken upon oath. The justices had heard and determined the matter, and the rule for a *mandamus* ought to be discharged.

H. H. Asquith, Q.C., and *Blaiklock*, in support of the rule.—Mr. Denton's interest as a resident and large employer of labour was sufficient to give him a *locus standi* at licensing meetings. His contention was that a person who had a *bonâ fide* reason for being heard, and conducted himself properly, had a right to be heard without having first been sworn. By excluding his evidence the question whether the license ought to be granted was not fully considered by the justices, and the facts were not, therefore, properly determined. The rule ought to be made absolute, even if the time that had elapsed made it inexpedient or impossible to withdraw the licence, assuming that on a re-hearing the objection was allowed. It was a question of principle that they wished decided.

WRIGHT, J.—It is quite clear that this rule for a *mandamus* must also be discharged. As regards the substantial question whether the justices had power to call upon a person standing in Mr. Denton's position to give his evidence upon oath, that seems to me to be a matter solely within their discretion. It would, however, be contrary to the interests of the public if the justices exercised that discretion too strictly, and within reasonable limits the local public should be allowed to express their views at licensing meetings. It is clearly intended by implication in the licensing Acts that the public should be allowed to express, otherwise than on oath, their opinion on matters of local public interest; but I can see nothing in the Acts which points to any actual right of an individual to make statements of facts without being sworn, nor any provisions that hinder the justices from exercising their discretion as to whether they will hear such statements or not, without requiring them to be tested by cross-examination.

As to the *mandamus* I confess I can see no substance in the application. Mr. Denton has not shown that if the rule were made absolute any useful purpose would be served. He does not even give a reason why he should not be sworn. The opponents to the granting of the provisional licence were fully heard, and the petition against it, to which Mr. Denton was one of the signatories, was put in and considered. Lastly, against the *mandamus* may be urged the difficulty which would be occasioned by the granting of the application and the interference with other interests, which have accrued by reason of the provisional licence having been confirmed. In my opinion, therefore, this rule, like that for the *certiorari*, must be discharged.

DARLING, J.—I concur. It is clear that the justices have the power to require a witness to be sworn if they think proper to exercise it. They had required the other witnesses to give their evidence on oath, and they, rightly in my opinion, decided that any evidence that Mr. Denton desired to give against sworn evidence should be deposed to by him. This case is a good illustration of the saying that a little knowledge is a dangerous thing. Mr. Denton having read the case of *Boulter* v. *The Justices of Kent*, imagined that the decision in that case absolutely entitled him to make statements of fact before a licensing meeting without being sworn. He mistook the point that that case really decided, and it is unfortunate for him that he read that case at all.

Rules discharged.

Solicitors for the applicant, *Arthur Blott*, for *James Jackson*, Northampton.

Solicitors for the licence-holder, *Metcalfe & Birkett*, for *Beck & Green*, Northampton.

Solicitor for the justices, *W. Hirst Sampson*, Wellingborough.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) March 14.

In re NEW PAR CONSOLS (LIMITED). (a.)

County court—Jurisdiction—Company—Winding up—Committal order—Prohibition—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 1 (6).

A writ of prohibition does not lie in respect of a committal order made by a county court judge in the course of proceedings to wind up a company.

Appeal from an order of Bigham, J., granting a writ of prohibition.

In the course of proceedings taken in the county court of Cornwall for the winding-up of a mining company called the New Par Consols (Limited), an order was made by the county court judge on the 22nd of October, 1897, under section 7 of the Companies (Winding-up) Act, 1890, directing Charles Gregory, one of the directors of the company, to submit to the official receiver and verify by affidavit a statement as to the affairs of the company.

Gregory having made default in complying with this order, the county court judge made an order for his committal to prison for contempt of court.

Gregory then applied to the High Court for a writ of prohibition to be directed to the county court judge restraining any further proceedings on the committal order, on the ground that the sealed copy of the order of the 22nd of October, which had been served upon him, did not bear the indorsement required by the County Court Rules giving him notice that unless he obeyed the directions contained therein he would be guilty of a contempt of court and liable to be committed to prison.

Bigham, J., made an order directing that the writ of prohibition should issue.

From this order the official receiver appealed.

Sir R. B. Finlay, S.G., and *Muir Mackenzie*, for the official receiver.—Formerly the jurisdiction over this company would have been in the Stannaries Court, and by section 120 of the Companies Act, 1862, the Stannaries Court had, for the purposes of the winding-up of companies, the same power of enforcing orders made by it as the Court of Chancery had in relation to matters within its jurisdiction. The Companies (Winding-up) Act, 1890, by section 1, sub-section 1, enacts as follows: "The courts having jurisdiction to wind up companies in England and Wales shall be the High Court, the Chancery Courts of the counties Palatine of Lancaster and Durham, the County Courts, and the Stannaries Court." By sub-section 6, "Every court having jurisdiction under this Act to wind up a company shall, for the purposes of that jurisdiction, have all the powers of the High Court." These powers include the power to commit for contempt of court: *Reg.* v. *Judge of County Court of Surrey*, 13 Q. B. D. 963. By an Act passed in 1896 (59 & 60 Vict. c. 45) the Stannaries Court was abolished, and all its jurisdiction and powers were vested in the county court. The result is that the county court for the purposes of its jurisdiction over the winding-up of companies is in the same position as the High Court, and therefore a writ of prohibition does not lie.

R. G. Glenn, for the applicant.—The point that prohibition does not lie was not taken before the judge at chambers, and sub-section 6 of section 1 of the Companies (Winding-up) Act, 1890, cannot fairly be construed as exempting the county court from liability to prohibition.

A. L. SMITH, L.J.—The county court judge clearly had jurisdiction to wind up this company, and by sub-section 6 of section 1 of the Companies (Winding-up) Act, 1890, he had for the purposes of that jurisdiction all the powers of the High Court, and among them the power to commit for contempt of court. It follows that we cannot order a writ of prohibition to be directed to him. The appeal must therefore be allowed.

CHITTY, L.J.—I am of the same opinion. The effect of the sub-section is to place the county court for this particular purpose on an equal footing with the High Court. I therefore think that the pro-prohibition was incautiously granted.

COLLINS, L.J., concurred.

Appeal allowed.

Solicitor for the official receiver, *Solicitor to the Board of Trade.*

Solicitors for the applicant, *Gregory & Co.*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) Feb. 23.

SPOONER v. T. & W. BROWNING. (a.)

Principal and agent—Authority of agent—Stockbroker's clerk—Agent to accept orders—Evidence of holding out—Liability of principal.

The defendants, a firm of stockbrokers, allowed one of their clerks a commission upon business introduced by him. On three separate occasions the plaintiff gave the clerk orders to take to the defendants for the purchase of shares, and the plaintiff received through the clerk bought-notes signed by the defendants in respect of these shares. No notice of assent to the orders was given by the defendants before executing them. In the first two transactions the plaintiff paid for the shares by cheque drawn in favour of the defendants, which he handed to the clerk to take to them. In the third transaction he paid for the shares by cheque drawn in favour of the clerk, which the clerk handed to the defendants. Subsequently the plaintiff gave the clerk further orders for the purchase of shares, but the clerk, instead of taking these orders to the defendants, forged the defendants' signature to bought-notes and handed them to the plaintiff, and in return received cheques in payment, which he appropriated to his own use.

In an action against the defendants to recover the money so paid, the jury found that the clerk had no express authority to enter into the contracts; but that the defendants held him out, or permitted him to represent himself, as possessed of such authority.

Held, by A. L. Smith *and* Chitty, L.JJ., *that the course of business in the first three transactions did not afford any evidence upon which the jury could reasonably find that the defendants held out the clerk as having authority to bind them by contracts, or as representing that the defendants would execute the orders given to the clerk.*

Held, by Collins, L.J. (*dissenting*), *that, as no notice of assent was given by the defendants before executing the first three orders, there was evidence for the jury, arising out of the mode of doing business, that the defendants by*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

conduct represented, or permitted their clerk to represent, that orders received by him would be executed by the defendants unless they gave notice to the contrary.

Appeal by the plaintiff from the judgment of Hawkins, J., at the trial of the action with a jury. The facts and arguments are sufficiently stated in the judgments.

Crump, Q.C., and *J. Eldon Bankes*, for the plaintiff.

J. Lawson Walton, Q.C., and *A. G. McIntyre*, for the defendants.

Cur. adv. vult.

Feb. 23.—A. L. SMITH, L.J.—This is an action brought by the plaintiff, who is a farmer, against a firm of stockbrokers, in substance to recover moneys paid by the plaintiff to a person named Dennis on account, as the plaintiff supposed, of the price of shares purchased by the defendants for him, which shares have not been delivered by the defendants to him. The case came to trial before my brother Hawkins and a special jury, when the learned judge, doubting whether he should do so, left the following three questions to the jury: First, Had Dennis express authority to enter into the contracts? Answer, No. Secondly, Did the defendants hold him out or permit him to represent himself as possessed of such authority—that is, to enter into contracts on the defendants' behalf? Answer, Yes. Thirdly, Had the plaintiff authorized Dennis to deal with the defendants so as to bind the plaintiff by payments to Dennis? Answer, No. My brother Hawkins subsequently, after argument, entered judgment for the defendants upon the ground that there was no evidence to support the second finding of the jury. The plaintiff appeals. The question comes to this: Should my brother Hawkins upon the evidence have held that there was no evidence to go to the jury upon the second question?

The evidence, so far as material to the point under consideration, shows this: Dennis was a junior clerk of the defendants, who received a commission upon business introduced by him to them. Dennis was known to the plaintiff as a friend. Upon the 11th of February, 1895, the plaintiff gave him an order to take to the defendants to be executed by them. It was an order to purchase for the plaintiff five Wolhuters shares. This order Dennis took to the defendants, who executed it, and the plaintiff afterwards received from the defendants a bought-note signed by them showing the purchase of these shares by them for him. This note was sent by the defendants to the plaintiff by Dennis. On the same day the plaintiff gave a similar order through Dennis for the purchase by the defendants for the plaintiff of ten Mainland Consolidated shares. This order Dennis took to the defendants, who executed it, and the plaintiff afterwards received through Dennis a bought-note signed by the defendants, showing the purchase of these shares by the defendants for the plaintiff. After the receipt of these notes from the defendants the plaintiff, on the 25th of February, 1895, drew his cheque in favour of the defendants for the price of these two lots of shares amounting to £35 8s. 6d., which cheque he gave to Dennis to be handed by him to the defendants. This Dennis did, and these two transactions are duly entered in the defendants' ledger. Upon the 8th of March, 1895, the plaintiff gave a third order to Dennis to be taken to the defendants for them to purchase for the plaintiff one hundred Idaho shares. This order Dennis also took to the defendants, who executed it, and afterwards sent through Dennis to the plaintiff a bought-note signed by them showing the shares purchased by them for him. Upon the 19th of March, 1895, the plaintiff drew his cheque for the amount of these shares—namely £17 16s. 2d.—in favour of Dennis, to be handed by him to the defendants, which he did. This transaction was also entered in the defendants' books, and these three matters thus became closed.

After these three transactions and throughout the year 1895 the plaintiff gave Dennis, who still remained the defendants' clerk, orders for the purchase of other shares to be taken by him to the defendants for execution. Dennis took none of these orders to the defendants. What he did was this: He made out bought-notes purporting to be signed by the defendants, and handed them to the plaintiff. These were forgeries of Dennis. The plaintiff upon the receipt of these forged bought-notes drew cheques for the different amounts supposed by him to be due to the defendants, and handed them to Dennis to be taken to the defendants. These cheques Dennis misapplied to his own use. The defendants knew nothing of these orders of the plaintiff, or of what Dennis was doing, till the beginning of the year 1896. It is not suggested that the plaintiff was guilty of any negligence in not finding out that the bought-notes he received from Dennis from time to time did not bear the genuine signatures of the defendants, nor that the defendants were guilty of any negligence in not discovering Dennis's frauds. Both the plaintiff and the defendants were equally cheated by Dennis.

The question is narrowed to this: Does the fact of a principal allowing an agent to obtain orders for him which he may or may not execute, as he pleases—as the person giving the order well knows—afford any evidence either that he holds out the agent as having authority to bind him by contracts, or as representing that he—the principal—will execute the orders brought to him by the agent? Now it is clear that upon receipt of the first order brought by Dennis to the defendants, they were perfectly entitled to refuse to execute it, and they were under no obligation whatever to communicate to the plaintiff whether they would execute the order or not. If they had not executed this order it cannot be said that their legal position would have been different when the second or any subsequent order came through Dennis to them, assuming they had not executed any of these orders. But it is said because they executed the first order—and in this case the two subsequent orders—their position became altered, and that by executing these orders they thereby held out the agent as having authority as regards subsequent orders to bind them by contracts, or at anyrate held him out as representing that they, the defendants, would execute the orders thereafter brought to them by him unless they communicated to the plaintiff that they would not execute the orders so brought. When, I would ask, is it that the legal obligation upon the principal to communicate to the customer that he would not execute an order brought to him by the agent first arises? Is it after the first, second, third, or after what number of orders executed? If it arises at all it seems to me it arises after the first order executed, and this, in my judgment, is not so any more than after a second or a third order executed. As I have before stated, the defendants in this case knew nothing of the orders given to Dennis by the plaintiff after the first three which they executed, and yet it is said that by not communicating to the plaintiff that they would not execute orders of which they knew nothing, they are liable to the customer. I cannot see this.

It is said that the defendants held out Dennis as having authority to receive payment, for they took and accepted a cheque brought to them by Dennis drawn by the plaintiff in favour of Dennis. This

cheque was taken in payment of an order which they had executed. If they had executed any of the orders subsequent to the first three, this might have afforded evidence of the holding out of Dennis to receive payment for the orders executed; but how does this show that they held out Dennis to receive payment for orders which they had never heard of, and of course not executed? It seems to me that although there was evidence fit to be left to the jury that the defendants held out Dennis as their agent to receive orders, which they might or might not thereafter execute, as they pleased, there was no evidence that he was held out by the defendants as their agent either to make contracts on their behalf or to bind them to accept orders when brought by Dennis to them, and that they are not estopped by their conduct from asserting against the plaintiff what is the truth—namely, that they had not executed for the plaintiff the bought-notes forged by Dennis.

For these reasons I have arrived at the conclusion that there is no evidence to support the second finding of the jury, and I therefore think my brother Hawkins came to the right conclusion in entering judgment for the defendants, and that this appeal should be dismissed.

CHITTY, L.J.—This appeal relates exclusively to the second finding of the special jury. At the request of counsel the learned judge left three specific questions to them. The jury, having answered them, were by consent discharged, and the further consideration of the action was reserved to be heard before the judge. On the further consideration, after argument, he held that there was no evidence to support the finding on the second question.

It is unnecessary for me to recapitulate the facts at length. They have already been stated by the Lord Justice. The jury found that Dennis had no express authority from the defendants to bind them, and that the plaintiff did not authorize Dennis to deal with the defendants so as to bind the plaintiff by payments to Dennis, but that—in answer to the second question—the defendants did hold Dennis out or permit him to represent himself as possessed of authority—as I understand the finding—to bind them by acceptance of the orders given by the plaintiff to Dennis.

There was no direct evidence of holding out or permission to represent. No communications took place between the plaintiff and the defendants directly; during the transactions in question no letter passed between the plaintiff and the defendants, nor did the plaintiff visit the defendants' office or anywhere see any of them. The communications which did take place were all through Dennis as an intermediary. The nature of his intervention I will state presently when dealing with the first three transactions. He was not the bearer of any message by word of mouth from the defendants to the plaintiff. He was a young man nearly of age in March, 1895, and had for some years been a junior clerk in the employment of the defendants. He was on intimate terms with the plaintiff, a farmer, and was constantly visiting him in the country. He advised the plaintiff in Stock Exchange transactions, and the plaintiff advised him and encouraged him in betting transactions. The plaintiff, as he said in his letter to the defendants of the 31st of May, 1896, dealt with him direct because he knew him well and his family, and never dreamt that he was a cheat. On all orders brought by him to the defendants, and accepted by them, he was allowed a part of the commission. Such then, stated shortly, was the general relation in which Dennis stood towards the plaintiff and the defendants.

The appellant relies on the first three transactions and the course of business followed in them; and it is contended for him that from the course of business thus followed there was evidence from which the jury had sufficient ground for drawing the inference that the defendants held forth their clerk Dennis as having authority to bind them to accept orders for purchase and sale on the Stock Exchange. The question narrows itself down to this: Do these transactions afford evidence from which the jury could reasonably draw the inference of fact that the defendants held Dennis out as having any such authority?

These three transactions were carried out substantially in the same manner. There is no question about them except as to the inference to be drawn from them. For the purposes of my judgment it will suffice to describe the first transaction. Dennis receives from the plaintiff in the country an order by word of mouth intended for the defendants to buy for him certain shares on the Stock Exchange. This order is carried on the 11th of February by Dennis to the defendants for execution by them. Plainly the defendants on receiving the order were at liberty to reject or accept it as they thought fit. Unless bound by prior contract no man is bound to accept an order sent to him. A stockbroker who accepts and executes an order to buy on the Stock Exchange becomes bound by the Stock Exchange rules as a principal. The defendants, on the order being submitted to them, make inquiries of Dennis as to the position of the plaintiff, and are satisfied. But this fact does not appear to have been communicated by Dennis to the plaintiff, and has no bearing on the question of ostensible authority. The defendants being thus satisfied, accept the order, but how? A regular Stock Exchange bought-note is made out and signed by one of the principals of the defendants' firm. This note is handed by the defendants to their clerk Dennis for delivery to the plaintiff. Dennis takes the note to the plaintiff in the country and delivers it to the plaintiff. This is the only manner in which the defendants signify to the plaintiff their acceptance of his order. The plaintiff then draws a cheque on the 25th of February to cover this and the second transaction, and hands it to Dennis for delivery to the defendants. The cheque is delivered to them. The transaction is entered in their books and is closed.

Now I am at a loss to see how these transactions, thus carried out, afford evidence of holding out Dennis as having authority to bind the defendants to accept any subsequent order coming from the plaintiff. The question is not whether the defendants held out Dennis as having authority merely to receive an order for transmission to them; such a question appears to me to be beside the point. But it is whether Dennis was held out by the defendants as having authority to bind the defendants on the mere receipt of the order by him so as to constitute the relation of principal and agent (or broker) between the plaintiff and the defendants. I think that the evidence arising from the course followed in these transactions leads to a conclusion contrary to that contended for by the appellant. In these transactions the defendants signified their acceptance of the orders brought to them in one way, and in one way only, by handing a duly signed bought-note to Dennis for transmission to the plaintiff. In the subsequent transactions Dennis stole or fraudulently obtained the defendant's forms of contract, and forged their signature; and by these means defrauded the plaintiff.

It was urged by the appellant that by the first three transactions the relation of customer and broker was constituted. Admitted that it was, so far as these transactions were concerned. But what then? The appellant's counsel contended that, having regard to this past relation, the defendants were bound to

accept all further orders given by the plaintiff to Dennis, and, if not for any amount however large, at least for moderate amounts such as are disclosed by the first three transactions. I am unable to agree with this contention. It seems to me that, after the first three transactions, the defendants were still at liberty to reject or accept any orders received from the plaintiff by Dennis, had Dennis delivered them to the defendants. But none of them were in fact delivered, and thus the defendants had no opportunity of accepting or rejecting them.

It was further urged that the defendants, by the course pursued in the first three transactions, placed the plaintiff in such a position as entitled him to presume that all orders given by him to Dennis were or would be accepted by the defendants, until they gave notice to the contrary to the plaintiff. But I cannot accept this proposition, or the proposition that authority to solicit orders was, in the circumstances of this case, evidence of ostensible authority to accept orders so as to bind the defendants.

In my opinion, Mr. Justice Hawkins was right in holding that there was no evidence to support the second finding.

COLLINS, L.J.—I regret that, after the most anxious consideration, I am unable to agree in the conclusion arrived at by my brothers in this case. There is, however, no principle of law involved, but merely a question as to the possible inference from certain facts. We are asked to ignore the findings of a special jury under the direction of the most experienced judge upon the bench upon a question peculiarly fitted for the decision of business men.

It is not necessary to re-state the facts. That there was actual authority given by the defendants to Dennis to solicit orders on their behalf is admitted. It was proved that in three successive transactions orders were given by the plaintiff to Dennis to be executed by the defendants' firm, and that on each occasion, without any other communication between the plaintiff and the defendants, either by letter or word of mouth, contract-notes for the required purchases were forwarded through Dennis to the plaintiff, and cheques returned by the plaintiff to Dennis, who handed them over to the firm. In fact, each of these transactions was carried out by the defendants through the agency of Dennis. The plaintiff never saw or communicated with anyone but Dennis, and the defendants communicated with the plaintiff only through Dennis.

There was evidence that the plaintiff did not know the actual limitations of Dennis's authority, but looked upon him as a partner, or, at all events, as authorized to accept contracts on behalf of the firm. It was further proved that on receipt of the first order one of the partners satisfied himself by inquiries of Dennis as to the responsibility of the plaintiff before accepting him as a client. They thereupon executed the first order and accepted payment by a cheque sent to Dennis in favour of the firm, and the amount of the cheque sent exceeding the amount required, they repaid the difference to the plaintiff by handing to Dennis their cheque in favour of the plaintiff. They executed the next order without further inquiry, and received in payment a cheque sent to Dennis and drawn in his favour. The jury by their answer to the third question negatived the defendants' contention that Dennis was the plaintiff's agent, and that finding has not been contested.

It seems to me that these facts constituted evidence fit to be considered by a jury of a holding out by the defendants of Dennis, at the lowest, as a person authorized to receive orders on behalf of the firm—indeed this was hardly disputed by the defendants' counsel. If he was so held out, it would follow that the defendants would be bound to treat an order given to Dennis as received by the firm in ordinary course. They could not plead non-receipt of the order as an excuse for failure to perform it. But as they would be in no wise bound to accept the order, I think such a mode of doing business might well ground a presumption that they undertook by some means to apprize the customer whether they intended to execute it or not. The assent of the broker to the order would necessarily precede its execution; and in dealings on the Stock Exchange, if the would-be customer had to wait to know whether his order was accepted or not till the time arrived in which notice of performance would reach him in ordinary course, he might find his purpose in the transaction wholly defeated. What mode of giving this necessary information the parties intended to adopt would be a matter of inference for a jury from all the circumstances. Where, as here, no notice of assent was given in any case before the execution of the order, I think there was evidence for the jury that the mode of doing business was that the assent which must have preceded the execution of the order was to be inferred from silence—in other words, that the customer would be entitled to assume, in the absence of notice to the contrary, that his orders were accepted in due course, and to act on such assumption by not placing them elsewhere; and thus the defendants, being estopped from denying that they received the orders, would be also estopped from denying that they accepted them.

Suppose actual authority given to a particular clerk to receive orders on behalf of the firm. This would not of itself confer authority on such clerk to bind the firm to accept them, but surely, as a matter of business, it would throw upon the firm the obligation of giving notice to a customer, who had tendered an order to the person authorized to receive it, of their refusal to execute it, and surely in the absence of such notice a customer whose previous orders had been uniformly executed without notice of assent given, would be entitled to assume that the order had been accepted, and to complain if it were not performed. If a stockbroker, who had executed several previous orders for a customer without any intimation that he accepted the mandate except by forwarding the contract-note, were on receiving a further order, which might be of vital importance, to decline to execute it, without any notice to his customer, who, acting on the assumption that the order would be executed, abstained from placing it elsewhere, would not a jury be justified in inferring that the business was done on the implied terms that orders received would be executed unless notice to the contrary was given, and in holding the broker responsible? I think such inference might be more readily drawn where the orders are given to an employee designated by the broker as the proper person to receive them. Business would require that the broker should consider such orders so as to determine whether he would execute them or not, and the customer would be entitled to know his decision.

Where the mode of doing business is that no notice of assent is given except by the execution of the contract, I think it would be unreasonable to suppose that the order could be declined without notice; and therefore the course of business might well justify the inference that where no such notice had been given the order had been accepted. Where there has been a long course of business the evidence is necessarily stronger, but two or three cases may be evidence enough to justify business men in drawing an inference, which indeed seems inevitable if business is to be carried on at all.

I think, therefore, that the facts proved constituted some evidence for the jury that the defendants by their conduct represented, or permitted Dennis to represent, that orders received by him would be executed by the firm unless they gave notice to the contrary. If the plaintiff changed his position on the faith of such representation the estoppel would be complete. Though there was no express finding that the plaintiff acted on the faith of such representation, the second question seems to have been put on the assumption that he did act upon it, and no point seems to have been made that he did not, and I think there can be no doubt how the jury would have answered it had it been left to them. We are dealing here with the finding of a special jury who saw the witnesses, and who, or some of whom, were presumably conversant with business; and the question is not whether we should draw the same inference as they did, but whether there was evidence fit for their consideration. The evidence as to how payment was accepted by the defendants has a material bearing on the question of ostensible authority, as it is evidence both of notice to the defendants of the light in which the plaintiff regarded Dennis, and of a representation by them that Dennis's position in the firm was such that payment by cheque to his order was a good payment to the firm. It is not, I think, necessary in order to support the finding of the jury to put the ostensible authority higher than I have done, but I think the facts proved were evidence of ostensible authority to accept, as well as to receive, orders within limits measured by reference to the business actually accepted. Had the learned judge entered judgment for the plaintiff, I cannot help thinking that counsel would have had an uphill task in seeking to set it aside in this court on the ground that there was no evidence to support it.

The result is that I think Mr. Justice Hawkins was right in leaving the question to the jury, but wrong in holding that there was no evidence to support the finding. If the finding stands, the plaintiff would be entitled to judgment for at least nominal damages under the second alternative in paragraph 5 of the claim. This falls very far short of the whole relief claimed by the plaintiff, and I agree with Mr. Justice Hawkins and my brothers of this court that the defendants are not bound by the forgeries of Dennis, nor estopped from denying that they executed the orders received by him. The question whether he was held out as authorized to receive payment on their behalf was not left to the jury, but I think there is evidence that Dennis was held out as authorized to receive payment, even by cheques payable to his own order. Although in the undisputed cases the cheques were sent in return for contracts, I think the representation arising from the defendants' conduct in allowing such modes of payment to pass without comment might be construed by the jury to cover an authority to receive cheques along with the orders.

I feel constrained, therefore, to hold that the finding of the jury to the second question must stand, and that the plaintiff is entitled to judgment on this appeal.

Appeal dismissed.

Solicitors for the plaintiff, *Emanuel, Round, & Nathan.*

Solicitors for the defendants, *Debenham & Walker.*

High Court of Justice.

Chan. Div. } Romer, J. } Feb. 26; March 4.

In re WOODS AND LEWIS'S CONTRACT. (*a.*)

Vendor and purchaser—Interest on purchase-money—Default of vendor—Delay due to defective title—Imputation of knowledge of defect to vendor.

On investigation of a title to land a defect was discovered in the conveyance to the vendor, which purported to be made under the authority of an insurance company's Act of Parliament, the power given by the Act not having been duly pursued. The steps required to be taken in order to cure the defect caused the completion of the purchase to be delayed until nearly three months after the date fixed by the contract.

By clause 10 of the contract, if from any cause whatever, other than the default of the vendor, the purchase was not completed on the appointed day, the purchaser was to pay to the vendor interest on the purchase-money from that day until completion of the purchase. The defect of title was not known to the vendor at the date of the contract.

Held, that ignorance of this defect did not amount to a "default" on the vendor's part within the meaning of the above clause, and that he was entitled to interest thereunder until completion of the purchase.

In re Young and Harston's Contract, 34 *W. R.* 84, 31 *Ch. D.* 168, *and* In re Hetling and Merton's Contract, 42 *W. R.* 19, [1893] 3 *Ch.* 269, *distinguished.*

Summons.

By agreement dated the 26th of July, 1897, Woods contracted to sell and Lewis to purchase a leasehold house in Berkeley-square.

By clause 9 the purchase-money was to be paid on the 31st of August, 1897, and upon payment thereof the vendor and all other necessary parties were to execute a proper assurance to the purchaser. By clause 10, if from any cause whatever, other than the default of the vendor, the purchase should not be completed on the said 31st of August, the purchaser was to pay to the vendor interest at £4 per cent. per annum on the purchase-money from that day until completion of the purchase.

What purported to be a conveyance of the property to the vendor was made by indenture dated the 1st of June, 1897, between S. C. Thomson, of the first part, three persons being directors of the Standard Life Assurance Society, of the second part, and the vendor, of the third part. The said S. C. Thomson thereby admitted himself to be a trustee of the said society, and he purported to convey the property under the 11th section of the Standard Life Assurance Co.'s Act (8 & 9 Vict. c. lxxv.).

By the 29th section of the Act it is, so far as material, enacted that a general meeting of the company may from time to time appoint any number of trustees not exceeding five, in whose names, or in any three or more of whose names, any mortgage or other security to be granted in favour of the company may (if desired) be taken, and the said trustees shall be under the control of the ordinary directors of the company, and shall from time to time make and execute such conveyances, surrenders, assignments, and assurances, and do such other acts, matters, and things as shall from time to time be directed or ordered by the said ordinary directors, and the same shall to all intents and purposes be as valid as if made and executed or done by all the proprietors for the time being in the company.

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Instead of being made under the direction of the ordinary directors of the said assurance company in pursuance of the said 29th section, the said indenture the 1st of June, 1897, purported to be made with the concurrence of only three of the ordinary directors of the said assurance company under the provisions of the 11th section of the said Act, which enacts that all mortgages, charges, wadsets, and other securities whatsoever executed and given, or to be executed and given, in favour of the said company of, or affecting, any property in England, Ireland, or elsewhere (save Scotland), shall and may be released and discharged by the party in whom the same may for the time being be vested with the privity or at the instance of any three or more of the ordinary directors of the company or persons acting as such.

Inasmuch as the said indenture of the 1st of June, 1897, was effected under the 11th section instead of under the 29th section of the said Act of Parliament, it was objected for the purchaser that the conveyance to the vendor was defective, and that unless it had been in fact authorized by a resolution of the directors a deed of confirmation was necessary. No such resolution having been passed, a deed of confirmation was required and eventually obtained, but the purchase was not completed until the 24th of November. The vendor claimed interest to that date under the contract, but the purchaser objected that the delay was occasioned by the vendor's default.

This summons was taken out under the Vendor and Purchaser Act, 1874, on behalf of the vendor for a declaration that there had been no default on his part.

Farwell, Q.C., and *G. Cave*, for the summons.—The purchaser ought to pay interest under clause 10, in the contract. The circumstances bring the vendor within the rule laid down by Knight Bruce, L.J., in *Sherwin* v. *Shakspear*, 1 W. R. 460, 2 *ib.* 668, 5 De G. M. & G. 517, at p. 527, and there has been no "default" on his part.

They also referred to *In re Young and Harston's Contract*, 34 W. R. 84, 31 Ch. D. 168; and *In re London (Mayor, &c., of) and Tubbs' Contract*, [1894] 2 Ch. 524.

Neville, Q.C., and *Holmes*, for the respondent.—The vendor has not fulfilled his legal obligation to the purchaser, and that is "default" on his part, and the purchaser is, under clause 10, not bound to pay interest.

They referred to *In re Hetling and Merton's Contract*, 42 W. R. 19, [1893] 3 Ch. 269.

Farwell, in reply.—In *In re Hetling and Merton's Contract* the vendor knew the material fact giving rise to the difficulty.

He also cited *Williams* v. *Glenton*, 14 W. R. 294, L. R. 1 Ch. App. 200.

ROMER, J.—I will assume in this case that the delay in completion has been caused solely by the defect in the vendor's title. But the defect was clearly not known to the vendor at the date of the contract, nor was the defect so obvious as to make ignorance on his part inexcuseable or unreasonable, and the question is whether under the circumstances I ought to hold that the delay has been caused by the vendor's "default" within the meaning of that word as used in the 10th clause of the contract.

The meaning of that word has been described by Bowen, L.J., in *In re Young and Harston's Contract*, 31 Ch. D. at p. 174, as follows: "Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction." I accept that description and apply it to the case before me. It is clear that when the defect of title was pointed out by the purchaser there was no undue delay on the part of the vendor in complying with the purchaser's requisitions and trying to cure the defect. So that the imputation of default in this case to the vendor can only be justified by holding that under the circumstances of a contract for the sale of land, and an interest in land, it is reasonable to assume, for the purpose of the clause as to interest, that the vendor is bound or must be taken to know every possible defect of his title.

Now, when I consider the state of the laws of this country concerning land, and the difficulties under which even a perfectly honest and careful vendor labours, it does not appear to me to be reasonable to impute to him knowledge of all possible defects of title for the purpose of such a clause as I am considering. I do not consider that ignorance of such a defect of title as existed in this case amounted to a "default" on his part within the meaning of that word as used in the clause. In several cases it has been pointed out that delay arising from such ignorance on the part of a vendor of land did not amount to "wilful default" on his part; see—*e.g.*, the observations of Knight Bruce, L.J., in *Williams* v. *Glenton*, L. R. 1 Ch. App. at p. 206. No doubt he was then dealing with a case where the interest clause made interest payable if delay occurred "from any cause whatever," but it had been previously settled that the generality of those words did not allow a vendor to claim the interest where delay occurred by his wilful default. And, when the grounds are considered on which it has been held in the above cases that ignorance of defects in title did not amount to wilful default, it appears to me that those grounds apply to the case before me and show that the vendor ought not be held guilty of "default."

The cases relied on by the respondents before me are clearly distinguishable. In *In re Young and Harston's Contract* the delay occurred owing to the vendor going abroad two days before the time known by him to have been fixed for completion of the purchase; and the case of *In re Hetling and Merton's Contract* turned upon this, that the vendor knew at the date of the contract certain facts from which it was inferred by the court he ought to have gathered that the purchase could not, or probably could not, be completed by the date fixed for completion. The grounds for that decision are clearly stated by the present Master of the Rolls, [1893] 3 Ch. at p. 281.

I may add that there is in the case before me no great hardship in holding the purchaser liable to pay interest, for he did not as the purchaser did in *In re Hetling and Merton's Contract* have his money ready to complete at the proper time and keep it ready making no interest of it (see observations of the Master of the Rolls in that case at the bottom of p. 281). I therefore hold that the vendor is entitled to interest.

Judgment for the applicant.

Solicitors for the applicant, *Hulberts, Hussey, & Metcalfe.*

Solicitors for the respondent, *Ingle Holmes & Sons.*

Chan. Div. } Feb. 11.
Byrne, J. }

BIRMINGHAM BREWERIES (LIMITED) v. JAMESON. (a.)

Landlord and tenant—Brewer's lease—Beerhouse—Covenant not to sell beer other than that purchased of lessor—Assignment of reversion—"Where context allows" Assigns or successors in business—Construction.

H. "lessor," a brewer, demised a beerhouse to N. "lessee," beer retailer, by lease wherein N. covenanted "to deal exclusively with the lessor or his firm of H. & Sons, or his or their successors in business, for all beers," &c., and not to take any such articles other than such as should be purchased of "the lessor or his firm, or his or their successors in business," provided that he was willing to supply the same at the price and terms usually charged by the lessor or his firm to his or their tenants. And it was declared that, "where the context allows," the expressions "lessor" and "lessee" included, besides the lessor, his executors, administrators, and assigns, and besides the lessee, his executors, administrators, and assigns.

The plaintiffs became assignees of the reversion, but the firm of H. & Sons, of which H. was a partner, continued to carry on business. N. assigned the lease to the defendant.

Held, (1) that the expression "lessor" in the covenant included assigns, and (2) that the plaintiffs could dictate as to which of the persons named in the covenant the defendant must buy of, and could require him to buy of them.

Action.

By a lease dated the 5th of September, 1889, and made between Alfred Hood, described as of "The Brewery, Nechells, Birmingham, in the county of Warwick, brewer (hereinafter called 'the lessor')" of the one part, and J. S. Nock described as of "100, Nechells-park-road, Nechells, Aston-juxta-Birmingham, beer retailer (hereinafter called the 'lessee')" of the other part, the lessor demised to the lessee a beerhouse and premises in Guilford-street, Lozells, in Birmingham, for a term of fourteen years, from the 1st of June, 1889, at the rent and upon the covenants therein reserved and contained.

In the lease was a covenant by the lessee with the lessor as follows:

"And also that he, the lessee, his executors, administrators, lessees, tenants, and assigns, and all other persons for the time being carrying on the business of a beer retailer or publican upon the said premises, will and shall during the said term of years hereby granted, deal exclusively with the lessor, or his firm of Messrs. Hood & Sons, or his or their successors in business, for all beers, ales, porter, stout (except bottled stout), and other like articles, which shall be sold or consumed upon the said hereby demised premises, or shall be brought thereon to be sold or consumed. And will not nor shall during the said term, on any pretence whatsoever, purchase, take in, receive, or have in his or their possession, or directly or indirectly sell or dispose of, or permit the sale, disposal, or consumption in or upon the said premises of any such articles, other than such as shall have been purchased or taken of the lessor or his firm, or his or their successors in business, provided that he or they shall be willing to supply the same at the price and terms usually charged by the lessor or his firm to his or their tenants."

And the lease contained a declaration that "where the context allows the expressions 'the lessor' and 'the lessee' used in these premises include, besides the said Alfred Hood, his executors, administrators, and assigns, and besides the said J. S. Nock, his executors, administrators, and assigns." The reversion expectant upon the said lease was assigned in April, 1894, by Hood to the Midland Brewers Auxiliary Company, Limited, who in May, 1896, assigned it to the plaintiff company. Hood & Sons continued to carry on business as before at the Nechells brewery. The term granted to the lessee was assigned to the defendant.

The defendant had purchased his liquors elsewhere than from the plaintiff company. He pleaded that he had always been ready and willing to purchase from Hood & Sons so long as they were willing to supply the same, and contended that he was under no obligation to deal with the plaintiff company.

The plaintiffs claimed an injunction against the defendant purchasing any beers, &c., other than those purchased of the plaintiffs.

Dunham, for the plaintiffs.—The covenant runs with the reversion, and the assignee of the reversion alone can enforce it. The defendant offers to buy of Hood & Sons, but the firm cannot enforce the covenant, not being parties to it. The lessor had the right of saying from whom the lessee was to take his beer, whether from him or the firm, and now the plaintiffs, as his assignees, have the same right, and may require the lessee to buy either of themselves, or of Hood, or Hood & Sons. The words "and assigns" are imported into the covenant after "lessor": *Clegg* v. *Hands*, 38 W. R. 433, 436, 44 Ch. D. 503, 520; *White* v. *Southend Hotel Co.*, 45 W. R. 434, [1897] 1 Ch. 767. [His lordship referred to *Fleetwood* v. *Hull*, 37 W. R. 714, 23 Q. B. D. 35.]

Douglas, for the defendant.—The covenant is personal to the lessor, and the defendant has fulfilled his duty in offering to buy of Hood & Sons: *Doe d. Calvert* v. *Reid*, 10 B. & Cr. 849, at p. 856. When the business and the reversion of the lease are separated a covenant of this kind cannot be enforced by the assignees of the reversion: *Vyvyan* v. *Arthur*, 1 B. & Cr. 410, at p. 414. It is sought to read in the words "and assigns" after "lessor," but the interpretation clause only applies where the context allows, and the words in the context "or his firm of Messrs. Hood & Sons or his or their successors in business" do not allow the addition. The present case differs from *Clegg* v. *Hands*, because in that case—(1) There was no severance of the business from the reversion of the lease; (2) the interpretation clause had not the qualification of "where the context allows"; and also (3) because the lessor was not described there as of a certain brewery, as he is here. The case of *White* v. *Southend Hotel Co.* is in my favour, because there the business going one way and the house another, the lessee was held to have fulfilled the covenant in buying his wines of the assignee of the business. In *Doe d. Calvert*, the lessor was described as of a particular brewhouse, and the covenant was held to be to buy of him personally. Suppose the assignee of the reversion were not a brewer at all, could it have been said that he could compel the lessee to buy beer of him? The alternative as to the persons from whom the beer is to be taken is at the option of the lessee, not of the lessor or his assignee: *Reed* v. *Kilburn Co-operative Society*, L. R. 10 Q. B. 264.

Dunham, in reply.—The covenant is to take beer "supplied," not "brewed," by the lessor or his assigns.

BYRNE, J. (after stating the facts).—I need not consider whether the plaintiffs can sue, and whether the covenant runs with the reversion, as these questions

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

are not raised. Upon the construction of the covenant I may say, as was said by Lord [illegible] in the case of [illegible] v. [illegible]: "Now mark, as far as they give us a rule of construction, are very useful, but it is seldom to my mind that a case upon the construction of one particular document tells us much upon the construction of another document, unless it lays down some principle to guide us" and in distinguishing that case from [illegible] v. [illegible] he points out that the words "or their successors in their late or present trade as brewers" in that case, which are similar to the words here, were not used in [illegible] v. *Harris*. Now, I must say whether the words "his executors, administrators, and assigns" must be introduced after the word "lessor." At first I was struck with the argument that in view of the words of this covenant it could not be said that the context allowed of the interpretation being applying. It was said that the covenant by the lessee, his executors, administrators, or assigns, followed by the term lessor without these words, showed that they were not intended to be inserted. But these words after "lessee" only show that the underlessees and others are to fulfil the obligations of the lease.

I think, therefore, that the interpretation clause must be applied, and that the covenant must be read as if it were to read exclusively "with the lessor, his executors, administrators, and assigns, or his firm of Messrs. Hood & Sons, or his and their successors in business." But it is said that although the lessor, his executors, administrators, and assigns are the persons who could sue, yet that the covenant was sufficiently complied with if the lessee took his beer of Messrs. Hood & Sons, even if Hood had left the business. Upon this point I will refer to the observations of Lindley, L.J., in [illegible] v. *Harris*. "I agree with Mr. Collins in thinking that this case is one of very great importance both to brewers and tenants who take tied houses, because it is certainly rather a startling thing to anybody to be told that when you have agreed to buy beer of a particular brewer, you may find yourself bound to take beer of somebody else. Whether you are or not depends upon the agreement into which you have entered. The whole question here turns upon the true construction of this agreement, and the only difficulty that I think serious is to find out whether this agreement is or is not assignable—that is to say, whether the tenant here entered into a contract with certain persons, relying upon their personal skill and reputation, and agreed to buy beer of them and them alone, or whether he did not enter into a very much wider contract, and agree to buy beer from them or anybody to whom they might assign the business or the public-house. The answer to the question whether this is a personal unassignable contract or not, must be gathered from the instrument itself, having regard, of course, to the position of both parties." It was said on behalf of the defendant that it was a startling thing to say that where a man covenanted to buy beer of the lessor he may be bound to take it of another person whose beer he knows nothing about. But such an argument is only of weight where the contract is ambiguous. Where the words of the contract are clear, you must construe them as they stand. The covenant here is with the lessor, his administrators and assigns, and they can all enforce it, and dictate to the tenant of whom the beer is to be taken. It was said that the assignee might not be a brewer at all, but the covenant is not to take beer brewed by, but only supplied by, particular persons. The covenant is not fulfilled by taking beer of Messrs. Hood & Sons, and was not for their benefit, except in so far as it was for the benefit of Mr. Hood as a member of the firm.

Judgment for the plaintiff.

Solicitors for the plaintiffs, *Hurrell, Christopher, & Co.*

Solicitors for the defendants, *Ward & Bowie*, for *Lane, Clutterbuck, & Tomlinson*, Birmingham.

Chan. Div. }
Wright, J. } Jan. 27.

In re NEW BRITISH IRON CO.
Ex parte BECKWITH. (*a.*)

Company—Winding up—Directors' fees—Creditors—Articles of association—Fixed remuneration—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38, sub-section 7.

Where the articles of association fix the fees of the directors of a company at a specific sum, the directors are entitled to prove with other creditors of the company in the winding up for such fees due at the date of the liquidation; for, the fees being fixed by the articles of association, they were impliedly part of the contract between the company and the directors when they accepted their office. The directors are therefore in the position of ordinary creditors, and not of members of the company, in regard to those fees; and section 38, sub-section 7, of the Companies Act, 1862, does not apply.

In re Leicester Club and County Racecourse Co., Ex parte Cannon, 34 *W. R.* 14, 30 *Ch. D.* 629, *distinguished.*

In re Dale and Plant, 38 *W. R.* 409, 43 *Ch. D.* 255, *followed.*

Application by the directors of this company for leave to prove in the winding up for fees due to them as directors at the date of the winding up.

Clause 62 of the articles of association was as follows: "The remuneration of the board shall be an annual sum of £1,000 to be paid out of the funds of the company, which sum shall be divided in such a manner as the board shall from time to time determine."

The articles also provided that directors should be members of the company and shareholders.

The company had gone into liquidation, and the directors claimed the right to prove in winding up for fees due to them at the date of commencement of the liquidation.

Dighton Pollock, for the directors.—*Ex parte Cannon*, 34 W. R. 14, 30 Ch. D. 629, is distinguishable, as there the fees were of the nature of a gratuity, here they are a fixed sum mentioned in the articles. [WRIGHT, J.—Kay, L.J., in *In re Dale and Plant*, 38 W. R. 409, 43 Ch. D. 255, did not approve of *Ex parte Cannon*].

Howard Wright, for the liquidator.—The liquidator does not wish to dispute this claim of the directors, but did not consider that he was justified in paying this claim in face of the decison in *Ex parte Cannon* without the leave of the court.

WRIGHT, J.—In this case there is a provision in the articles of association of this company which did not exist in *Ex parte Cannon*. This clause in the articles of association is not, of course, of itself a term of the contract between the directors and the shareholders—it is only part of the contract of the shareholders with each other—but when we find the directors appointed on the footing of this article and accepting their office on this same

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

basis, we then have evidence that the terms of that article were embodied in their contract with the company. That being so and this article being so impliedly embodied in the contract, we find that the directors obtained the contractual right to be paid £1,000 a year as remuneration, and the case is therefore distinguishable from *Ex parte Cannon*. I do not intend by this decision to fritter away any obligation which I am under of being bound by any previous decision. The facts in *Ex parte Cannon* differ from those in this present case or I should have followed that decision, but the judgment of Pearson, J., in that case was on the ground that the directors were not in a distinct contractual position with regard to the company, and that their position as directors in that particular company was no more than that of members, without giving them any separate right. The present case is within the principle of *In re Dale and Plant*, and therefore it does not come within section 38 of the Act of 1862. This remuneration is not due to the directors in their character as members of the company, but falls into the category of sums due to them under another and distinct contract. Their claim must therefore be allowed.

Solicitors, *J. Beckwith; Freshfields & Williams.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.) Feb. 12; March 4.

REG. *v.* DOUGLAS AND OTHERS. (*a.*)

Justices—Disqualification—Solicitor—Clerk to magistrates—Ex officio *justice—Justices' Qualification Act*, 1871 (34 *&* 35 *Vict. c.* 18), *ss.* 1, 2—*Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *s.* 22.

D., a solicitor, had acted as clerk to the magistrates of the Ringwood Division of the county of Southampton for many years, and recently became ex officio *a justice of that division by virtue of being elected chairman of the district council. He tendered his resignation of the office of clerk to the magistrates, but no steps were taken to accept it, and he continued to draw the salary attached to the office and to perform the duties connected therewith as before by means of a deputy.*

W. was tried and convicted of an assault upon a woman before D. and six other justices, and he applied for a certiorari *to bring up the conviction to be quashed.*

Held, that the conviction must stand, as D. could lawfully adjudicate upon the case, because he had ceased in fact to be a practising solicitor at the time of the conviction, and by his accepting the office of chairman to the district council his former office of clerk to the justices had been vacated, since the two offices were incompatible.

Reg. *v.* Mayor, &c., of Bangor, 35 *W. R.* 158, 18 *Q. B. D.* 349, *followed.*

This was the argument on a rule *nisi* directed to the respondents, justices for the county of Southampton and one Rosa Müller, to show cause why a writ of *certiorari* should not issue to bring up a conviction of the applicant, one Walker, for assault upon the said Rosa Müller, to be quashed on the ground that Alderman Druitt, one of the seven justices who adjudicated upon the case, was a solicitor, and therefore disqualified from acting as justice by virtue of the Justices' Qualification Act, 1871, and further upon the ground that at the time of the conviction he was clerk to the justices.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The case was heard at a petty sessional court held at Christchurch, in the county of Southampton.

At the date of the conviction Alderman Druitt had ceased to practice as a solicitor, and had transferred his business to his son and nephew. He continued, however, to take out his certificate under the belief that it was necessary for him to do so as registrar of the county court, and his certificate was in force at the date of the conviction.

In 1897, Alderman Druitt accepted the office of Mayor of Christchurch, and therefore under the Local Government Act, 1894, he became *ex officio* justice of the peace for the county of Southampton. His resignation of his office of clerk to the bench was thereupon tendered, but was never accepted by his brother magistrates, and he continued to draw the salary attached to the office and to perform the duties connected therewith as previously by means of a deputy.

A. T. Lawrence, Q.C. (*Clavell Salter* with him), showed cause against the rule. By the Local Government Act, 1894, the chairman of a district council (unless a woman) or personally disqualified by any Act became *ex officio* a justice of the peace for the county in which the district council was situated. Unless, therefore, Alderman Druitt was disqualified on one of the two grounds alleged when the rule was obtained he was entitled to sit as a magistrate for the county of Southampton. Even if his holding the office of magistrates' clerk was inconsistent with his being a justice, that of itself did not amount to a statutory disqualification. Even if the offices were incompatible the conviction was not necessarily bad. [WRIGHT, J.—If the two offices are incompatible, one of them is vacated. It is stated in *Rex* v. *Pattison*, [1832] 4 B. & Ad. 9, that Lord Tenterden, on being appointed a judge of the Queen's Bench, surrendered the patent creating him a judge of the Common Pleas, and it was in that case argued (p. 21) that "the defendant was not at liberty without permission of those who elected him to vacate the office he then held by the mere acceptance of a second *conferred by a different authority*." The point was argued in that case, and, in my opinion, with considerable force, in this way: "What ground is there for saying that if two offices are incompatible the first should be vacated by the appointment to the second rather than the appointment to the first should make the person ineligible to the second?"] Since these proceedings were taken Alderman Druitt had retired from the office of clerk to the bench. The salary might have been improperly paid him after he became a magistrate, but, if so, he would return it, and that was a matter of account merely. It was no part of his case to argue that the two offices could be exercised together, but to make the conviction bad it must be shown that Alderman Druitt had such an interest as to preclude the presumption that the person convicted had had a fair trial. If objection could have been raised, on the ground of possible bias or the like, to his forming one of the bench, it had been waived at the hearing, for on both occasions when the applicant was before the magistrate he was represented by solicitors who knew the facts: *Reg.* v. *Burton*, *ante*, p. 127, [1897] 2 Q. B. 468.

E. Bowen Rowlands (*F. H. M. Corbet* with him), in support of the rule.—The facts showed that Alderman Druitt was acting through his son, who was his deputy, in advising the magistrates, and was also sitting on the bench as a judicial officer. The offices were incompatible. A justice could not receive pay, whereas he was taking money for his clerkship. It was contrary with the whole policy of law that a

man should fill both positions. The question of waiver could only arise where the magistrate was interested, but in the present case he had no jurisdiction and had no right to be on the bench at all: *Worth and Others* v. *Newton*, 2 W. R. 628, 10 Exch. 247.

Cur. adv. vult.

Lord RUSSELL OF KILLOWEN, C.J.—This was a case in which a rule had been obtained upon the 22nd of November, 1897, for a *certiorari* to bring up a certain conviction of one Frederick Walker for assault, which conviction had taken place upon the 20th of August, 1897. The conviction took place at Christchurch, which is in the Ringwood division of the county of Southampton, before a bench of seven magistrates, and it was alleged that this conviction was wrong because one of the magistrates who took part in adjudicating upon it was disqualified from acting as a magistrate. The case is an illustration of the jealousy with which the law requires that there shall be perfect legal capacity in the tribunal which is to adjudicate even in the least important cases. Six of the magistrates were duly and fully qualified, but is was said that the seventh, who also took part, was not qualified, and, as a result, that the whole proceedings were wrong, and that this court ought to quash the conviction. The magistrate who was said to be disqualified was one Alderman Druitt, the mayor of Christchurch, who, under the Local Government Act, 1894, by reason of his tenure of that office, became *ex officio* entitled to act as a magistrate for the county of Southampton, and entitled to sit upon cases coming from the Ringwood division.

Two objections were made. One was that Alderman Druitt, being a solicitor, was thereby incapacitated, and the other that he was clerk to the magistrates, and on that ground was disqualified. As regards the first ground of objection, there is no real foundation for it. The gentleman, we are satisfied, ceased to practise as a solicitor as far back as the year 1892. At that time he made over his business to certain relations, and we are satisfied that from that time he did not practise. It is true that up to the year 1896 he took out his certificate as a solicitor, but he had done that, we are satisfied upon his statement, because he thought it was necessary for him to do so in his character as one of the joint registrars of the county court. That ground of objection therefore fails.

The second point, and the one which has been mainly argued here, is, that he being clerk to the magistrates, was incapacitated from sitting as a magistrate. Now the facts as regard to this position are these. He was appointed magistrates' clerk as far back as the year 1838, and he continued to hold that office in the sense of drawing the salary of the office and in the sense of being liable to be called upon by the magistrates, if they desired, to advise them, until a date subsequent to the date of the conviction. But it appears that he had tendered his resignation, and that his resignation had not been accepted, and that the magistrates, whose servant he was as their clerk, had done what I must distinctly say was a highly improper thing. Although they knew that he became, by virtue of his office as Mayor of Christchurch, a magistrate of the county of Southampton, yet they permitted him to continue to hold the office of clerk to the magistrates and to draw the salary of that office. This was a highly improper thing for them to have assented to, and it was a highly improper thing for him to have agreed to. But I do not see the least ground for suggesting any jobbery or wrong motive in it, although undoubtedly the conduct of this gentleman, Alderman Druitt, and of the magistrates was reprehensible. But although he continued to hold the office of magistrates' clerk and to draw salary, it is quite clear that he was allowed, with the assent of the magistrates, to have the duty of the magistrates' clerk performed after he became *ex officio* a magistrate, and, indeed, before that time, by his son. The question is in this condition of things—being, as I have said, the clerk to the magistrates — was he incapacitated from assuming the position of and acting as a magistrate? I need not say that the two positions cannot be held by the same person. The question is, What is the effect in point of law of one who is in the position of magistrates' clerk occupying the position of magistrate, and being one of the same body who were his employers and principals? That is the question of law which we have here to consider. It is obvious that the magistrates' clerk is in effect the servant of the magistrates, appointed by them, and they are the persons who fix his salary, subject to some control by the Home Office. It is obvious also that he cannot be compelled to continue in the service of the magistrates as their clerk against his will. It follows, then, that it was quite within the competence of this gentleman to decline to continue to act as clerk, subject, it may be, to some complaint against him if he violated his terms with the magistrates. Subject to that, he had a right to determine his position as magistrate's clerk. It, therefore, was a position which he could free himself from if he so wished. It follows, from what I have said, that these two offices are incompatible offices, and the question thereupon arises—which, finally, is the one we have to decide—What is the effect of a man holding two incompatible offices under such circumstances as these? He cannot hold both, it is obvious, as they are distinctly incompatible. It seems to me the principle upon which this case must be decided is expressed by the Court of Appeal in the case of *Reg.* v. *Mayor, &c., of Bangor*, 35 W. R. 158, 18 Q. B. 349. That case was not referred to during the argument, and I see that both Wright, J., and myself argued it at the bar. That was a case in which the returning officer declared the election of the candidate, whose votes placed him at the head of the poll at the election of a councillor for one of the wards of the borough, to be void on the ground that his being an alderman rendered him ineligible to fill the office of councillor. The question in the Court of Appeal was whether an alderman could serve in the office of councillor, it having been decided in the court below that the returning officer had exceeded his duty in declaring the election void. It was contended for the alderman that if the incapacity existed at all "it must exist because the two offices are incompatible. But if they are, the assumption of the second office vacates the first." In giving judgment, Lord Esher, M.R., on p. 361, says: "It has been said that the offices are incompatible, and that two incompatible offices cannot be held by the same person at the same time. The later proposition is true with respect to the office of alderman and councillor, not on the ground that they are offices of profit, but on the ground that they are so incompatible that the Legislature cannot have intended they should be held by the same person at the same time. What is the consequence of this doctrine? A long series of authorities has upheld the proposition that when two offices are incompatible, and the suggested ineligibility of the candidate for one of them only arises from the fact that it is incompatible with the office he already holds, he is not thereby prevented from being elected to the second office, whether it be superior in rank or power to the other or not." Then Lord Esher, M.R.,

proceeds to enlarge upon that argument, and concludes that the alderman, by the fact of his election and acceptance of the position of councillor, vacated his position as alderman, although in the hierarchy of local government the office of alderman was regarded as a superior office. The principle of that case applies here. We think that by his acceptance of the office of mayor, which carried with it the consequence of his becoming a magistrate for the county of Southampton, the position which he accepted and in which he acted had the effect of vacating the position he held as clerk to the magistrates.

Therefore, although the proceedings of the magistrates were irregular in continuing him in that position, and the conduct of Alderman Druitt in continuing to accept the salary in that position was irregular, yet we think he was not incapacitated from acting as a magistrate, and that the conviction was therefore valid, and must stand.

It follows that the rule must be discharged; but, under the circumstances, it will be without costs.

Rule discharged.

Solicitors for the applicant, *Routh, Stacey, & Castle*, for *Burt & Haviland*, Christchurch.

Solicitors for the justices, *Lovell, Son, & Pitfield*, for *Druitt & Druitt*, Christchurch.

Q. B. Div. (Grantham and Wright, JJ.) March 2.

WESTACOTT *v.* STEWART. (*a.*)

Election law—County council—Death of candidate—Injunction—Prerogative mandamus—*Ballot Act*, 1872 (35 *&* 36 *Vict. c.* 33), *s.* 1—*Municipal Corporations Act*, 1882 (45 *&* 46 *Vict. c.* 50), *s.* 58.

The last paragraph of section 1 *of the Ballot Act*, 1872, *is incorporated in the Municipal Corporations Act*, 1882, *by virtue of section* 38 *of the latter Act.*

Semble, *for the purposes of municipal and county council elections, the paragraph must be read as if the words "as if the notice required by section* 54 *of the Municipal Corporations Act had been given . . ." were substituted for the words "as if the writ had been received . . ."*

In an election for a county council the poll was fixed to take place on the 3*rd of March. The nomination of candidates took place on the* 23*rd of February. On the* 26*th of February one of the candidates nominated died. The returning officer, though acquainted with the fact of the candidate's death, refused, on a request to do so by another of the candidates, to countermand the poll.*

Held, that an injunction restraining the returning officer from proceeding with the poll was not the proper remedy, but that a prerogative writ of mandamus *was, under the circumstances, the proper remedy.*

Action for an injunction.

The plaintiff was one of four candidates nominated for an election of county councillors for the Central Hackney Division of the administrative county of London, fixed to take place on the 3rd of March, 1898. The nominations took place on the 23rd of February, 1898. On the 26th of February, 1898, Henry Sylvester Samuels, one of the candidates nominated, died; whereupon the plaintiff requested the defendant, who was the returning officer, to countermand the notice of the poll in accordance with section 1 of the Ballot Act, 1872 (35 & 36 Vict. c. 33). Though the defendant was satisfied of the fact of the death of Samuels, he refused to countermand the poll.

The plaintiff brought an action for an injunction restraining the defendant from proceeding with the election. An *ex parte* application for an *interim* injunction was made to Grantham, J., in chambers, and referred by him to the Divisional Court.

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75, the sections of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), which deal with the election of councillors, are re-enacted so as to apply to the election of county councillors.

Section 58 (i.) of the latter Act provides: "If an election for councillors is contested, the poll shall, as far as circumstances admit, be conducted as the poll at a parliamentary election is, by the Ballot Act, 1872, directed to be conducted, and, subject to the modifications expressed in Part III. of the third Schedule, and to the provisions of this Act, the provisions of the Ballot Act, 1872, relating to a poll at a parliamentary election (including the provisions relating to duties of the returning officer after the close of the poll), shall apply to a poll at an election of councillors."

Section 1, paragraph 4, of the Ballot Act, 1872, is as follows: "If after the adjournment of an election by the returning officer for the purpose of taking a poll, one of the candidates shall die before the poll has commenced, the returning officer shall, upon being satisfied of the fact of such death, countermand the notice of the poll, and all proceedings with reference to the election shall be commenced afresh in all respects as if the writ had been received by the returning officer on the day on which proof was given to him of such death . . ." The other paragraphs of the section deal with the nomination of candidates, and section 2 deals exclusively with the conduct of the poll.

Dickens, Q.C. (*S. H. Day* and *Kenrick* with him), for the plaintiff, on the ground that there were doubts as to whether an injunction was the proper remedy, applied for a perogative writ of *mandamus*, as an alternative remedy. [*Macmorran, Q.C.*, for the defendant, did not object to the course suggested.] Paragraph 4 of section 1 of the Ballot Act, 1872, is incorporated by section 58 of the Municipal Corporations Act, 1882, because it is a provision relating to a poll at a parliamentary election and to the conduct of a poll. It is said that section 2 only of the Ballot Act, 1872, which deals exclusively with the conduct of a poll, is incorporated, and that section 1, dealing as it does with a nomination, is not incorporated. But the countermanding of a poll is clearly part of the conduct of a poll.

Macmorran. Q.C. (*Avory* with him), for the defendant.—No part of section 1 can apply to a municipal or county council election. The date of the poll in such elections is not fixed by the returning officer, but, in the case of the county council, by the county council itself, and all the polls are taken on the same day. Therefore, if the poll were post poned who would be the person to fix the later date? Again, section 1 of the Ballot Act says that the proceedings shall be commenced afresh "as if the writ had been received by the returning officer on the day on which proof was given to him of such death." That passage clearly cannot apply to the case of municipal or county council elections, where no writ is employed. The principle in parliamentary elections is that there are two great parties represented. That is not the case in municipal and county council elections. There is, therefore, no reason why an election should

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

be postponed on the ground that one of the candidates has died.

GRANTHAM, J.—We think that the fourth paragraph of section 1 of the Ballot Act, 1872, is incorporated into the Municipal Corporations Act, 1882, by virtue of section 58. With regard to the first portion of section 1 there is no difficulty. It has to do with the nomination only. But the fourth paragraph is within the language of section 58, because it deals with the poll. It would be inconvenient to have four names upon the voting papers, the bearer of one of which was dead. It was said by counsel that in passing the Ballot Act the Legislature considered that they were dealing with two great opposing parties, and that the provision in question was enacted to prevent one of those parties snatching a victory owing to the death of the candidate who represented the views of the other party. And it was argued that, that being so, the Legislature could not have intended to incorporate the provision in an Act dealing with elections where parties were not opposed to each other in the same way. I do not agree with the learned counsel. If there is an election at all there must be two or more candidates representing different views. Therefore, the same considerations apply as in parliamentary elections.

As to the learned counsel's argument, founded upon the language of section 1 of the Ballot Act, I confess I thought it suggested some difficulty. But if the language used cannot be strictly applied to municipal or county council elections, power to modify it is given by the use of the words "as far as circumstances permit," in section 58 of the Municipal Corporations Act, 1882. In our judgment the injunction prayed for is not the proper remedy, but a prerogative writ of *mandamus* must go commanding the defendant to stay the election.

WRIGHT, J.—As to the form the remedy should take, I do not think that an injunction is the proper remedy. There are two other alternatives: first, that the election should proceed, and that the persons aggrieved should subsequently institute an election petition. That would be an inconvenient and expensive remedy. The other alternative is for us to grant a prerogative writ of *mandamus*. That is the proper remedy, seeing that there is no other convenient one.

Section 58 of the Municipal Corporations Act, 1882, does more than simply re-enact the provisions of the Ballot Act relating to the poll. It enacts that the poll at municipal elections shall be conducted as the poll at a parliamentary election is by the Ballot Act directed to be conducted. The countermanding of the poll is no part of the nomination, though the provision with regard to it is, in the Act, placed among the provisions dealing with the nomination. It belongs to the poll. The postponement of the poll is part of the conduct of the poll.

We are, therefore, to hold that the provision applies to municipal elections if we can. I was struck with Mr. Macmorran's argument that, there being no writ employed in municipal elections, the language of the provisions was inapplicable to such elections. But I think that in construing the provision for the purpose of a municipal or county council election we may substitute for the day on which the writ was received the day when notice of the election was given in pursuance of section 54 of the Municipal Corporations Act, 1882.

Peremptory prerogative writ of mandamus *granted.*

Solicitors for the plaintiff, Grover Humphreys & Son.

Solicitor for the defendant, Blaxland.

Q. B. Div. (Kennedy, J.) — Feb. 8, 10, 11.

LOWER RHINE AND WÜRTTEMBERG INSURANCE ASSOCIATION v. SEDGWICK. (a.)

Insurance—Marine—Re-insurance—Lapse of original policies—New policy—Alteration of risk—Liability under policy of re-insurance.

The defendant re-insured certain risks with the plaintiffs. Of the two original policies covering these risks, one expired by effluxion of time and the second was cancelled, the defendant at the time that the policy was cancelled issuing a fresh policy to his assured, which, however, contained provisions differing somewhat from those in the two original policies. No notice of these changes was sent to the plaintiffs, who subsequently, in ignorance of these circumstances, paid the defendant as and for a total loss.

Held, that the plaintiffs could not recover back from the defendant the money so paid. The defendant had paid under his policy for a total loss, and was entitled to recover from the plaintiffs under their re-insurance policy because at the time he re-insured with them, and at the time of the loss, he had an insurable interest in the subject-matter of the insurance.

Held, also, that the difference in terms between the two policies merely affected the defendant's position with his assured, and gave no ground for the plaintiffs cancelling their liability under their policy of re-insurance.

Commercial cause.

This was an action brought to recover back money paid by the plaintiffs to the defendant under a mistake of fact.

The plaintiffs, an insurance association, re-insured the defendant, an underwriter at Lloyds, in respect of his liability under a policy on the hull and machinery of the steamship *Collynie*. The vessel, within the period covered by the policy, became a total loss, and the defendants paid his assured as and for a total loss. He then claimed to be indemnified by the plaintiffs, and subsequently they paid him for such a loss in ignorance that at the time of such payment he had cancelled the policy which was the subject of the re-insurance.

The facts were these: On the 20th of February 1896, the defendant with six others, subscribed for £50 each a policy for twelve calendar months from that date in respect of the *Collynie*. This policy was stated to be for £350 on hull valued at £3,600, and on machinery valued at £2,000, total £5,600. All liability under this policy ceased by efflux of time on the 20th of February, 1897. On the 20th of June, 1896, the defendant, with six others, subscribed for £25 each a policy on the same ship for twelve calendar months from that date, the total amount insured being £850, the risks, the valuation on hull and machinery, and the premium being the same as under the former policy. On the 27th of November, 1896, the defendant and his six co-insurers re-insured with the plaintiffs the risks as under-written by them, by a policy on the same ship from the 4th of November, 1896, to the 20th of June, 1897, for £250 on hull and machinery at £5,600, and in the margin it was stated to be "a re-insurance of a policy or policies and subject to the same terms, conditions of clauses, as original policy or policies . . . and to pay as may be paid thereon." The defendant's original policies were not asked for or shown to the plaintiffs. The plaintiffs themselves again re-insured under a policy dated the 12th of November, 1896, against total loss only. On the 20th of February,

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

1897, the first policy expired by effluxion of time, and the second policy of the 20th of June was cancelled; and on the same day (the 20th of February) the defendant, with eight others, subscribed a policy for £50 each (£450) on the same ship for twelve calendar months from that date. Such policy was for £1,040 on hull and machinery valued at £5,000. On the 3rd of May, 1897, the *Collynie* was totally lost, and the plaintiffs paid the defendant £350 for a total loss under their policy of re-insurance, the defendant having paid his assured a total loss under the policy of the 20th of February, 1897. When the plaintiffs sought to recover from their re-insurers, their re-insurers asked to see the original policies, and the plaintiffs then ascertained the facts, which before they were ignorant of, relating to the cancellation of the policy of the 20 h of June, 1896, and the substitution in its place of the policy of the 20th of February, 1897.

English Harrison, Q.C. (with him *Hurst*), for the plaintiffs.—The terms of the re-insurance policy show that the plaintiffs were liable only in respect of payments made by the defendant under the policy existing at the date of the re-insurance. The original policies having ceased to exist they were no longer liable and the money paid under a mistake of facts ought to be returned. Moreover, they were not liable because the policy under which the defendant had in fact paid and the policy in respect of which they had re-insured the defendant, contained different provisions. These new provisions never having been brought to their notice the parties were never *ad idem*.

Joseph Walton, Q.C., and *Scrutton*.—The defendant is entitled to keep the money paid by the plaintiffs because he could recover it in an action on his re-insurance policy. He has an interest in the subject-matter of insurance to the amount insured. The loss admittedly came within the nature of the risk covered by the policy. The assured was free to change the amount of his risk during the currency of the policy, and was under no liability to notify that fact to his re-insurers unless their risk was altered thereby. Having paid his loss, the defendant was entitled to recover from his re-insurers.

KENNEDY, J.—In this case the action was brought to recover money which had been received by the defendant as it is alleged against the interest of the plaintiffs. It is really an action to recover money paid by a re-insurer to the insurer of a ship, that became during the period and within the limits of the risks covered by the policy, a total loss. The ground of the claim for the return of the money by the defendant, is that the payment was made under a mistake of fact, and it is part of the proposition accepted as between the two parties, that if the payment which undoubtedly was made was a payment which never ought to have been made—in the sense that the defendant could not have legally recovered it in an action—that the rights of the parties would not be altered by the fact that the money had in fact been paid. It is also admitted by the plaintiffs that the present action is not based on any allegation of fraud or misrepresentation on the part of the defendant in respect of the risks and liabilities covered by the policies when he applied for and received payment from the plaintiffs.

The facts are very few, and they are not disputed. [His lordship stated the facts and continued:] The plaintiffs claim on two grounds—first, they say that their re-insurance policy must be treated as a policy which can only be effectual in respect of a payment by Mr. Sedgwick (the defendant) upon a policy which was existing at the time that the re-insurance policy was made, and it is not disputed that neither of the policies underwritten by the defendant before the date of the re-insurance were in existence at the time of the loss, for one it is agreed had expired by effluxion of time, and the other had been cancelled. Then the plaintiffs say, as a second ground upon which the money ought to be returned, that the policy which was in existence at the date of the loss, and under which the defendant has paid, contains provisions differing from those contained in the first two policies, and from those which appeared to be embodied in the re-insurance policy. The main points of difference, I may point out in passing, being on the total amount of value of hull and machinery—namely, in the allowed policy set down at £5,600, and in that of the 20th of February, 1897, at £5,000, the change in the rate of premium from £9 9s. to £10 10s. per cent. without discount, and the amount to be returned differing also in the case of the vessel being laid up. Now it is said that these are differences which, even if it were open for Mr. Sedgwick to claim upon a policy effected after the date of the re-insurance policy, he could only do so if the new policy contained no special difference in its terms from the allowed policy. I think the plaintiff's contention is badly founded. I think the question ought to be tried as an action in which Mr. Sedgwick was the plaintiff and the present plaintiffs the defendants. And if the parties were in that changed relationship, what good plea could the present plaintiffs raise as a defence to answer Mr. Sedgwick's claim? Mr. Sedgwick had an insurable interest in the hull of this vessel, and at the time of the loss he had re-insured that interest in the subject-matter of the insurance with the plaintiffs. That would be all that is necessary to decide such an action. It is unnecessary to aver interest at the time of effecting the policy. It is sufficient for an insurer to show at the time of the loss that he had such an interest. It is not disputed that the defendant had an insurable interest as insurer at the time of effecting the policy of re-insurance under the first two policies. If, then, he had, at the time of effecting the re-insurance, an insurable interest in the subject-matter of the insurance, and had an interest still at the time of the loss, it is immaterial that his interest should have increased or diminished by the time of the loss. The defendant was clearly interested at both times, and the change in the conditions of the policy and valuation of the vessel merely affected, in this instance, his relations with his own assured, and did not change his insurable interest as against the plaintiffs.

Now, the policy upon which the defendant was paid by the plaintiffs undoubtedly shows that it was a re-insurance policy. It states that on the face of it. The reference in the re-insurance policy to the original policy is a reference to such policy as might happen to be in existence at the date of the loss, and the stipulation that it was to be "subject to the same clauses," and "to pay as may be paid" means that whatever claim the defendant pays as original insurer the plaintiffs will repay as re-insurers except so far as the terms and conditions in the re-insurance policy cut down their liability. Great stress was laid on the differences in valuation and its possible effect in the case of a claim for constructive total loss, and no doubt difficult questions might have arisen if the money had been paid as and for a "partial loss." But in this case there was an actual total loss, and as the question does not arise we need not stay to consider what might possibly be a somewhat nice question. The same may be said on another point raised by the plaintiff also, in reference to repairs under the time clauses. For instance, suppose the original policy had been for £5,000 valuation, and the re-insurance

had been for £5,600, what would be the position of the re-insurers then? Could the insurer say to the re-insurers, Pay me what I have insured for at any-rate? That seems to me to raise a point of considerable difficulty. As I have said, the claim here was paid on a total loss, and not upon a constructive total loss, and these points, therefore, have not to be decided. Here the description of the subject-matter in both policies was the same—namely, hull of ship, and the fact of valuing it for £5,600 in one, and £5,000 in the other policy does not give a ground for cancelling the re-insurance policy. It is merely a difference of figures which in the events that have happened has not affected the particular rights of the parties. The rate of premium and the returns on the premium is not a matter which concerns the plaintiffs at all. For these reasons I am of opinion that the plaintiffs have failed. The only substantial question here was whether the defendant could have legally claimed against the plaintiffs on a policy of re-insurance. In my opinion it would have been impossible for his re-insurers to have framed a good plea to such an action. The defendant, therefore, is entitled to retain the money, which, if returned to the plaintiffs, he could recover back from them in an action. My judgment, therefore, must be for the defendant, with costs.

Solicitors for the plaintiffs, *Pritchard & Sons.*

Solicitors for the defendant, *Walton, Johnson, Bubb, & Whatton.*

Q. B. Div.
(Hawkins and Channell, JJ.) } Feb. 11, 12.

MONKSWELL (LORD) AND OTHERS (*Petitioners*) *v.* THOMPSON (*Respondent*). (*a.*)

Election law — School board election — Recount as between two candidates only — Finality as regards candidates not petitioned against—Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *s.* 2.

At a school board election, at which there were eight candidates for five seats, the result of the poll was duly declared by the returning officer. A petition was presented on behalf of the first unsuccessful candidate against the last successful candidate, asking for a recount as between these two candidates only, and claiming the seat for the candidate for whom the petition was presented. No petition was presented against any of the first four successful candidates, and no recount of their votes was asked for. The result of the recount as between the two candidates was to place the unsuccessful candidate in a majority of lawful votes over the candidate petitioned against.

Held, that, as there had been no petition presented against the first four successful candidates, the numbers of the votes declared for them by the returning officer must be taken to be correct, and that, as the candidate for whom the petition had been presented had, upon such recount, shown that he had the majority of votes, he was entitled to the seat, although he had not shown that the candidate petitioned against would not have been among the five successful candidates upon a recount of all the votes given at the election.

Case stated for the opinion of the court, pursuant to the order of Kennedy, J., made under section 93, sub-section 7, of the Municipal Corporations Act, 1882, in the matter of the election petition touching the election of members of the School Board of London for the Chelsea Division. The case was stated by Mr. Cooke, of the Election Petitions Office.

The election was held on the 25th of November, 1897, when there were eight candidates for the five seats, and the poll was declared by the returning officer as follows:

	Votes.
Mr. Frederick Davies	14,973
Mr. Thomas Huggett	14,906
Mrs. Maitland	14,839
Viscount Morpeth	13,292
Mr. William Thompson (the respondent)	13,223
Mr. Leslie Johnson	13,218
Mr. Petherbridge	8,882
Mr. Jones	5,937

and the first five candidates were declared by the returning officer to be duly elected.

A petition was presented by the petitioners against the return of the respondent, Mr. William Thompson, alleging that mistakes had been made in the counting of the ballot papers and the votes recorded thereon in favour of the respondent and of the said Leslie Johnson, and that by reason of such mistakes the result of the poll had not been truly ascertained and that the said Johnson had a majority of lawful votes at the election. And the petition prayed that a recount might be had of the votes recorded in favour of the respondent and the said Leslie Johnson, and that it might be declared that the respondent was not duly elected and that his election was void, and that the said Leslie Johnson (for whom the seat was claimed) was duly elected and ought to have been returned.

On the 23rd of December, 1897, Kennedy, J., ordered that the case raised by the petition should be stated as a special case and that the ballot papers be examined and the votes recorded thereon in favour of the said Leslie Johnson and the respondent respectively be recounted before Mr. Cooke, and that he should state the result of the recount in the special case, and that such only of the ballot papers as might be in dispute at the end of the recount should be annexed to the special case.

The respondent appealed to the Court of Appeal to reverse this order, or to vary it by directing that the votes recorded in favour of all the candidates be recounted, but the court dismissed the appeal.

The examination and recount took place before Mr. Cooke, with the result that the number of votes recounted for Mr. Johnson and the respondent were: for Mr. Johnson, 13,183; for the respondent, 13,176.

In addition to the ballot papers containing the above votes there were 23 ballot papers in dispute at the end of the recount, which were annexed to this case. There were 18 ballot papers not bearing the official make, stamp, or perforation. These contained 11 votes for Johnson and 15 for the respondent, but all these 26 votes were disallowed by Mr. Cooke, in accordance with section 2 of the Ballot Act, 1872.

The respondent contended that it was in any case not sufficient for the petitioners merely to show a majority without further showing that on a true calculation of all the votes recorded at the election the respondent was not one of the five candidates standing highest on the poll, and that the said Leslie Johnson was one of such candidates.

The petitioners objected that under the order of Kennedy, J., there was no power to raise any such point, and the petitioners said that they did show that on a true calculation of all the votes that the respondent was not, and that the said Leslie Johnson was one of the five candidates standing highest on the poll, because as regards the first four candidates the official declaration of the result of the poll not having

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law

been questioned by petition was now conclusive as to their election and as to the number of votes polled for each of them.

The questions for the consideration of the court were:

1. Whether the election of the respondent was void.

2. Whether Johnson was duly elected and ought to have been returned.

3. Whether it was in any case open to the petitioners to upset the election of the respondent and claim the seat for Johnson without showing that on a true calculation of the votes recorded, the respondent was not one of the five candidates standing highest on the poll, and that Johnson was one of such candidates.

The result of the adjudication of the disputed ballot papers by the court was to give the respondent 16 more votes, and Johnson 14 more votes; so that in the final result Johnson had five more votes than the respondent.

Yarborough Anderson, for the respondent.—It is shown that the respondent is five votes behind Johnson; but before the petitioners can succeed they must show not only on the recount as between Johnson and the respondent, that Johnson had the majority of votes over the respondent, but they must also show that upon the recount of all the votes recorded at the election the respondent was not among the first five candidates, and that Johnson was; and they have not shown that.

S. H. Day and *Willoughby Williams*, for the petitioners.—It is sufficient to show, as we have done, that as between these two candidates Johnson has the majority.

HAWKINS, J.—By section 2 of the Ballot Act, 1872, the mode in which the poll at elections shall be taken is very fully and very intelligibly set forth. The section, after dealing with the way in which the poll is to be taken, goes on to say: "The decision of the returning officer as to any question arising in respect of any ballot-paper shall be final, subject to reversal on petition questioning the election or return." The returning officer in this case returned the names of the candidates with the number of votes recorded for each. As regards the first four of these candidates, the twenty-one days allowed for presenting a petition had elapsed, and nobody had presented a petition as against them, or even suggested that there was any error in the counting of the votes of those candidates, and I think that, so far as those candidates are concerned, the decision of the returning officer—which was that they had each polled so many votes—must be taken to be final. Then there are left the two other candidates, the respondent and Mr. Johnson, for whom this petition is presented. There has been a recount of the votes as between these two candidates, and the result is that Mr. Johnson's name ought to be substituted for the name of the respondent as the person who was elected by reason of his having a greater number of votes; so that, assuming these four candidates to be correctly occupying the places in which they were placed by the returning officer, the substitution of the name of Johnson for that of Thompson (the respondent) is that which ought to be made, because Mr. Johnson has succeeded in showing that he had more votes than the respondent. With regard to the other four candidates I very much doubt whether we should have any power under the circumstances to interfere. There is no authority showing that we have any such power, and we have to judge for ourselves as to what the intention of the Legislature was. I am strongly of opinion that the intention of the Legislature was that there should be finality with regard to all those candidates whose votes were not attacked by petition within twenty-one days. No recount is asked for here with regard to the votes of the first four candidates; but the respondent asks for judgment because there is no proof that he is not within the number of the successful candidates, although he has less votes than Mr. Johnson. What is said on behalf of the respondent is that Mr. Johnson has no right to be treated as elected because some of the four who were returned might have had votes given to them erroneously. The *onus* of proving that rests on those who assert it. Mr. Johnson says, "I am concerned only in showing that as between myself and the respondent I had a majority of votes, and I have succeeded in doing that." Unless it can be shown that there is an error in some of the votes of the first four candidates numerically, or that there is some ground for saying that by inquiring into these votes there would be a different result, it is no use. There is nothing more than a mere suggestion of that, and there is no complaint by either of the parties as to these votes, and there is not even now any challenge of those votes, and there is no suggestion by the respondent of any benefit that could accrue to either of the parties if there were a recount of the whole of the votes. I think therefore we must take, *primâ facie* at all events, the judgment of the returning officer. Such return is *primâ facie* evidence, as it has never been impeached in respect of the four successful candidates; and we must take that as *primâ facie* evidence of the correctness of the return. It is a judgment which he had the jurisdiction to pronounce, and having pronounced it, there having been no petition against it within the twenty-one days, we must take it as an unchallenged return as far as regards the first four candidates, and we must take the numbers so returned by him as *primâ facie* correct. If there had been any real suggestion that an error had been committed, then there might have been a difficulty in saying what course we ought to pursue. But no such difficulty arises here where we have no proof and no suggestion that any particular mischief has been done by the counting. I am clearly of opinion that the judgment which we ought to pronounce should be in favour of the petitioners, because by the recount as asked for by this petition there has been shown to be an error to the exent of several votes, which would have put Mr. Johnson in a majority instead of a minority. I do not think that we ought to act upon the mere suggestion that the returning officer may have been in error in his original counting, without any ground being shown for such suggestion; and I do not see any reason why the petitioners who have succeeded should go to the useless expense of challenging the decision of the returning officer which nobody else has challenged. My opinion is that the judgment ought to be for the petitioners.

CHANNELL, J.—I also am clearly of opinion that our judgment in this case ought to be that the respondent should be unseated, and that Mr. Johnson, on whose behalf the petition was presented, should be seated. I think the facts upon which we have got to go in order to consider what our judgment should be, are that, as now ascertained, Johnson had five votes more than Thompson, the respondent, and that there were four candidates who had a considerable number of votes more. If we are to take those as being the votes there cannot be any doubt as to what our judgment should be. I think we are to take these as the votes. The whole point is, are we to take the figures of the first four candidates as declared at the poll as the basis of our

are not raised. Upon the construction of the covenant I may say, as was said by Cotton, L.J., in the case of *Clegg* v. *Hands*, "Now cases, as far as they give us a rule of construction, are very useful, but it is seldom to my mind that a case upon the construction of one particular document tells us much upon the construction of another document, unless it lays down some principle to guide us"; and in distinguishing that case from *Doe d. Calvert* v. *Reid*, he points out that the words "or their successors in their late or present trade as brewers" in that case, which are similar to the words here, were not used in *Clegg* v. *Hands*. Now, I must see whether the words "his executors, administrators, and assigns" must be introduced after the word "lessor." At first I was struck with the argument that in view of the words of this covenant it could not be said that the context allowed of the interpretation clause applying. It was said that the covenant by the lessee, his executors, administrators, or assigns, followed by the term lessor without these words, showed that they were not intended to be inserted. But these words after "lessee" only show that the under-lessees and others are to fulfil the obligations of the lease.

I think, therefore, that the interpretation clause must be applied, and that the covenant must be read as if it were to deal exclusively "with the lessor, his executors, administrators, and assigns, or his firm of Messrs. Hood & Sons, or his and their successors in business." But it is said that although the lessor, his executors, administrators, and assigns are the persons who could sue, yet that the covenant was sufficiently complied with if the lessee took his beer of Messrs. Hood & Sons, even if Hood had left the business. Upon this point I will refer to the observations of Lindley, L.J., in *Clegg* v. *Hands*, "I agree with Mr. Collins in thinking that this case is one of very great importance both to brewers and tenants who take tied houses, because it is certainly rather a startling thing to anybody to be told that when you have agreed to buy beer of a particular brewer, you may find yourself bound to take beer of somebody else. Whether you are or not depends upon the agreement into which you have entered. The whole question here turns upon the true construction of this agreement, and the only difficulty that I think serious is to find out whether this agreement is or is not assignable—that is to say, whether the tenant here entered into a contract with certain persons, relying upon their personal skill and reputation, and agreed to buy beer of them and them alone, or whether he did not enter into a very much wider contract, and agree to buy beer from them or anybody to whom they might assign the business or the public-house. The answer to the question whether this is a personal unassignable contract or not, must be gathered from the instrument itself, having regard, of course, to the position of both parties." It was said on behalf of the defendant that it was a startling thing to say that where a man covenanted to buy beer of the lessor he may be bound to take it of another person whose beer he knows nothing about. But such an argument is only of weight where the contract is ambiguous. Where the words of the contract are clear, you must construe them as they stand. The covenant here is with the lessor, his administrators and assigns, and they can all enforce it, and dictate to the tenant of whom the beer is to be taken. It was said that the assignee might not be a brewer at all, but the covenant is not to take beer brewed by, but only supplied by, particular persons. The covenant is not fulfilled by taking beer of Messrs. Hood & Sons, and was not for their benefit, except in so far as it was for the benefit of Mr. Hood as a member of the firm.

Judgment for the plaintiff.

Solicitors for the plaintiffs, *Hurrell, Christopher, & Co.*

Solicitors for the defendfents, *Ward & Bowie*, for *Lane, Clutterbuck, & Tomlinson*, Birmingham.

Chan. Div.
Wright, J. } Jan. 27.

In re NEW BRITISH IRON CO.
Ex parte BECKWITH. (*a.*)

Company—Winding up—Directors' fees—Creditors—Articles of association—Fixed remuneration—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38, *sub-section* 7.

Where the articles of association fix the fees of the directors of a company at a specific sum, the directors are entitled to prove with other creditors of the company in the winding up for such fees due at the date of the liquidation; for, the fees being fixed by the articles of association, they were impliedly part of the contract between the company and the directors when they accepted their office. The directors are therefore in the position of ordinary creditors, and not of members of the company, in regard to those fees; and section 38, *sub-section* 7, *of the Companies Act*, 1862, *does not apply.*

In re Leicester Club and County Racecourse Co., Ex parte Cannon, 34 *W. R.* 14, 30 *Ch. D.* 629, *distinguished.*

In re Dale and Plant, 38 *W. R.* 409, 43 *Ch. D.* 255, *followed.*

Application by the directors of this company for leave to prove in the winding up for fees due to them as directors at the date of the winding up.

Clause 62 of the articles of association was as follows: "The remuneration of the board shall be an annual sum of £1,000 to be paid out of the funds of the company, which sum shall be divided in such a manner as the board shall from time to time determine."

The articles also provided that directors should be members of the company and shareholders.

The company had gone into liquidation, and the directors claimed the right to prove in winding up for fees due to them at the date of commencement of the liquidation.

Dighton Pollock, for the directors.—*Ex parte Cannon*, 34 W. R. 14, 30 Ch. D. 629, is distinguishable, as there the fees were of the nature of a gratuity, here they are a fixed sum mentioned in the articles. [WRIGHT, J.—Kay, L.J., in *In re Dale and Plant*, 38 W. R. 409, 43 Ch. D. 255, did not approve of *Ex parte Cannon*].

Howard Wright, for the liquidator.—The liquidator does not wish to dispute this claim of the directors, but did not consider that he was justified in paying this claim in face of the decison in *Ex parte Cannon* without the leave of the court.

WRIGHT, J.—In this case there is a provision in the articles of association of this company which did not exist in *Ex parte Cannon*. This clause in the articles of association is not, of course, of itself a term of the contract between the directors and the shareholders—it is only part of the contract of the shareholders with each other—but when we find the directors appointed on the footing of this article and accepting their office on this same

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

basis, we then have evidence that the terms of that article were embodied in their contract with the company. That being so and this article being so impliedly embodied in the contract, we find that the directors obtained the contractual right to be paid £1,000 a year as remuneration, and the case is therefore distinguishable from *Ex parte Cannon*. I do not intend by this decision to fritter away any obligation which I am under of being bound by any previous decision. The facts in *Ex parte Cannon* differ from those in this present case or I should have followed that decision, but the judgment of Pearson, J., in that case was on the ground that the directors were not in a distinct contractual position with regard to the company, and that their position as directors in that particular company was no more than that of members, without giving them any separate right. The present case is within the principle of *In re Dale and Plant*, and therefore it does not come within section 38 of the Act of 1862. This remuneration is not due to the directors in their character as members of the company, but falls into the category of sums due to them under another and distinct contract. Their claim must therefore be allowed.

Solicitors, *J. Beckwith; Freshfields & Williams.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.) — Feb. 12; March 4.

REG. *v.* DOUGLAS AND OTHERS. (*a.*)

*Justices—Disqualification—Solicitor—Clerk to magistrates—*Ex officio *justice—Justices' Qualification Act,* 1871 (34 *&* 35 *Vict. c.* 18), *ss.* 1, 2—*Local Government Act,* 1894 (56 *&* 57 *Vict. c.* 73), *s.* 22.

D., a solicitor, had acted as clerk to the magistrates of the Ringwood Division of the county of Southampton for many years, and recently became ex officio *a justice of that division by virtue of being elected chairman of the district council. He tendered his resignation of the office of clerk to the magistrates, but no steps were taken to accept it, and he continued to draw the salary attached to the office and to perform the duties connected therewith as before by means of a deputy.*

W. was tried and convicted of an assault upon a woman before D. and six other justices, and he applied for a certiorari *to bring up the conviction to be quashed.*

Held, that the conviction must stand, as D. could lawfully adjudicate upon the case, because he had ceased in fact to be a practising solicitor at the time of the conviction, and by his accepting the office of chairman to the district council his former office of clerk to the justices had been vacated, since the two offices were incompatible.

Reg. *v.* Mayor, &c., of Bangor, 35 *W. R.* 158, 18 *Q. B. D.* 349, *followed.*

This was the argument on a rule *nisi* directed to the respondents, justices for the county of Southampton and one Rosa Müller, to show cause why a writ of *certiorari* should not issue to bring up a conviction of the applicant, one Walker, for assault upon the said Rosa Müller, to be quashed on the ground that Alderman Druitt, one of the seven justices who adjudicated upon the case, was a solicitor, and therefore disqualified from acting as justice by virtue of the Justices' Qualification Act, 1871, and further upon the ground that at the time of the conviction he was clerk to the justices.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The case was heard at a petty sessional court held at Christchurch, in the county of Southampton.

At the date of the conviction Alderman Druitt had ceased to practice as a solicitor, and had transferred his business to his son and nephew. He continued, however, to take out his certificate under the belief that it was necessary for him to do so as registrar of the county court, and his certificate was in force at the date of the conviction.

In 1897, Alderman Druitt accepted the office of Mayor of Christchurch, and therefore under the Local Government Act, 1894, he became *ex officio* justice of the peace for the county of Southampton. His resignation of his office of clerk to the bench was thereupon tendered, but was never accepted by his brother magistrates, and he continued to draw the salary attached to the office and to perform the duties connected therewith as previously by means of a deputy.

A. T. Lawrence, Q.C. (*Clavell Salter* with him), showed cause against the rule. By the Local Government Act, 1894, the chairman of a district council (unless a woman) or personally disqualified by any Act became *ex officio* a justice of the peace for the county in which the district council was situated. Unless, therefore, Alderman Druitt was disqualified on one of the two grounds alleged when the rule was obtained he was entitled to sit as a magistrate for the county of Southampton. Even if his holding the office of magistrates' clerk was inconsistent with his being a justice, that of itself did not amount to a statutory disqualification. Even if the offices were incompatible the conviction was not necessarily bad. [WRIGHT, J.—If the two offices are incompatible, one of them is vacated. It is stated in *Rex* v. *Pattison*, [1832] 4 B. & Ad. 9, that Lord Tenterden, on being appointed a judge of the Queen's Bench, surrendered the patent creating him a judge of the Common Pleas, and it was in that case argued (p. 21) that "the defendant was not at liberty without permission of those who elected him to vacate the office he then held by the mere acceptance of a second *conferred by a different authority.*" The point was argued in that case, and, in my opinion, with considerable force, in this way: "What ground is there for saying that if two offices are incompatible the first should be vacated by the appointment to the second rather than the appointment to the first should make the person ineligible to the second?"] Since these proceedings were taken Alderman Druitt had retired from the office of clerk to the bench. The salary might have been improperly paid him after he became a magistrate, but, if so, he would return it, and that was a matter of account merely. It was no part of his case to argue that the two offices could be exercised together, but to make the conviction bad it must be shown that Alderman Druitt had such an interest as to preclude the presumption that the person convicted had had a fair trial. If objection could have been raised, on the ground of possible bias or the like, to his forming one of the bench, it had been waived at the hearing, for on both occasions when the applicant was before the magistrate he was represented by solicitors who knew the facts: *Reg.* v. *Burton, ante*, p. 127, [1897] 2 Q. B. 468.

E. Bowen Rowlands (*F. H. M. Corbet* with him), in support of the rule.—The facts showed that Alderman Druitt was acting through his son, who was his deputy, in advising the magistrates, and was also sitting on the bench as a judicial officer. The offices were incompatible. A justice could not receive pay, whereas he was taking money for his clerkship. It was contrary with the whole policy of law that a

man should fill both positions. The question of waiver could only arise where the magistrate was interested, but in the present case he had no jurisdiction and had no right to be on the bench at all: *Worth and Others* v. *Newton*, 2 W. R. 628, 10 Exch. 247.

Cur. adv. vult.

Lord RUSSELL OF KILLOWEN, C.J.—This was a case in which a rule had been obtained upon the 22nd of November, 1897, for a *certiorari* to bring up a certain conviction of one Frederick Walker for assault, which conviction had taken place upon the 20th of August, 1897. The conviction took place at Christchurch, which is in the Ringwood division of the county of Southampton, before a bench of seven magistrates, and it was alleged that this conviction was wrong because one of the magistrates who took part in adjudicating upon it was disqualified from acting as a magistrate. The case is an illustration of the jealousy with which the law requires that there shall be perfect legal capacity in the tribunal which is to adjudicate even in the least important cases. Six of the magistrates were duly and fully qualified, but is was said that the seventh, who also took part, was not qualified, and, as a result, that the whole proceedings were wrong, and that this court ought to quash the conviction. The magistrate who was said to be disqualified was one Alderman Druitt, the mayor of Christchurch, who, under the Local Government Act, 1894, by reason of his tenure of that office, became *ex officio* entitled to act as a magistrate for the county of Southampton, and entitled to sit upon cases coming from the Ringwood division.

Two objections were made. One was that Alderman Druitt, being a solicitor, was thereby incapacitated, and the other that he was clerk to the magistrates, and on that ground was disqualified. As regards the first ground of objection, there is no real foundation for it. The gentleman, we are satisfied, ceased to practise as a solicitor as far back as the year 1892. At that time he made over his business to certain relations, and we are satisfied that from that time he did not practise. It is true that up to the year 1896 he took out his certificate as a solicitor, but he had done that, we are satisfied upon his statement, because he thought it was necessary for him to do so in his character as one of the joint registrars of the county court. That ground of objection therefore fails.

The second point, and the one which has been mainly argued here, is, that he being clerk to the magistrates, was incapacitated from sitting as a magistrate. Now the facts as regard to this position are these. He was appointed magistrates' clerk as far back as the year 1838, and he continued to hold that office in the sense of drawing the salary of the office and in the sense of being liable to be called upon by the magistrates, if they desired, to advise them, until a date subsequent to the date of the conviction. But it appears that he had tendered his resignation, and that his resignation had not been accepted, and that the magistrates, whose servant he was as their clerk, had done what I must distinctly say was a highly improper thing. Although they knew that he became, by virtue of his office as Mayor of Christchurch, a magistrate of the county of Southampton, yet they permitted him to continue to hold the office of clerk to the magistrates and to draw the salary of that office. This was a highly improper thing for them to have assented to, and it was a highly improper thing for him to have agreed to. But I do not see the least ground for suggesting any jobbery or wrong motive in it, although undoubtedly the conduct of this gentleman, Alderman Druitt, and of the magistrates was reprehensible. But although he continued to hold the office of magistrates' clerk and to draw salary, it is quite clear that he was allowed, with the assent of the magistrates, to have the duty of the magistrates' clerk performed after he became *ex officio* a magistrate, and, indeed, before that time, by his son. The question is in this condition of things—being, as I have said, the clerk to the magistrates — was he incapacitated from assuming the position of and acting as a magistrate? I need not say that the two positions cannot be held by the same person. The question is, What is the effect in point of law of one who is in the position of magistrates' clerk occupying the position of magistrate, and being one of the same body who were his employers and principals? That is the question of law which we have here to consider. It is obvious that the magistrates' clerk is in effect the servant of the magistrates, appointed by them, and they are the persons who fix his salary, subject to some control by the Home Office. It is obvious also that he cannot be compelled to continue in the service of the magistrates as their clerk against his will. It follows, then, that it was quite within the competence of this gentleman to decline to continue to act as clerk, subject, it may be, to some complaint against him if he violated his terms with the magistrates. Subject to that, he had a right to determine his position as magistrate's clerk. It, therefore, was a position which he could free himself from if he so wished. It follows, from what I have said, that these two offices are incompatible offices, and the question thereupon arises—which, finally, is the one we have to decide—What is the effect of a man holding two incompatible offices under such circumstances as these? He cannot hold both, it is obvious, as they are distinctly incompatible. It seems to me the principle upon which this case must be decided is expressed by the Court of Appeal in the case of *Reg.* v. *Mayor, &c., of Bangor*, 35 W. R. 158, 18 Q. B. 349. That case was not referred to during the argument, and I see that both Wright, J., and myself argued it at the bar. That was a case in which the returning officer declared the election of the candidate, whose votes placed him at the head of the poll at the election of a councillor for one of the wards of the borough, to be void on the ground that his being an alderman rendered him ineligible to fill the office of councillor. The question in the Court of Appeal was whether an alderman could serve in the office of councillor, it having been decided in the court below that the returning officer had exceeded his duty in declaring the election void. It was contended for the alderman that if the incapacity existed at all "it must exist because the two offices are incompatible. But if they are, the assumption of the second office vacates the first." In giving judgment, Lord Esher, M.R., on p. 361, says: "It has been said that the offices are incompatible, and that two incompatible offices cannot be held by the same person at the same time. The later proposition is true with respect to the office of alderman and councillor, not on the ground that they are offices of profit, but on the ground that they are so incompatible that the Legislature cannot have intended they should be held by the same person at the same time. What is the consequence of this doctrine? A long series of authorities has upheld the proposition that when two offices are incompatible, and the suggested ineligibility of the candidate for one of them only arises from the fact that it is incompatible with the office he already holds, he is not thereby prevented from being elected to the second office, whether it be superior in rank or power to the other or not." Then Lord Esher, M.R.,

proceeds to enlarge upon that argument, and concludes that the alderman, by the fact of his election and acceptance of the position of councillor, vacated his position as alderman, although in the hierarchy of local government the office of alderman was regarded as a superior office. The principle of that case applies here. We think that by his acceptance of the office of mayor, which carried with it the consequence of his becoming a magistrate for the county of Southampton, the position which he accepted and in which he acted had the effect of vacating the position he held as clerk to the magistrates.

Therefore, although the proceedings of the magistrates were irregular in continuing him in that position, and the conduct of Alderman Druitt in continuing to accept the salary in that position was irregular, yet we think he was not incapacitated from acting as a magistrate, and that the conviction was therefore valid, and must stand.

It follows that the rule must be discharged; but, under the circumstances, it will be without costs.

Rule discharged.

Solicitors for the applicant, *Routh, Stacey, & Castle*, for *Burt & Haviland*, Christchurch.

Solicitors for the justices, *Lovell, Son, & Pitfield*, for *Druitt & Druitt*, Christchurch.

Q. B. Div. (Grantham and Wright, JJ.) March 2.

WESTACOTT *v.* STEWART. (*a.*)

Election law—County council—Death of candidate—Injunction—Prerogative mandamus—*Ballot Act*, 1872 (35 *&* 36 *Vict. c.* 33), *s.* 1—*Municipal Corporations Act*, 1882 (45 *&* 46 *Vict. c.* 50), *s.* 58.

The last paragraph of section 1 *of the Ballot Act*, 1872, *is incorporated in the Municipal Corporations Act*, 1882, *by virtue of section* 38 *of the latter Act.*

Semble, *for the purposes of municipal and county council elections, the paragraph must be read as if the words "as if the notice required by section* 54 *of the Municipal Corporations Act had been given . . ." were substituted for the words "as if the writ had been received . . ."*

In an election for a county council the poll was fixed to take place on the 3*rd of March. The nomination of candidates took place on the* 23*rd of February. On the* 26*th of February one of the candidates nominated died. The returning officer, though acquainted with the fact of the candidate's death, refused, on a request to do so by another of the candidates, to countermand the poll.*

Held, that an injunction restraining the returning officer from proceeding with the poll was not the proper remedy, but that a prerogative writ of mandamus *was, under the circumstances, the proper remedy.*

Action for an injunction.

The plaintiff was one of four candidates nominated for an election of county councillors for the Central Hackney Division of the administrative county of London, fixed to take place on the 3rd of March, 1898. The nominations took place on the 23rd of February, 1898. On the 26th of February, 1898, Henry Sylvester Samuels, one of the candidates nominated, died; whereupon the plaintiff requested the defendant, who was the returning officer, to countermand the notice of the poll in accordance with section 1 of the Ballot Act, 1872 (35 & 36 Vict. c. 33). Though the defendant was satisfied of the fact of the death of Samuels, he refused to countermand the poll.

The plaintiff brought an action for an injunction restraining the defendant from proceeding with the election. An *ex parte* application for an *interim* injunction was made to Grantham, J., in chambers, and referred by him to the Divisional Court.

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 75, the sections of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), which deal with the election of councillors, are re-enacted so as to apply to the election of county councillors.

Section 58 (i.) of the latter Act provides: "If an election for councillors is contested, the poll shall, as far as circumstances admit, be conducted as the poll at a parliamentary election is, by the Ballot Act, 1872, directed to be conducted, and, subject to the modifications expressed in Part III. of the third Schedule, and to the provisions of this Act, the provisions of the Ballot Act, 1872, relating to a poll at a parliamentary election (including the provisions relating to duties of the returning officer after the close of the poll), shall apply to a poll at an election of councillors."

Section 1, paragraph 4, of the Ballot Act, 1872, is as follows: "If after the adjournment of an election by the returning officer for the purpose of taking a poll, one of the candidates shall die before the poll has commenced, the returning officer shall, upon being satisfied of the fact of such death, countermand the notice of the poll, and all proceedings with reference to the election shall be commenced afresh in all respects as if the writ had been received by the returning officer on the day on which proof was given to him of such death . . ." The other paragraphs of the section deal with the nomination of candidates, and section 2 deals exclusively with the conduct of the poll.

Dickens, Q.C. (*S. H. Day* and *Kenrick* with him), for the plaintiff, on the ground that there were doubts as to whether an injunction was the proper remedy, applied for a perogative writ of *mandamus*, as an alternative remedy. [*Macmorran, Q.C.*, for the defendant, did not object to the course suggested.] Paragraph 4 of section 1 of the Ballot Act, 1872, is incorporated by section 58 of the Municipal Corporations Act, 1882, because it is a provision relating to a poll at a parliamentary election and to the conduct of a poll. It is said that section 2 only of the Ballot Act, 1872, which deals exclusively with the conduct of a poll, is incorporated, and that section 1, dealing as it does with a nomination, is not incorporated. But the countermanding of a poll is clearly part of the conduct of a poll.

Macmorran, Q.C. (*Avory* with him), for the defendant.—No part of section 1 can apply to a municipal or county council election. The date of the poll in such elections is not fixed by the returning officer, but, in the case of the county council, by the county council itself, and all the polls are taken on the same day. Therefore, if the poll were post poned who would be the person to fix the later date? Again, section 1 of the Ballot Act says that the proceedings shall be commenced afresh "as if the writ had been received by the returning officer on the day on which proof was given to him of such death." That passage clearly cannot apply to the case of municipal or county council elections, where no writ is employed. The principle in parliamentary elections is that there are two great parties represented. That is not the case in municipal and county council elections. There is, therefore, no reason why an election should

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

be postponed on the ground that one of the candidates has died.

GRANTHAM, J.—We think that the fourth paragraph of section 1 of the Ballot Act, 1872, is incorporated into the Municipal Corporations Act, 1882, by virtue of section 58. With regard to the first portion of section 1 there is no difficulty. It has to do with the nomination only. But the fourth paragraph is within the language of section 58, because it deals with the poll. It would be inconvenient to have four names upon the voting papers, the bearer of one of which was dead. It was said by counsel that in passing the Ballot Act the Legislature considered that they were dealing with two great opposing parties, and that the provision in question was enacted to prevent one of those parties snatching a victory owing to the death of the candidate who represented the views of the other party. And it was argued that, that being so, the Legislature could not have intended to incorporate the provision in an Act dealing with elections where parties were not opposed to each other in the same way. I do not agree with the learned counsel. If there is an election at all there must be two or more candidates representing different views. Therefore, the same considerations apply as in parliamentary elections.

As to the learned counsel's argument, founded upon the language of section 1 of the Ballot Act, I confess I thought it suggested some difficulty. But if the language used cannot be strictly applied to municipal or county council elections, power to modify it is given by the use of the words "as far as circumstances permit," in section 58 of the Municipal Corporations Act, 1882. In our judgment the injunction prayed for is not the proper remedy, but a prerogative writ of *mandamus* must go commanding the defendant to stay the election.

WRIGHT, J.—As to the form the remedy should take, I do not think that an injunction is the proper remedy. There are two other alternatives: first, that the election should proceed, and that the persons aggrieved should subsequently institute an election petition. That would be an inconvenient and expensive remedy. The other alternative is for us to grant a prerogative writ of *mandamus*. That is the proper remedy, seeing that there is no other convenient one.

Section 58 of the Municipal Corporations Act, 1882, does more than simply re-enact the provisions of the Ballot Act relating to the poll. It enacts that the poll at municipal elections shall be conducted as the poll at a parliamentary election is by the Ballot Act directed to be conducted. The countermanding of the poll is no part of the nomination, though the provision with regard to it is, in the Act, placed among the provisions dealing with the nomination. It belongs to the poll. The postponement of the poll is part of the conduct of the poll.

We are, therefore, to hold that the provision applies to municipal elections if we can. I was struck with Mr. Macmorran's argument that, there being no writ employed in municipal elections, the language of the provisions was inapplicable to such elections. But I think that in construing the provision for the purpose of a municipal or county council election we may substitute for the day on which the writ was received the day when notice of the election was given in pursuance of section 54 of the Municipal Corporations Act, 1882.

Peremptory prerogative writ of mandamus *granted.*

Solicitors for the plaintiff, *Grover Humphreys & Son.*

Solicitor for the defendant, *Blaxland.*

Q. B. Div. (Kennedy, J.) — Feb. 8, 10, 11.

LOWER RHINE AND WÜRTTEMBERG INSURANCE ASSOCIATION v. SEDGWICK. (a.)

Insurance—Marine—Re-insurance—Lapse of original policies—New policy—Alteration of risk—Liability under policy of re-insurance.

The defendant re-insured certain risks with the plaintiffs. Of the two original policies covering these risks, one expired by effluxion of time and the second was cancelled, the defendant at the time that the policy was cancelled issuing a fresh policy to his assured, which, however, contained provisions differing somewhat from those in the two original policies. No notice of these changes was sent to the plaintiffs, who subsequently, in ignorance of these circumstances, paid the defendant as and for a total loss.

Held, that the plaintiffs could not recover back from the defendant the money so paid. The defendant had paid under his policy for a total loss, and was entitled to recover from the plaintiffs under their re-insurance policy because at the time he re-insured with them, and at the time of the loss, he had an insurable interest in the subject-matter of the insurance.

Held, also, that the difference in terms between the two policies merely affected the defendant's position with his assured, and gave no ground for the plaintiffs cancelling their liability under their policy of re-insurance.

Commercial cause.

This was an action brought to recover back money paid by the plaintiffs to the defendant under a mistake of fact.

The plaintiffs, an insurance association, re-insured the defendant, an underwriter at Lloyds, in respect of his liability under a policy on the hull and machinery of the steamship *Collynie*. The vessel, within the period covered by the policy, became a total loss, and the defendants paid his assured as and for a total loss. He then claimed to be indemnified by the plaintiffs, and subsequently they paid him for such a loss in ignorance that at the time of such payment he had cancelled the policy which was the subject of the re-insurance.

The facts were these: On the 20th of February 1896, the defendant with six others, subscribed for £50 each a policy for twelve calendar months from that date in respect of the *Collynie*. This policy was stated to be for £350 on hull valued at £3,600, and on machinery valued at £2,000, total £5,600. All liability under this policy ceased by efflux of time on the 20th of February, 1897. On the 20th of June, 1896, the defendant, with six others, subscribed for £25 each a policy on the same ship for twelve calendar months from that date, the total amount insured being £850, the risks, the valuation on hull and machinery, and the premium being the same as under the former policy. On the 27th of November, 1896, the defendant and his six co-insurers re-insured with the plaintiffs the risks as under-written by them, by a policy on the same ship from the 4th of November, 1896, to the 20th of June, 1897, for £250 on hull and machinery at £5,600, and in the margin it was stated to be "a re-insurance of a policy or policies and subject to the same terms, conditions of clauses, as original policy or policies . . . and to pay as may be paid thereon." The defendant's original policies were not asked for or shown to the plaintiffs. The plaintiffs themselves again re-insured under a policy dated the 12th of November, 1896, against total loss only. On the 20th of February,

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

1897, the first policy expired by effluxion of time, and the second policy of the 20th of June was cancelled; and on the same day (the 20th of February) the defendant, with eight others, subscribed a policy for £50 each (£450) on the same ship for twelve calendar months from that date. Such policy was for £1,040 on hull and machinery valued at £5,000. On the 3rd of May, 1897, the *Collynie* was totally lost, and the plaintiffs paid the defendant £350 for a total loss under their policy of re-insurance, the defendant having paid his assured a total loss under the policy of the 20th of February, 1897. When the plaintiffs sought to recover from their re-insurers, their re-insurers asked to see the original policies, and the plaintiffs then ascertained the facts, which before they were ignorant of, relating to the cancellation of the policy of the 20 h of June, 1896. and the substitution in its place of the policy of the 20th of February, 1897.

English Harrison, Q.C. (with him *Hurst*), for the plaintiffs.—The terms of the re-insurance policy show that the plaintiffs were liable only in respect of payments made by the defendant under the policy existing at the date of the re-insurance. The original policies having ceased to exist they were no longer liable and the money paid under a mistake of facts ought to be returned. Moreover, they were not liable because the policy under which the defendant had in fact paid and the policy in respect of which they had re-insured the defendant, contained different provisions. These new provisions never having been brought to their notice the parties were never *ad idem*.

Joseph Walton, Q.C., and *Scrutton*.—The defendant is entitled to keep the money paid by the plaintiffs because he could recover it in an action on his re-insurance policy. He has an interest in the subject-matter of insurance to the amount insured. The loss admittedly came within the nature of the risk covered by the policy. The assured was free to change the amount of his risk during the currency of the policy, and was under no liability to notify that fact to his re-insurers unless their risk was altered thereby. Having paid his loss, the defendant was entitled to recover from his re-insurers.

KENNEDY, J.—In this case the action was brought to recover money which had been received by the defendant as it is alleged against the interest of the plaintiffs. It is really an action to recover money paid by a re-insurer to the insurer of a ship, that became during the period and within the limits of the risks covered by the policy, a total loss. The ground of the claim for the return of the money by the defendant, is that the payment was made under a mistake of fact, and it is part of the proposition accepted as between the two parties, that if the payment which undoubtedly was made was a payment which never ought to have been made—in the sense that the defendant could not have legally recovered it in an action—that the rights of the parties would not be altered by the fact that the money had in fact been paid. It is also admitted by the plaintiffs that the present action is not based on any allegation of fraud or misrepresentation on the part of the defendant in respect of the risks and liabilities covered by the policies when he applied for and received payment from the plaintiffs.

The facts are very few, and they are not disputed. [His lordship stated the facts and continued:] The plaintiffs claim on two grounds—first, they say that their re-insurance policy must be treated as a policy which can only be effectual in respect of a payment by Mr. Sedgwick (the defendant) upon a policy which was existing at the time that the re-insurance policy was made, and it is not disputed that neither of the policies underwritten by the defendant before the date of the re-insurance were in existence at the time of the loss, for one it is agreed had expired by effluxion of time, and the other had been cancelled. Then the plaintiffs say, as a second ground upon which the money ought to be returned, that the policy which was in existence at the date of the loss, and under which the defendant has paid, contains provisions differing from those contained in the first two policies, and from those which appeared to be embodied in the re-insurance policy. The main points of difference, I may point out in passing, being on the total amount of value of hull and machinery—namely, in the allowed policy set down at £5,600, and in that of the 20th of February, 1897, at £5,000, the change in the rate of premium from £9 9s. to £10 10s. per cent. without discount, and the amount to be returned differing also in the case of the vessel being laid up. Now it is said that these are differences which, even if it were open for Mr. Sedgwick to claim upon a policy effected after the date of the re-insurance policy, he could only do so if the new policy contained no special difference in its terms from the allowed policy. I think the plaintiff's contention is badly founded. I think the question ought to be tried as an action in which Mr. Sedgwick was the plaintiff and the present plaintiffs the defendants. And if the parties were in that changed relationship, what good plea could the present plaintiffs raise as a defence to answer Mr. Sedgwick's claim? Mr. Sedgwick had an insurable interest in the hull of this vessel, and at the time of the loss he had re-insured that interest in the subject-matter of the insurance with the plaintiffs. That would be all that is necessary to decide such an action. It is unnecessary to aver interest at the time of effecting the policy. It is sufficient for an insurer to show at the time of the loss that he had such an interest. It is not disputed that the defendant had an insurable interest as insurer at the time of effecting the policy of re-insurance under the first two policies. If, then, he had, at the time of effecting the re-insurance, an insurable interest in the subject-matter of the insurance, and had an interest still at the time of the loss, it is immaterial that his interest should have increased or diminished by the time of the loss. The defendant was clearly interested at both times, and the change in the conditions of the policy and valuation of the vessel merely affected, in this instance, his relations with his own assured, and did not change his insurable interest as against the plaintiffs.

Now, the policy upon which the defendant was paid by the plaintiffs undoubtedly shows that it was a re-insurance policy. It states that on the face of it. The reference in the re-insurance policy to the original policy is a reference to such policy as might happen to be in existence at the date of the loss, and the stipulation that it was to be "subject to the same clauses," and "to pay as may be paid" means that whatever claim the defendant pays as original insurer the plaintiffs will repay as re-insurers except so far as the terms and conditions in the re-insurance policy cut down their liability. Great stress was laid on the differences in valuation and its possible effect in the case of a claim for constructive total loss, and no doubt difficult questions might have arisen if the money had been paid as and for a "partial loss." But in this case there was an actual total loss, and as the question does not arise we need not stay to consider what might possibly be a somewhat nice question. The same may be said on another point raised by the plaintiff also, in reference to repairs under the time clauses. For instance, suppose the original policy had been for £5,000 valuation, and the re-insurance

had been for £5,600, what would be the position of the re-insurers then? Could the insurer say to the re-insurers, Pay me what I have insured for at any-rate? That seems to me to raise a point of considerable difficulty. As I have said, the claim here was paid on a total loss, and not upon a constructive total loss, and these points, therefore, have not to be decided. Here the description of the subject-matter in both policies was the same—namely, hull of ship, and the fact of valuing it for £5,600 in one, and £5,000 in the other policy does not give a ground for cancelling the re-insurance policy. It is merely a difference of figures which in the events that have happened has not affected the particular rights of the parties. The rate of premium and the returns on the premium is not a matter which concerns the plaintiffs at all. For these reasons I am of opinion that the plaintiffs have failed. The only substantial question here was whether the defendant could have legally claimed against the plaintiffs on a policy of re-insurance. In my opinion it would have been impossible for his re-insurers to have framed a good plea to such an action. The defendant, therefore, is entitled to retain the money, which, if returned to the plaintiffs, he could recover back from them in an action. My judgment, therefore, must be for the defendant, with costs.

Solicitors for the plaintiffs, *Pritchard & Sons.*

Solicitors for the defendant, *Walton, Johnson, Bubb, & Whatton.*

Q. B. Div.
(Hawkins and Channell, JJ.) Feb. 11, 12.

MONKSWELL (LORD) AND OTHERS (*Petitioners*) *v.* THOMPSON (*Respondent*). (*a.*)

Election law — School board election — Recount as between two candidates only — Finality as regards candidates not petitioned against—Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *s.* 2.

At a school board election, at which there were eight candidates for five seats, the result of the poll was duly declared by the returning officer. A petition was presented on behalf of the first unsuccessful candidate against the last successful candidate, asking for a recount as between these two candidates only, and claiming the seat for the candidate for whom the petition was presented. No petition was presented against any of the first four successful candidates, and no recount of their votes was asked for. The result of the recount as between the two candidates was to place the unsuccessful candidate in a majority of lawful votes over the candidate petitioned against.

Held, that, as there had been no petition presented against the first four successful candidates, the numbers of the votes declared for them by the returning officer must be taken to be correct, and that, as the candidate for whom the petition had been presented had, upon such recount, shown that he had the majority of votes, he was entitled to the seat, although he had not shown that the candidate petitioned against would not have been among the five successful candidates upon a recount of all the votes given at the election.

Case stated for the opinion of the court, pursuant to the order of Kennedy, J., made under section 93, sub-section 7, of the Municipal Corporations Act, 1882, in the matter of the election petition touching the election of members of the School Board of London for the Chelsea Division. The case was stated by Mr. Cooke, of the Election Petitions Office.

The election was held on the 25th of November, 1897, when there were eight candidates for the five seats, and the poll was declared by the returning officer as follows:

	Votes.
Mr. Frederick Davies	14,973
Mr. Thomas Huggett	14,906
Mrs. Maitland	14,839
Viscount Morpeth	13,292
Mr. William Thompson (the respondent)	13,223
Mr. Leslie Johnson	13,218
Mr. Petherbridge	8,882
Mr. Jones	5,937

and the first five candidates were declared by the returning officer to be duly elected.

A petition was presented by the petitioners against the return of the respondent, Mr. William Thompson, alleging that mistakes had been made in the counting of the ballot papers and the votes recorded thereon in favour of the respondent and of the said Leslie Johnson, and that by reason of such mistakes the result of the poll had not been truly ascertained and that the said Johnson had a majority of lawful votes at the election. And the petition prayed that a recount might be had of the votes recorded in favour of the respondent and the said Leslie Johnson, and that it might be declared that the respondent was not duly elected and that his election was void, and that the said Leslie Johnson (for whom the seat was claimed) was duly elected and ought to have been returned.

On the 23rd of December, 1897, Kennedy, J., ordered that the case raised by the petition should be stated as a special case and that the ballot papers be examined and the votes recorded thereon in favour of the said Leslie Johnson and the respondent respectively be recounted before Mr. Cooke, and that he should state the result of the recount in the special case, and that such only of the ballot papers as might be in dispute at the end of the recount should be annexed to the special case.

The respondent appealed to the Court of Appeal to reverse this order, or to vary it by directing that the votes recorded in favour of all the candidates be recounted, but the court dismissed the appeal.

The examination and recount took place before Mr. Cooke, with the result that the number of votes recounted for Mr. Johnson and the respondent were: for Mr. Johnson, 13,183; for the respondent, 13,176.

In addition to the ballot papers containing the above votes there were 23 ballot papers in dispute at the end of the recount, which were annexed to this case. There were 18 ballot papers not bearing the official make, stamp, or perforation. These contained 11 votes for Johnson and 15 for the respondent, but all these 26 votes were disallowed by Mr. Cooke, in accordance with section 2 of the Ballot Act, 1872.

The respondent contended that it was in any case not sufficient for the petitioners merely to show a majority without further showing that on a true calculation of all the votes recorded at the election the respondent was not one of the five candidates standing highest on the poll, and that the said Leslie Johnson was one of such candidates.

The petitioners objected that under the order of Kennedy, J., there was no power to raise any such point, and the petitioners said that they did show that on a true calculation of all the votes that the respondent was not, and that the said Leslie Johnson was one of the five candidates standing highest on the poll, because as regards the first four candidates the official declaration of the result of the poll not having

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law

been questioned by petition was now conclusive as to their election and as to the number of votes polled for each of them.

The questions for the consideration of the court were:

1. Whether the election of the respondent was void.

2. Whether Johnson was duly elected and ought to have been returned.

3. Whether it was in any case open to the petitioners to upset the election of the respondent and claim the seat for Johnson without showing that on a true calculation of the votes recorded, the respondent was not one of the five candidates standing highest on the poll, and that Johnson was one of such candidates.

The result of the adjudication of the disputed ballot papers by the court was to give the respondent 16 more votes, and Johnson 14 more votes; so that in the final result Johnson had five more votes than the respondent.

Yarborough Anderson, for the respondent.—It is shown that the respondent is five votes behind Johnson; but before the petitioners can succeed they must show not only on the recount as between Johnson and the respondent, that Johnson had the majority of votes over the respondent, but they must also show that upon the recount of all the votes recorded at the election the respondent was not among the first five candidates, and that Johnson was; and they have not shown that.

S. H. Day and *Willoughby Williams*, for the petitioners.—It is sufficient to show, as we have done, that as between these two candidates Johnson has the majority.

HAWKINS, J.—By section 2 of the Ballot Act, 1872, the mode in which the poll at elections shall be taken is very fully and very intelligibly set forth. The section, after dealing with the way in which the poll is to be taken, goes on to say: "The decision of the returning officer as to any question arising in respect of any ballot-paper shall be final, subject to reversal on petition questioning the election or return." The returning officer in this case returned the names of the candidates with the number of votes recorded for each. As regards the first four of these candidates, the twenty-one days allowed for presenting a petition had elapsed, and nobody had presented a petition as against them, or even suggested that there was any error in the counting of the votes of those candidates, and I think that, so far as those candidates are concerned, the decision of the returning officer—which was that they had each polled so many votes—must be taken to be final. Then there are left the two other candidates, the respondent and Mr. Johnson, for whom this petition is presented. There has been a recount of the votes as between these two candidates, and the result is that Mr. Johnson's name ought to be substituted for the name of the respondent as the person who was elected by reason of his having a greater number of votes; so that, assuming these four candidates to be correctly occupying the places in which they were placed by the returning officer, the substitution of the name of Johnson for that of Thompson (the respondent) is that which ought to be made, because Mr. Johnson has succeeded in showing that he had more votes than the respondent. With regard to the other four candidates I very much doubt whether we should have any power under the circumstances to interfere. There is no authority showing that we have any such power, and we have to judge for ourselves as to what the intention of the Legislature was. I am strongly of opinion that the intention of the Legislature was that there should be finality with regard to all those candidates whose votes were not attacked by petition within twenty-one days. No recount is asked for here with regard to the votes of the first four candidates; but the respondent asks for judgment because there is no proof that he is not within the number of the successful candidates, although he has less votes than Mr. Johnson. What is said on behalf of the respondent is that Mr. Johnson has no right to be treated as elected because some of the four who were returned might have had votes given to them erroneously. The *onus* of proving that rests on those who assert it. Mr. Johnson says, "I am concerned only in showing that as between myself and the respondent I had a majority of votes, and I have succeeded in doing that." Unless it can be shown that there is an error in some of the votes of the first four candidates numerically, or that there is some ground for saying that by inquiring into these votes there would be a different result, it is no use. There is nothing more than a mere suggestion of that, and there is no complaint by either of the parties as to these votes, and there is not even now any challenge of those votes, and there is no suggestion by the respondent of any benefit that could accrue to either of the parties if there were a recount of the whole of the votes. I think therefore we must take, *primâ facie* at all events, the judgment of the returning officer. Such return is *primâ facie* evidence, as it has never been impeached in respect of the four successful candidates; and we must take that as *primâ facie* evidence of the correctness of the return. It is a judgment which he had the jurisdiction to pronounce, and having pronounced it, there having been no petition against it within the twenty-one days, we must take it as an unchallenged return as far as regards the first four candidates, and we must take the numbers so returned by him as *primâ facie* correct. If there had been any real suggestion that an error had been committed, then there might have been a difficulty in saying what course we ought to pursue. But no such difficulty arises here where we have no proof and no suggestion that any particular mischief has been done by the counting. I am clearly of opinion that the judgment which we ought to pronounce should be in favour of the petitioners, because by the recount as asked for by this petition there has been shown to be an error to the exent of several votes, which would have put Mr. Johnson in a majority instead of a minority. I do not think that we ought to act upon the mere suggestion that the returning officer may have been in error in his original counting, without any ground being shown for such suggestion; and I do not see any reason why the petitioners who have succeeded should go to the useless expense of challenging the decision of the returning officer which nobody else has challenged. My opinion is that the judgment ought to be for the petitioners.

CHANNELL, J.—I also am clearly of opinion that our judgment in this case ought to be that the respondent should be unseated, and that Mr. Johnson, on whose behalf the petition was presented, should be seated. I think the facts upon which we have got to go in order to consider what our judgment should be, are that, as now ascertained, Johnson had five votes more than Thompson, the respondent, and that there were four candidates who had a considerable number of votes more. If we are to take those as being the votes there cannot be any doubt as to what our judgment should be. I think we are to take these as the votes. The whole point is, are we to take the figures of the first four candidates as declared at the poll as the basis of our

judgment. I think we are. Section 2 of the Ballot Act, 1872—which has been read—appears to provide that the decision of the returning officer as to one ballot paper shall be final, and it seems to follow that his decision as to 13,000, or any number of ballot papers, is to be final too. But even if that does not apply, it is the duty of the returning officer to count the votes on the principle of the maxim which I think applies—namely, *omnia præsumuntur rite esse acta*, and therefore, unless an error is shown, the result must be taken to be right. An election petition is subject to the ordinary rule of any other proceeding—namely, that if a person makes an allegation the burden is upon him to prove that it is correct, and if we start with the returning officer's figures, then the first question is, Who is it that says they are wrong? The petitioners do not say that they are wrong. The petitioners' case practically is this, they say that the figures of the first four were right, but the figures of the fifth and sixth were wrong; and they have shown that the figures of the fifth and sixth were wrong. They have not given any evidence at all as to the figures of the first four, because their case is that those figures were right, and the respondent has not shown that the figures of the first four were wrong. If the respondent could show that the figures of the first four were wrong, in what way must he show it? In this petition or in another? If he had shown that those figures were wrong, and that only one of the candidates had got a less number of votes than he now has, then I think it would follow that he could not be unseated. But I think it is not sufficient for him to say that there may have been somebody who may have had less votes. He must show it.

That seems to me to answer the point made for the respondent as to the difficulty which would arise in the case of a petition against a person who is at the top of the poll. If there were such a petition, and no petition against any of the other successful candidates, and upon the result of that petition the number of votes for the man who was declared at the head of the poll had been reduced below the fifth as declared, that person at the head of the poll would go out. But if he was only reduced to the second place then he would not go out, as it would follow that the petitioner had petitioned against the wrong person. The court would then, as we are doing in this case, take the figures of those four candidates which had not been recounted as the figures at which they were declared, and then they would give judgment upon the whole as so ascertained—correcting the figures where there had been an application to correct them and taking the other figures as they stood as declared. There would be no difficulty in giving a proper judgment. It is quite sufficient, however, for our judgment to say that it has not been shown to us that there was any error in the poll of the first four candidates; that, as it was not shown that there was any error, the presumption is that they were right, and that we must give our judgment as to the result of this election upon the basis that the figures of the first four candidates were correct and were correctly declared, and upon the presumption that those figures are right and that the figures of the fifth and sixth on the poll have been reversed. It follows that the petitioners must succeed, and that the person on whose behalf the petition is presented, must be seated, and that the respondent must be unseated.

Judgment for the petitioners with costs.

Solicitors for the petitioners, *Radford & Frankland.*

Solicitors for the respondent, *S. R. Lewin & Co.*

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — Dec. 13.

In re HUNT.

Ex parte THE BOARD OF TRADE. (a.)

Bankruptcy—Practice—Costs of stranger to bankruptcy—Taxation—Power of Board of Trade to review—Bankruptcy Rules, 1886 *and* 1890, *r.* 124—*Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 73, *sub-section* 3.

Where the respondent to a motion by a trustee in bankruptcy has had his costs taxed by the registrar in a county court the Board of Trade has no power to insist on the review of such taxation by the taxing-master of the High Court under rule 124. *That rule only applies to the costs of persons employed in the bankruptcy, not to the costs of strangers litigating with the trustee.*

Motion by the Board of Trade for an order directing the bankruptcy taxing-master of the High Court to review the taxation of a bill of costs as taxed by the registrar of the county court at Derby.

The trustee in the bankruptcy in June, 1897, moved the county court at Derby for an order directing one George Brown to pay the sum of £49 to the trustee. This sum of £49 represented the value of a stack of hay acquired by Brown, which the trustee alleged was in the order and disposition of the bankrupt at the commencement of the bankruptcy.

The trustee failed in his motion, and judgment was given for Brown, with costs, which were taxed by the registrar at Derby and allowed at £48 18s. The Board of Trade thought these costs excessive and gave notice to Brown's solicitors pursuant to rule 124 of the Bankruptcy Rules that they required the taxation to be reviewed by the bankruptcy taxing-master of the High Court. That master refused to review the taxation on the ground that he had no jurisdiction to do so, whereupon the Board of Trade made the present application to the court.

Muir Mackenzie, for the Board of Trade.—The words of rule 124, "any bill of costs . . . of any solicitor," are wide enough to cover the present case. If it were not so, the Board of Trade would have no check on the bills of strangers payable by the estate.

W. Appleton, for the respondents.—Rule 124 only applies to the costs of such solicitors and other persons, enumerated in section 73 and in the rule itself, who are employed in the bankruptcy; it does not apply to the costs of strangers.

He referred to rule 117, and to *In re Dowson*, 36 W. R. 864, 21 Q. B. D. 417; and *Ex parte Angerstein*, 22 W. R. 581, L. R. 9 Ch. App. 479.

Muir Mackenzie replied.

WRIGHT, J.—I must say that I was inclined to agree with Mr. Muir Mackenzie, at first sight, that rule 124 taken by itself would warrant the application that is made; but Mr. Appleton has altered my view in that respect. I think he is right when you take the three things together—rule 124, section 73, and sub-section 3 of that section. The last part of that sub-section appears to me to indicate strongly that it is referring to the charges of those persons whose employment requires sanction. "The taxing-master shall satisfy himself before passing such bills and charges"—that is, all bills and charges of solicitors, managers,

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

accountants, auctioneers, brokers, and other persons not being trustees—"that the employment of such solicitors and other persons in respect of the particular matters out of which such charges arise has been duly sanctioned." When you come to rule 117 there is the same enumeration, and there again you find the same words: "Before taxing the bill or charges of any solicitor, manager, accountant, auctioneer, broker, or other person employed by an official receiver or trustee, the taxing-master shall require a certificate in writing, signed by the official receiver or trustee," and so forth. Then when you come to rule 124 it is very difficult to suppose, when there is the same enumeration of persons, that it is referring to any different class of costs. The rule runs: "Where any bill of costs, charges, fees, or disbursements of any solicitor, manager, accountant, broker, or any other person, has been taxed by a registrar of a county court, the Board of Trade may require the taxation to be reviewed by the bankruptcy taxing-master of the High Court"—exactly the same enumeration and presumably in relation to the same people. And then, what appears to me to clinch it, is sub-section 2 of that rule, which provides, "In any case in which the Board of Trade require such a review of taxation as is above mentioned, they shall give notice to the person whose bill has been taxed and shall apply to the taxing-master of the High Court to appoint a time for the review of such taxation, and thereupon the taxing-master of the High Court shall fix a time for the review of, and shall review such taxation." It does not appear to me, having regard to the collocation of the section and rules to which I have referred, that that means a notice to be given to anyone except the kind of persons enumerated. I do not think it provides for notice to be given to strangers. On the whole, I hold the true construction is that it is confined to the kind of persons enumerated in sub-section 3 of section 73. The motion must be dismissed with costs.

Solicitor for the applicant, *The Solicitor to the Board of Trade.*

Solicitors for the respondents, *Robotham, Attwood, & Robotham*, Derby.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Feb. 3.

Ex parte WICKENS. (*a.*)

Bill of sale—Seizure of goods—Entering into possession for purpose of realizing security—Non-production of last receipt for rent—Reasonable excuse—Relief against seizure—Jurisdiction to order bill of sale to be given up—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 7, *sub-section* 4.

Where the grantee of a bill of sale seizes the goods for the purpose of realizing his security, and the grantor makes an application under section 7 *of the Bills of Sale Act,* 1882, *the judge has jurisdiction to order the bill of sale to be given up on payment of the principal sum and the interest then due.*

Where the grantor of a bill of sale did not upon demand produce to the grantee a receipt for a quarter's rent which became due only a short time before, and of which the landlord had not yet required payment,

Held (*approving* Ex parte Cotton, 32 *W. R.* 58, 11 *Q. B. D.* 301), *that the grantor had not without reasonable excuse failed to produce the last receipt for rent within the meaning of section* 7, *sub-section* 4, *of the Bills of Sale Act,* 1882.

Per Collins, L.J.—*A grantee is not entitled under sub-section* 4 *to demand that the grantor shall send him his last receipt for rent by post.*

Appeal from an order made by Day, J., at chambers, in the matter of a bill of sale.

The bill of sale, which was dated the 14th of July, 1897, was given by a Mrs. Wickens to one Shuckburgh, to secure repayment of a loan of £30, with interest at the rate of 60 per cent. per annum. The principal was to be repaid on the 14th of July, 1898, and interest was payable monthly on the 14th day of each month.

On the 22nd of July, 1897, the grantee wrote from Bristol to the grantor, who lived at Weston-super-Mare, demanding that her receipt for rent due on the 24th of June should be sent by post to him at Bristol on or before the 26th of July. The grantor, not having been pressed by her landlord, had not at that time paid her rent.

On the 27th of July, the grantee, by his bailiff, seized the goods comprised in the bill of sale on the ground of the non-production of the receipt for rent. The warrant under which the goods were seized was endorsed for £48 principal and interest, and £4 18s. costs of levy. Prior to taking possession the bailiff demanded the sum of £52 18s., and informed the grantor that if it was not paid he was instructed to seize.

On the same 27th of July a friend of the grantor paid the rent, and the grantor produced to the bailiff the receipt for the rent and tendered the sum of £35 13s., being the amount of the principal and interest to date and the costs of the levy. The bailiff having refused to accept this sum, the grantor applied at chambers, under section 7 of the Bills of Sale Act, 1882, for an order restraining the grantee from removing or selling the goods and directing that upon payment of the principal sum of £30 and interest to date and the costs of the levy the grantee should withdraw from possession, and the bill of sale be discharged.

Day, J., made an order restraining the grantee from remaining in possession and directing that upon payment of £30 and 15s. for interest to date the bill of sale should be given up, and that the grantee should pay the costs of the application.

H. Reed, Q.C., and *Lewis Thomas*, for the grantee.

Danckwerts, for the grantor.

A. L. SMITH, L.J.—I think that, when the grantee entered into possession and seized the goods, he did so for the purpose of realizing his security, not for the purpose of protecting the goods and maintaining his security. Within five days of the seizure the grantor made an application under section 7 of the Bills of Sale Act, 1882, which says that on such an application the court, if satisfied that the cause of seizure no longer exists, may restrain the grantee from selling the goods, or make such other order as may seem just. Day, J., ordered that on payment of the principal sum and 15s. for interest the bill of sale should be discharged. It is contended that the learned judge had no power to order the bill of sale to be discharged. But it has been held in a series of cases, the last of which is *Bovill* v. *Endle*, 44 W. R. 523, [1896] 1 Ch. 648, that, where a mortgagee enters into possession of the mortgaged property for the purpose of realizing his security, the court has jurisdiction to

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

order that, upon payment of the principal debt, interest to date, and the costs, the security shall be given up. I think that a bill of sale holder is in this respect in a similar position to an ordinary mortgagee, and that in such circumstances he may be ordered, on payment of what is then due, to deliver up his security. In my opinion, therefore, Day, J., had jurisdiction to order the bill of sale to be discharged. Then it is said that he ought at any rate to have allowed the costs of the levy. That depends on whether the seizure was rightful, or, in other words, on whether the grantor had without reasonable excuse failed to produce her last receipt for rent. At the time when the receipt was asked for the landlord had not yet demanded the rent. I follow my judgment in *Ex parte Cotton*, 32 W. R. 58, 11 Q. B. D. 301, and I think that under such circumstances a grantor has not without reasonable excuse failed to produce his receipt for rent within sub-section 4 of section 7 of the Bills of Sale Act, 1882. Further, I think that the learned judge had jurisdiction to order the grantee to pay the costs of the application.

CHITTY, L.J.—I agree. It is to be noticed in the first place that the demand for the receipt for rent was not a demand for the mere production of the receipt, but a demand to have it sent by post to Bristol. Neither had the landlord yet demanded the rent, nor had it been left unpaid for an unusual time. Under such circumstances I think it cannot be said that the grantor had failed without reasonable excuse to produce the receipt. It was argued that the grantee entered for the purpose of protecting his security. But the facts seem to me to show clearly that he took possession with a view to the realization of his security, and for the purpose of enforcing payment. And it is well-settled law that, where a mortgagee takes proceedings to realize his security, the mortgagor may offer the principal, interest, and costs, and thereby prevent foreclosure, without the necessity of giving six months' notice of intention to pay off the mortgage or of paying six months' interest in lieu of notice. I therefore think that the learned judge had jurisdiction to make an order for the discharge of the security, and I further think that the terms which he attached to his order were just.

COLLINS, L.J.—I am of the same opinion. The excuse for entering into possession was the non-production of the receipt for rent, but the grantee, in fact, took possession for the purpose of realizing his security. That let in the jurisdiction of the judge to compel him to accept payment of the principal sum and the interest then due. The question as to the levy fee and the costs of the application depends on whether the seizure was rightful or wrongful. The grantee did not show that the grantor failed without reasonable excuse to produce the receipt for rent, inasmuch as the landlord had not demanded the rent. But even if she had paid the rent, I do not think she was bound to part with the evidence that she had paid it, her only obligation would have been to produce the receipt. The grantee's demand was that she should send it by post to Bristol. In my opinion he had no right to make such a demand, and on that ground the seizure was wrongful. I therefore think the learned judge had jurisdiction to refuse to order the grantor to pay the levy fee, and to order the grantee to pay the costs of the application.

Appeal dismissed.

Solicitors for the grantee, *Ford & Ford*, for *J. Cumberland*, Bristol.

Solicitors for the grantor, *Pritchard, Englefield, & Co.*, for *A. R. Ford*, Weston-super-Mare.

From Q. B. Div. (Earl of Halsbury, L.C., and A. L. Smith and Collins, L.JJ.) — March 25.

BRYANT v. HANCOCK & CO. (a.)

Landlord and tenant—Lease of public-house—Covenant by lessee—Lessee and assigns not wilfully to do anything which might be a reasonable ground for withholding licence—Drunkenness permitted by under-tenant of assignee of lessee—Action against assignee.

A lease of a public-house granted by the plaintiff contained a covenant on the part of the lessee that he, his executors, administrators, and assigns, would not wilfully do or suffer anything which might be a reasonable ground for withholding the licence. The defendants, who were assignees of the lessee, let the premises to a monthly tenant, who on one occasion permitted drunkenness to take place on the premises, in consequence of which the licensing justices refused to renew the licence.

Held, that there had been no breach of covenant on the part of the defendants.

Appeal from the judgment of Lawrance, J., at the trial of the action without a jury.

By a lease dated the 16th of October, 1874, the plaintiff demised the Princess Royal Hotel, at Grangemouth, near Cardiff, to John Biggs, his executors, administrators, and assigns, for a term of twenty-one years.

The lease contained, among others, the following covenant on the part of the lessee:

"And further that he, the said John Biggs, his executors, administrators, or assigns, . . . shall and will . . . conduct the business" of the hotel "in a proper and orderly manner, so as to afford no ground or pretence for discontinuing the licences thereof; and will not wilfully do or suffer any act or thing which may be a breach of the rules and regulations established by law for the conducting of licensed public-houses or be a reasonable ground for the withdrawing or withholding of all or any of the licences for the sale of beer, ale, wine and spirituous liquors therein; and shall and will from time to time during the continuance of the said term apply for and do, or cause to be done, all and whatsoever shall be requisite for obtaining the renewal of such licences, and will at the end or other sooner determination of the said term forthwith deliver up the same licences in full force."

On the 31st of March, 1890, Biggs assigned the residue of the term to the defendants, and the defendants subsequently let the premises to a Mrs. Evans on a monthly tenancy.

On one occasion, while Mrs. Evans was tenant, some cases of drunkenness occurred on the premises, and at the next general annual licensing meeting the justices refused to renew the licence for the house on that ground.

The tenant appealed from the decision of the licensing justices to the quarter sessions.

The quarter sessions refused to hear the appeal, on the ground that the notices were not in proper order.

The tenant thereupon applied for and obtained a *mandamus* commanding the quarter sessions to hear and determine the appeal.

The quarter sessions accordingly heard the appeal, and the justices were equally divided in opinion.

One of the justices having withdrawn his judgment, the original decision of the licensing justices stood affirmed.

The tenant then again applied for a *mandamus* to

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the quarter sessions to hear and determine the appeal, and on failing to obtain it in the Queen's Bench Division, appealed unsuccessfully to the Court of Appeal and the House of Lords.

The plaintiff brought this action against the defendants to recover damages for breach of the above covenant.

At the trial a verdict and judgment were entered for the plaintiff for £5,300.

The defendants appealed.

B. F. Williams, Q.C., Arthur Lewis, and *S. T. Evans,* for the defendants.

Abel Thomas, Q.C., and *Tudor Howell,* for the plaintiff.

Cur. adv. vult.

March 25.—A. L. SMITH, L.J., read the judgment of the court as follows: In this case the plaintiff sues the defendants for breach of covenant, and has recovered damages to the amount of £5,300. The defendants appeal upon the ground that upon the true construction of the covenant sued on, when applied to the proved facts of the case, no breach thereof has been committed by them. The material facts are these: By lease dated the 16th of October, 1874, the plaintiff demised to John Biggs and his assigns the Princess Royal Hotel, at Grangemouth, near Cardiff, for a term of twenty-one years. Upon the 31st of March, 1890, Biggs assigned to the defendants the residue of the term granted by the lease of the 16th of October, 1874, and it is not disputed that the defendants as assignees became liable to the covenant sued on by the plaintiff. After the defendants had entered into possession of the hotel as such assignees, they let the same to a Mrs. Evans as tenant for a short part of the term vested in them. Mrs. Evans thus became under-tenant to the defendants, and in our opinion it cannot be said that she became an assign of either Biggs or the defendants within the meaning of the covenant sued on. It has been held that an assurance for a period less than the whole term is an underlease and not an assignment—*Cottee* v. *Richardson,* 7 Exch., 143; though an assurance purporting to be an underlease, but which comprises the whole term, may be an assignment: *Langford* v. *Selmes,* 3 K. & J. 220, 6 W. R. Ch. Dig. 34; *Beardman* v. *Wilson,* 17 W. R. 54, L. R. 4 C. P. 57. It has also been held that a covenant not to assign is not broken by the granting of an underlease: *Crusoe* v. *Bugby,* 3 Wils. 234. In the case of *Taite* v. *Gosling,* 27 W. R, 394, 11 Ch. D. 273, Fry, J., held that a lessee for a term of ninety-nine years could take advantage as an assign of mutual covenants where the assignees of a covenantee were to have the same benefit as the covenantees had. This is a very special case upon the particular meaning of the word "assign" in the particular covenant, and does not trench upon the well-known distinction between an underlessee and an assignee. Mrs. Evans, whilst tenant to the defendant as above-mentioned, upon one occasion permitted drunkenness to take place upon the premises. It is not, in our judgment, necessary to go through the many steps in the litigation which then took place; it is sufficient to say that it is clear that the defendants took all possible steps to obtain a renewal of the licence, which the justices refused to renew at the next general annual licensing meeting, their ground for refusal being that Mrs. Evans had permitted drunkenness upon the premises upon the occasion above-mentioned. It was thus that the licences of the Princess Royal Hotel were lost. In these circumstances the defendants are sued as being assignees of Biggs for the residue of the term contained in the lease of the 16th of October, 1874, and it is upon the true construction of the covenant therein contained that this case depends. Whether the covenant sued on is one covenant or different covenants is not material, for it is clear that there are three separate and distinct parts of the covenant, under each of which a different obligation is undertaken by the covenantor. The first part commences, "And further, that he, the said John Biggs," and ends with the words "for discontinuing the licences thereof." In our opinion this part of the covenant relates to the forfeiting of the licence when existing as distinguished from the renewal thereof, which is dealt with in the second part of the covenant. It would be wholly unreasonable to hold that both the first and second parts of the covenant referred to the same thing, so that both an absolute and qualified covenant existed as to the same thing.

This first part, in our judgment, is an absolute covenant by the covenantor, his executors, administrators, and assigns, against the forfeiture of an existing licence of the Princess Royal Hotel, and does not embrace the question of renewal of such licence. The second part of the covenant is a limited covenant, and is confined to the covenantor, his executors, administrators, and assigns, wilfully doing or suffering anything which should be a reasonable ground for withdrawing or withholding the licences—*i.e.*, which should afford a reasonable ground for the justices refusing to renew. This is clearly not an absolute covenant. And the third part of the covenant is a covenant by the covenantor, his executors, administrators, and assigns, to apply for and do all that shall be reasonably requisite for the renewal of the licence, and that when renewed he will deliver up the same at the determination of the term. This is not an absolute covenant. Now, as regards the first part of the covenant, no liability attaches to the defendants, for the simple reason that the then existing licences have not been forfeited. As regards the second part, the covenantor or his assigns have not wilfully done or suffered anything which should be a reasonable ground for the justices refusing to renew the licence. If the covenantor or his assigns are to be liable for a tenant of an assignee causing the licence not to be renewed, it seems to us there should either be a clear and absolute covenant that they would be so liable, or a covenant that such tenant would do nothing to jeopardize a renewal. We give no opinion upon whether Mrs. Evans's act was such as to afford reasonable ground for the justices refusing to renew. As regards the third part of the covenant the facts show that the defendants have done all in their power to obtain a renewal, but without avail. For these reasons we are of opinion that when the covenant sued on is correctly read no breach has been established against the defendants, and that this appeal therefore must be allowed and judgment entered for the defendants, with costs here and below.

Appeal allowed.

Solicitors for the plaintiff, *Bower, Cotton, & Bower,* for *Stephens, David, & Co.,* Cardiff.

Solicitors for the defendants, *Riddell, Vaizey, & Smith,* for *Joseph Henry Jones,* Cardiff.

High Court of Justice.

Chan. Div. Stirling, J. March 4, 22.

ALLHUSEN v. EALING AND SOUTH HARROW RAILWAY CO. (a.)

Railway—"House"—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 92.

Prior to 1890 *a mansion-house and grounds and a private road forming the approach thereto formed part of the T. Estate. In* 1890 *the then owners conveyed to the plaintiff* (inter alia) *the mansion-house and grounds and the site of the private road, reserving to themselves a right of way over such road. The defendants having served notice to treat for a portion of the road,*

Held, that they ought not, upon an interlocutory application, to be restrained from proceeding on such notice without purchasing the residue of the plaintiff's property.

Semble, *the said portion of the road did not form part of the plaintiff's "house" within section* 92 *of the Lands Clauses Consolidation Act,* 1845.

This was a motion by the plaintiff for an injunction to restrain the defendants from proceeding with the purchase of part of the plaintiff's mansion-house, known as Twyford Abbey, which was comprised in a certain notice to treat served by the defendants and dated the 21st of January, 1898, without the purchase of the remaining portion of the plaintiff's said mansion-house.

Twyford Abbey, mentioned in the notice of motion, is a mansion-house of considerable size, situated between Ealing and Sudbury, and standing in grounds surrounded principally by hedges, but partly by a fence. In this fence are entrance gates close to which stands a lodge. Leading from the lodge to a public highway, known as Hanger-lane, is a private road about 620 yards in length, having trees on each side and forming an attractive approach to the house. At the end of the road next to the highway is an outer lodge. Within the grounds of the mansion stands a parochial church or chapel, with a burial-ground. This chapel is from time to time, but not regularly, used as a place of public worship, and interments still take place in the burial-ground. The mansion and grounds and the private road, together with lands on each side of such road, originally formed part of an estate known as the Twyford Abbey Estate, and were formerly the property of a Mr. Willan. By a deed dated the 6th of November, 1890, the devisees under that gentleman's will conveyed to the plaintiff the mansion-house and grounds and the site of the private road, together with the advowson of the church or chapel, and all such right and title as the vendors had in or could dispose of in the said church or chapel, subject to a reservation to the vendors and other persons claiming under the will of Mr. Willan of a right of way over and along the private road, and also a right to make and maintain openings into the private road for the purpose of access thereto from any adjoining lands forming part of the Twyford Abbey Estate; and also subject to a reservation to the vendors and persons claiming under the will, and generally to all persons lawfully frequenting or going to and from the church and churchyard, of a right of way with horses and carriages from the outer to the inner lodge, and a right of way on foot from the inner lodge to the church and churchyard. The plaintiff had ever since been, and still was, in occupation of the property so conveyed to him.

The defendant railway company was incorporated by an Act of Parliament passed in August, 1894, for the purpose of making a railway between Ealing and South Harrow, and with this Act the Lands Clauses Act and the Railways Clauses Act, 1845, Part I., were incorporated.

On the 21st of January, 1898, the defendants served the plaintiff with a notice to treat for a portion of the private road (at a point distant from the inner lodge of about a quarter of a mile) comprising 2r. 31p., stating that the land in question was required solely to enable the company to construct a bridge for the purposes of their railway over the same, and that the roadway would be lowered 5ft. under the bridge so as to give a headway of 15ft., and that during construction access would be preserved to Twyford Abbey; and they expressed their willingness, instead of purchasing the said lands, to accept and purchase an easement for the purposes aforesaid.

On the 29th of January, 1898, the plaintiff gave notice that he required the defendants to purchase and take the whole of the house within the meaning of and pursuant to section 92 of the Lands Clauses Consolidation Act, 1845.

On the 7th of February, 1898, the defendants gave notice of their intention to issue a warrant for summoning a jury to determine the value of the plaintiff's interest in the lands described in the notice to treat, and the amount of compensation for the damage to be sustained by the plaintiff by reason of the execution of the works authorized by the Act. Thereupon the present action was brought, and the notice of motion served.

Balfour Browne, Q.C., Butcher, Q.C., and *Moss,* for the plaintiff.

Phipson Beale, Q.C., and *R. F. Norton,* for the defendant.

The following cases were cited: *Furniss* v. *Midland Railway Co.*, L. R. 6 Eq. 473, 17 W. R. Ch. Dig. 145; *Lord Grosvenor* v. *Hampstead Junction Railway Co.*, 5 W. R. 812, 1 De G. & J. 446; *Steele* v. *Midland Railway Co.*, 14 W. R. 367, L. R. 1 Ch. App. 275; *Barnes* v. *Southsea Railway Co.*, 32 W. R. 976, 27 Ch. D. 536; *Sparrow's case*, 2 De G. M. & G. 94; *Richards* v. *Swansea Improvement and Tramways Co.*, 26 W. R. 764, 9 Ch. D. 425; *Marson* v. *London, Chatham, and Dover Railway Co.*, L. R. 6 Eq. 101, 16 W. R. Ch. Dig. 80; *Fergusson* v. *London, Brighton, and South Coast Railway Co.*, 11 W. R. 1088; *Pulling* v. *London, Chatham, and Dover Railway Co.*, 12 W. R. 770 and 969, 33 L. J. Ch. 505; *Doe* v. *Collins*, 2 T. R. 498.

STIRLING, J., after stating the facts, said: The question is whether this portion of the road is part of Twyford Abbey within the meaning of section 92 of the Lands Clauses Act, 1845. If under the Act the defendants are bound to take the whole of Twyford Abbey they cannot escape from such liability by such a notice as is contained in the notice to treat, though it may well be that such works as are there mentioned or other works will have to be executed by the defendants in order to satisfy the obligations imposed by sections 53 and 68 of the Railways Clauses Consolidation Act, 1845, and to avoid payment of a large sum by way of compensation for injuriously affecting the plaintiff's lands by severance or otherwise.

It has been decided by a series of cases, amongst which I may mention *Lord Grosvenor* v. *Hampstead Junction Railway Co.*; *Fergusson* v. *London, Brighton, and South Coast Railway Co.*; *Pulling* v. *London, Chat-*

(a.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

ham, and Dover Railway Co.; and *Steele* v. *Midland Railway Co.*, that the word "house" in section 92 includes whatever would pass under a conveyance of a house by that description. It has also been settled that under the word "house" the curtilage and garden would pass, the reason being that these are matters of necessity, and not merely of pleasure, to the house.

On the other hand, it was decided in *Pulling* v. *London, Chatham, and Dover Railway Co.* that lands adjoining a house used simply for purposes of pleasure and for keeping cows did not constitute part of the house. [His lordship then referred to the judgment of Turner, L.J., in *Fergusson* v. *London, Brighton, and South Coast Railway Co.*, and also to the decision in *Doe* v. *Collins*.]

This being the state of the law, it seems to me that in some cases the soil of a piece of land used as a road might pass under the conveyance of a house. Take for example the case of a house standing in the middle of a garden enclosed by a ring fence and approached by a drive leading from the entrance gate to the front door, there the soil of the drive would be as much part of the garden, and therefore, legally speaking, of the house, as the grass plots or flower beds. The same would be true of a road leading through or along a kitchen garden to the back of the house, as appears to have been decided in *Barnes* v. *Southsea Railway Co.* On the other hand, in *Pulling* v. *London, Chatham, and Dover Railway Co.*, 12 W. R., at p. 971, Turner, L.J., was clearly of opinion that if a mansion stood in a park, the park would not pass by a conveyance of the mansion, and it seems to me that if matters now stood as they did in 1890, before the sale to the plaintiff, a conveyance of this mansion by the devisees of Mr. Willan would not, without more, have passed either the adjoining lands or the soil of the private road, although it might possibly have passed a right to use the road. A way to a house is certainly "of necessity," but the question is whether the soil of the way is also "of necessity."

In no reported case is there any suggestion to that effect, and I have great difficulty in discovering why it should be so. Avenues and roads such as that which forms the approach to Twyford Abbey are by no means of infrequent occurrence in the country, and sometimes extend to a distance of a mile or more, and if the land proposed to be taken by the defendants forms part of Twyford Abbey, the same thing must be true of a piece of road situate, it may be, more than a mile from a house. That goes far beyond anything that has yet been decided. Even if the plaintiff's property consisted only of a house with a garden and outbuildings there would be great difficulty in coming to the conclusion that the soil of this road would pass by a conveyance simply of "the house," though I think it highly probable that a right of way over the road would pass. The plaintiff's property, however, includes an interest in the church and churchyard, which in any view can hardly be part of a house. It also includes a field containing 6a. 2r. 32p., as to which regard being had to the authorities it seems open to great doubt whether it would pass under such a conveyance, and there being a substantial portion of the property of the plaintiff which would not so pass, the difficulty of holding that the soil of the road affording access to the whole of such property passed under a conveyance of the house is increased.

As I am now dealing with the case upon an interlocutory application, I think I ought to refuse the motion.

Solicitors, *Crossman, Pritchard, & Co.*; *Baxter & Co.*

Chan. Div.
Stirling, J. } March 23.

In re KECK AND HART'S CONTRACT AND THE VENDOR AND PURCHASER ACT, 1874. (*a.*)

Settled land—Compound settlement—Appointment of trustees of the compound settlement for the purposes of the Settled Land Acts—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (1), 20 (1) (2) (*i.*) (*ii.*) (*iii.*).

A vendor selling as tenant for life under the Settled Land Acts can convey the land free from any charges created by jointure deeds executed under a power contained in the deed creating the settlement. The purchaser will get a good title, and the trustees of the deed creating the settlement can give a good discharge to him for the purchase-money without being appointed in addition trustees of the jointure deeds for the purposes of the Settled Land Acts.

This was a summons taken out by a vendor under the Vendor and Purchaser Act, 1874, asking for a declaration that a requisition by the purchaser had been sufficiently answered. The question involved was whether a purchaser could insist that trustees of a settlement should be appointed in addition trustees for the purposes of the Settled Land Acts of several jointure deeds executed under powers contained in the settlement. The facts were as follow.

By his will dated the 30th of November, 1859, George Anthony Legh Keck devised all his real estate (except such as was situate in the county of Lancaster) to the use of the Hon. Henry Littleton Powys Keck and his assigns during his life with remainder to the use of Harry Leycester Powys Keck during his life with remainder to the use of trustees to preserve contingent remainders with remainder to the use of the first and every other son of the said Harry Leycester Powys Keck successively in tail male with remainder to the use of Charles Horatio Gardiner Powys Keck during his life with remainder (after a limitation to trustees to preserve contingent remainders) to the use of the first and every other son of the said Charles Horatio Gardiner Powys Keck successively in tail male with remainder to the use of Thomas Bancho Powys Keck during his life with remainders over.

The will also contained a power for any person who under the will should be tenant for life either before or after he should be entitled to possession to appoint a jointure to his wife. The testator died in 1860.

Henry Littleton Powys died on the 10th of July, 1863, having exercised the power of jointuring by a deed dated the 9th of February, 1862, and his widow survived him and was still living.

Harry Leycester Powys Keck, the present vendor, also exercised the power by a deed of the 23rd of July, 1891.

Chas. H. G. Powys Keck died in 1870 unmarried.

Thomas Bancho Powys Keck, the fourth tenant for life under the will, exercised the power by a deed dated the 22nd of October, 1870.

In 1897 the vendor entered into a contract with Sir Isaac Hart for the sale to him of a portion of the real estate settled by the testator's will. The contract contained a clause that the purchaser should not require the concurrence of any person entitled to or interested in any jointure rent-charge created under the power in the will nor of her trustees or trustee. The purchaser required the vender to procure trustees to be appointed for the purposes of the Settled Land Acts of the will and the three jointure deeds on the ground that they formed together a compound

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

settlement. As the requisition was insisted on the vendor took out the present summons.

Buckley, Q.C., and *Hewitt*, for the vendor.—The object of the statute was to render land more freely transferable: *Bruce* v. *Ailesbury*, 41 W. R. 318, [1892] A. C. 356, at p. 361. The general policy of the Act is that money representing land shall come to the hands of the trustees of the land. In this case the trustees of the will are trustees for all persons interested under the settlement, including the jointuresses. The will is a settlement and the vendor is a tenant for life within the definitions in section 2 of the Settled Land Act, 1882. We submit that the trustees of the will are trustees for the purposes of the Act, and that there is no need to appoint them trustees of the jointure deeds as well (see section 20 (2)). Our contention is, and it is supported by sections 38 (1) and 45 (1), that the object of the existence of trustees of the settlement is to have persons who owe a duty to all the *cestui que trusts* under the settlement to see that their interests are properly protected. Here the trustees of the will are the proper persons to see that the jointure is kept up. If the decisions in *In re Meade's Settled Estates*, [1897] 1 I. R. 121, 45 W. R. Dig. 141; and *In re Tibbits' Settled Estates*, [1897] 2 Ch. 149, *ante* p. 3, are right it would often be impossible for a tenant for life to obtain information as to these compound settlements. The real effect would be to render the powers of sale given by the Act completely nugatory, which is contrary to section 51 (1). *In re Knowles' Settled Estates*, 33 W. R. 364, 27 Ch. D. 707, is in our favour. The other two cases are cases where the court was asked to do this thing, but the question here is whether the vendor cannot make a good title without doing so. We submit that *In re Tibbits* is not to be regarded as deciding that where you have a settlement, and subsequent instruments under the settlement, trustees must be appointed of all the instruments to be trustees for the purposes of the Settled Land Acts.

They also referred to *Vine* v. *Raleigh*, 44 W. R. 169, [1896] 1 Ch. 37; Hood & Challis Conveyancing and Settled Land Act, 5th ed., p. 316, and to the Preface; 42 SOLICITORS' JOURNAL 5 and 28.

Sampson, for the purchaser.—My client is a willing purchaser, but I submit that the title is not one which ought to be forced on him. *In re Meade* is exactly in point, and it may be fairly inferred from *In re Tibbits* that North, J., thought that the order in *In re Meade* was a proper one.

STIRLING, J.—If I thought I were going to decide anything contrary to the opinion of North, J., or the Vice-Chancellor of Ireland, I should take time to consider my judgment, and should probably have decided this case contrary to my own opinion in deference to their authority and have left the matter to go to the Court of Appeal. But I do not think I am really called on so to decide. The point which comes before me is a different one from that which either of those learned judges had to decide in the cases which have been reported. The matter stands in this way: By will real estate was devised in strict settlement—that is to say, the real estate was devised to A. for life, with remainder to B. for life, with remainder to C. for life, and the settlement conferred powers of jointuring on the successive tenants for life. A. and C. are dead, B. is still alive. A., B., and C. have all executed jointure deeds. That executed by A. is now in operation and constitutes an existing charge. Those executed by B. and C. have not yet come into force. B. has contracted to sell a portion of the property devised by the will, and the objection taken by the purchaser is this, that although there are existing trustees of the will for the purposes of the Settled Land Acts, it is necessary that they should be appointed trustees of the compound settlement created by the will and the three jointure deeds which have been executed. The ground for the objection is to be found in the two cases I have referred to of *In re Meade's Settled Estates* and *In re Tibbits' Settled Estates*. Now, certainly in the case before North, J., and possibly in *In re Meade*, a question arose which I have not to consider. In the case before North, J., there were four deeds which created charges on the interest of the tenant for life, and North, J., was of opinion that having regard to section 4 of the Settled Land Act, 1890, he had power to appoint trustees of the compound settlement arising from the original settlement and those four deeds. That depends on the wording of section 4 of the particular Act. [His lordship read the section, and continued:] It is possible, though the facts are not clearly stated, that that was also the point in *In re Meade's Settled Estates*. But here I have nothing to do with any charge on the estate of the tenant for life. One of the jointure deeds did create a charge in the shape of pin-money to the wife of the tenant for life who is now dead. That has, therefore, come to an end, and there is nothing subsisting except the jointures. The question which I have to consider is not whether under section 38 there is or is not jurisdiction under these circumstances to appoint trustees of the so-called compound settlement, but whether the tenant for life can make a good title to the purchaser if trustees are not so appointed. Upon that I must go to the Act itself. There is no decision exactly on the point, and it seems to me I must consider the clauses of the Act. The first clause to be considered is section 2 (1). [His lordship read the section, and continued:] Now, what have we here? A will under which at the present moment property is held for B. for life with remainder over. That is the way in which the land devised by the will stands limited. Therefore it stands limited to persons by way of succession.

It seems to me, therefore, that will alone, without looking at the jointures, constitutes a settlement by itself within the meaning of the Act, and B. is tenant for life. That being so, what can the tenant for life convey to the purchaser from him? For that we have to go to section 20 (1). [His lordship read the section, and continued:] Therefore he may convey the land which is sold for the estate or interest which is the subject of the settlement. Now, the land which is the subject of the settlement is the fee simple. Then the operation of the deed is defined by sub-section 2. [His lordship read the sub-section, and continued:] Stopping there, therefore, the tenant for life can convey the land discharged from all the limitations, powers, and provisions of the settlement and from all estates and charges subsisting or to arise thereunder.

Can the tenant for life, then, convey the land discharged from the jointures under those words? It seems to me that he can. Jointures constitute estates or charges subsisting or to arise under the settlement. It is not necessary to say which, but they are estates subsisting under the settlement. Then that is made still stronger when we examine the exceptions which follow. The first is "all estates, interests, and charges having priority to the settlement." The jointures are not estates, interests, or charges having priority to the settlement. They arise under the settlement. The second is "All such other, if any, estates, interests, and charges that have been conveyed or created for securing money actually raised at the date of the deed." That is an importa

exception. If, for example a settlement contain a power to charge portions, and those portions are provided for by a mortgage of the property and actually raised, then those portions would fall within that exception; but the inference is obvious that portions, when not actually raised, may be overridden by the conveyance because the exception does not extend to anything but charges created for securing money actually raised at the date of the deed. Then the third exception is this: [His lordship read section 21 (2) (iii.), and continued:] It seems to me that under that section the tenant for life may make a good title, and it equally follows that the trustees appointed for the purposes of that settlement may give a good discharge to the purchaser for the purchase-money. It seems to me that under those circumstances the vendor has made a good title and I ought to declare on the summons that the requisitions have been sufficiently answered.

Solicitors, *Preston, Stow, & Preston*, for *R. W. Berridge & Sons*, Leicester; *Field, Roscoe, & Co.*, for *Story*, Leicester.

Chan. Div. }
Romer, J. } March 17, 18, 19, 22.

HARROP *v.* OSSETT (MAYOR AND CORPORATION OF). (a.)

Local government — Practice — Costs — Action against corporation—Action for injunction—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (b).

By the Public Authorities Protection Act, 1893, *s.* 1, *where, after the Act, "any action is commenced . . . against any person for any act done in pursuance or execution, or intended execution, . . . of any public duty or authority, the following provision shall have effect:* (b) *Wherever, in any such action, a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."*

Held, that the word "action," as used in the Act, referred to every action, and its generality ought not to be restricted, and therefore that an action for an injunction to restrain a municipal corporation from using a building as a small-pox hospital was within the Act.

Held, also, that the court had no discretion under the Act, and that, judgment having been given for the corporation in the action, the Act must be followed, and costs given as between solicitor and client.

Action.

This was an action to restrain the defendant corporation from using a building at Storrs Hill, Ossett, as a hospital for small-pox patients and from receiving or treating in or at such building any person suffering from small-pox. The action, which was brought by the owners of other land and houses at Storrs Hill, and was based on private nuisance to the plaintiffs, was dismissed with costs.

The defendant claimed costs as between solicitor and client.

By the Public Authorities Protection Act, 1893, s. 1, where, after the commencement of this Act, any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:

(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client.

(*c*) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action.

(*d*) If, in the opinion of the court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding the court may award to the defendant costs to be taxed as between solicitor and client.

This section shall not affect any proceedings by any department of the Government against any local authority or officer of a local authority.

Cozens-Hardy, Q.C., and *J. G. Wood*, for the defendant corporation.—The action having been dismissed with costs, the defendant is entitled to solicitor and client costs under the Public Authorities Protection Act, 1893, s. 1 (*b*). Section 264 of the Public Health Act, 1875, is entirely repealed by the Act of 1893 (see s. 2 and schedule); and the substituted section (section 1) of that Act is quite different from the old enactment. There is now no provision like that of section 264 for preliminary notice prior to action, which was held not to apply to an action for an injunction. (See the cases collected in Lumley's Public Health, 5th ed., vol. 1, p. 693.) The action must still be brought within six months, but the provision of section 264 for a special local venue is not re-enacted. Section 1 (*b*) of the Act of 1893 is entirely new. Section 1 (*c*) is partly the same as the old section 264, but the words at the end of section 1 (*c*) expressly excepting costs on an injunction show that the section generally applies not only to actions for damages, but to actions of all sorts. Wherever, therefore, in any action against persons within the statute, whether for injunction or for damages, judgment is obtained by the defendant, costs must be given him as between solicitor and client.

Macmorran, Q.C., and *Clare*, for the plaintiffs.—The Act of 1893 was intended to replace the repealed section 264 and similar sections in other Acts. Section 2 of that Act repeals so much of any public general Act as requires proceedings to be commenced at any particular place or within any particular time, or that notice of action is to be given. It substantially re-enacts section 264 in other respects. The action is to be commenced within six months, as under that section. [ROMER, J.—There is an important difference: "Or in cases of a continuance of injury . . . within six months next after the ceasing thereof."] That is the same in effect. Section 1 (*b*) refers to the same kind of action that the rest of the section refers to. Section 1 (*c*) does not affect the meaning of section 1 (*b*). The effect of section 1 (*c*) is that, if the action is substantially for damages, and the payment into court is enough to satisfy any damage done, the defendant is to be entitled to solicitor and client costs. If there is a claim for injunction that

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

provision as to solicitor and client costs is not to apply, and the court will deal with that in the ordinary way. Section 1 (*b*) applies only to actions which are within the Act just as they would have been within section 264, and that did not include actions for injunction at all. The Act of 1893, like the old Act, does not extend beyond an action of tort on which damages are claimed.

ROMER, J.—The word "action" as used in this Act refers to every action and not an action for damages or substantially for damages only, and in considering this Act I see no sufficient reason for cutting down the generality of the word or limiting it in any way. I do not see why it should be limited. In my opinion the word "action," as used in this statute, includes all actions in the Chancery Division and actions for an injunction, or actions partly for an injunction and partly for damages. As I say, I see no reason for restricting the generality of the operation of the statute. With regard to section 1 (*a*) clearly an action for an injunction could be brought, and would be brought, within its provisions, and the wording, to my mind, of section 1 (*c*) tends also to show that an action for an injunction is contemplated as one falling within the purview of the statute. I see, as I have said, no sufficient reason for restricting the generality of the word "action" referred to. I think it covers the action before me, and it appears that on the wording of the Act I have no discretion, and that judgment in substance having been given for the defendant in this action, I must of necessity follow the statute, and give solicitor and client costs, which I do.

Action dismissed, with costs as between solicitor and client.

Solicitors, *Chester, Mayhew, Broome, & Griffiths*, for *Iansens & Co.*, Wakefield; *Baker, Lees, & Postlethwaite* for *W. Brooke*, Town Clerk, Ossett.

Q. B. Div.
(Wright and Darling, JJ.) Feb. 25.

KNIGHT (*Appellant*) *v.* THE LANGPORT DISTRICT DRAINAGE BOARD (*Respondents*). (*a*.)

Drainage — Rates — Drainage board — Classification of properties in district according to amount of benefit received — Proportionate rating — Legality of.

Drainage commissioners, who have all the powers of commissioners of sewers in the levying of drainage rates, cannot classify the different rateable properties in their district and levy proportionate or differential rates upon properties in each class according to the supposed quantum of benefit received or danger avoided by the properties in that class; but they must levy an equal rate upon all properties in their district which are benefited by the works.

Case stated by the court of quarter sessions for the county of Somerset.

Two appeals were brought to the court of quarter sessions against two rates, being a special and general rate made by the Langport Drainage Board on the 10th of March, 1896, to levy moneys required by the board for the purposes of, and pursuant to the Somersetshire Drainage Act, 1877 (40 & 41 Vict. c. xxxvi.), and the appeals were brought under section 105 of that Act.

The court of quarter sessions quashed the rates, subject to this case.

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

The appellant, Mr. Knight, owns and occupies a certain shop and house in the town and parish of Langport within the jurisdiction of the Langport Drainage Board and of the Somersetshire Drainage Commissioners, and it was in respect of such property that the rates in question were made.

The respondents are the district drainage board for the Langport district in the county of Somerset, and this district, with certain other districts, includes and comprises the whole of the lands within the jurisdiction of the Somersetshire Drainage Commissioners, who, together with the boards of these districts, constitute the drainage authority under the Act.

In addition to the powers vested in the commissioners and district boards under the Act, there are, by section 140 of the Act, vested in such commissioners and district boards all powers conferred on commissioners of sewers by Act of Parliament, law, or custom.

The rates in question were expressed to be made under the provisions of the above Act. One of such rates consisted of a special rate, amounting to £1,755 3s. 8d.; the other of a general rate amounting to £877 11s. 10d.; and in accordance with the provisions of the Act the special rates were leviable by the commissioners and district boards for the purpose of defraying the expenses of any improvements in existing works, or the construction of new works, and form a tax upon owners. All the other rates leviable by these bodies are general rates, and form a tax upon occupiers.

The expenses in respect of which the two rates were made were lawfully incurred by the commissioners and the board respectively in respect of the drainage of the Langport district, as authorized by the Act, and the property of the appellant upon which a portion of such rates has been charged comes within an area deriving benefit, and is therefore lawfully rateable.

The appellant objected to the rates on the ground that instead of his property being rated equally with all other rateable property within the Langport district, the respondents have levied a differential rate and have rated the appellant at a higher rate in proportion to the greater benefit received by such property.

The principle adopted by the Langport board in the mode of levying within their district the special and general rates (including the rates now in question) made in pursuance of the Act, is as follows:

The net annual value of the various lands or properties as assessed to the poor rate in the parish is taken as the basis of the value of such lands or properties for the purpose of apportioning the drainage rates. The board have divided the different rateable properties in their district into three classes, which are relatively formed and arranged upon the principle of proportionate benefit received and danger avoided by the properties contained in each class by virtue of the above Act, and a proportionate or differential rate is levied in each of the three classes respectively. The district board have distributed the ratepayers into these three classes according to the *quantum* of supposed benefit received and danger avoided by each individual ratepayer in the drainage district.

The two rates were ordered by the Langport board to be levied in the several classes as follows:

Special Rate—Class 1, 2s.; class 2, 1s. 4d.; class 3, 8d. in the £ respectively.

General Rate—Class 1, 1s.; class 2, 8d.; class 3, 4d. in the £ respectively.

The appellant's property was placed in class 1 in both the special and general rates, and was rated accordingly at the highest scale—namely, at 2s. in

the £ as for the special rate, and at 1s. in the £ as for the general rate.

The appellant contended that the respondents had acted contrary to law in adopting the above system of classification and differential rating, and alleged that the respondents had no power to levy in their district any rate other than an equal rate upon all the property benefited by the Act, and that if the district were divided individual ratepayers in the same area could not be placed in the different classes because of the supposed different *quantum* of benefit received.

The respondents contended that the above-mentioned principle of classification and proportionate or differential rating was lawful, and was in accordance with the powers of the respondents.

The quarter sessions being of opinion that in thus classifying the different lands or properties within their district and levying a proportionate rate the respondents had acted contrary to law, quashed the two rates, subject to a case for the opinion of the court.

If the court should be of opinion that the above decision of the court of quarter sessions in favour of the appellant is right, then the order of quarter sessions is to stand; otherwise such order is to be quashed.

Foote, Q.C. (*Garland* with him), for the respondents (the drainage board).—The point here is whether the commissioners are bound to rate all equally, or whether they can divide people into classes, as they have done, according to the supposed benefit derived from the works; and that point has not been expressly decided, though there are *dicta* in the authorities which point in both directions. On the oldest Act on the subject, the 23 Hen. 8, c. 5, it has been decided that lands or tenements ought to be rated to the sewers rates according to the value of the lands. Our contention now is that the proper mode of rating in respect of these drainage rates is according to the *quantum* of benefit received. In *Bow* v. *Smith*, 9 Mod. 94, the Lord Chancellor said the right mode of assessing lands was to assess them "according to the danger they lie in." The judgment of Lord Tenterden in *Rex* v. *Commissioners of Sewers for the Tower Hamlets*, 9 B. & C. 517, supports the same view. To carry out that case section 14 of the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), was passed. The cases we chiefly rely upon are *Soady* v. *Wilson*, 3 A. & E. 248, and *The Metropolitan Board of Works* v. *The Vauxhall Bridge Co.*, 5 W. R. 711, 7 E. & B. 964. In *Soady* v. *Wilson*, Lord Denman, C.J., who delivered the judgment of the court, said that the doctrine rests on the principle that everyone whose property derives benefit from the works of the commissioners may be assessed to the rates they impose." In *The Metropolitan Board of Works* v. *Vauxhall Bridge Co.* Lord Campbell, C.J., who delivered the considered judgment of the court, said: "*Primâ facie*, assessment under a sewers rate must have regard to the benefit which the property derives from the sewers; and property which derives no benefit from the sewers is not liable to be assessed." In *Reg.* v. *Head and the Metropolitan Board of Works*, 3 B. & S. 419; s. c. *Reg.* v. *Metropolitan Board of Works*, 11 W. R. 339, the question was only as to a temporary and accidental user of land, and Cockburn, C.J., adopted the doctrine laid down in Callis on Sewers, and the view of that doctrine as applied in the *Vauxhall Bridge case*. The last case I refer to is that of *Pew* v. *The Metropolitan Board of Works*, 13 W. R. 580, 6 B. & S. 235, in which the considered judgment of the court was delivered by Blackburn, J., who said that though they were not bound by the opinion expressed in the *Vauxhall Bridge case*, as it was extra-judicial, they were reluctant to decide in opposition to it. These cases show that though the commissioners may not be bound to rate in this way, still, if they do so it is not illegal.

R. Wallace, Q.C. (*Howland Roberts* and *F. E. Weatherly* with him), for the appellant.—No case can be cited within the last hundred years which supports the contention of the respondents in this case. It is true there are some *dicta* in some of the cases which may be construed as not opposed to that view; but they are merely *dicta*. *Soady* v. *Wilson* has been relied upon, but that case has been explained in *St. Katherine's Dock Co.* v. *Biggs*, 10 Q. B. 641, where the view taken of *Soady* v. *Wilson* was that it turned upon the kind of benefit received and not upon any *quantum* of benefit. The case of the Vauxhall Bridge Co. does contain an opinion in favour of this differential mode of rating, but it is admittedly, and has been so treated as, an extra-judicial opinion, not binding as a decision upon this court. It is explained in the later case of *Reg.* v. *Head*. Then the question was considered in the more recent case of *Griffiths* v. *The Longdon Drainage Board*, 19 W. R. 1162, L. R. 6 Q. B. 738, where Blackburn, J., speaking of the Sewers Act (32 Hen. 8, c. 5), says that that Act has always received the construction that the rate is to be levied upon those who are benefited by works according to the value of their properties. These cases all show that the question really is benefit or no benefit, and not the *quantum* of benefit received by any individual in respect of his property. The decision of the quarter sessions was therefore right, and ought to be affirmed.

Foote, Q.C., replied.

WRIGHT, J.—The proposition which has been contended for on behalf of the drainage board is one which, if it had been well founded in law, would have found authoritative expression in cases decided a long time ago. It is a proposition which would involve very great interference with the *primâ facie* quality of the incidence of rates in respect of private interests. It would involve complicated inquiries and decisions as to the extent of the benefit derived by one property as compared with another; and the difficulty of working out appeals against rates based on any such principle would have been almost insuperable. I can hardly think that any such proposition as that can have existed without attention having been called to it, and without its having been familiarly known to the great lawyers who have been engaged in cases of this kind. I can see no one clear or satisfactory authority in favour of the contention. The only authority that seems to me to be at all seriously in favour of it is *The Metropolitan Board of Works* v. *The Vauxhall Bridge Co.* There an opinion was expressed, admittedly an extra-judicial opinion, but an opinion by very great authorities on questions of this kind; but to my mind the opinion which they expressed was not an opinion which carries Mr. Foote's contention as far as he requires. I should myself have doubted whether the judges in that case meant to say more than that according to the established law of sewers commissioners, lands could only be rated which were benefited by the sewerage works; and further it seems to me that whatever was said in that case was said in relation to the effect of a special Act, which provided that due effect should be given to reductions or allowances in relation to the rates, to say nothing whatever of specially high assessments based upon special interests and the exclusion of floods. Besides being an opinion extra-judicial, and besides being ambiguous and based on a special Act, it is open to the further observation that

in the case of *Pew* v. *The Metropolitan Board of Works*, decided in 1865, the court, although they expressed the view that the judges in what they said in the *Vauxhall Bridge case* spoke in the sense for which Mr. Foote contends, yet they did express the view that that extra-judicial expression of opinion in the *Vauxhall Bridge case* was one which did not represent the law as the judges in the case of *Pew* v. *Metropolitan Board of Works* themselves understood the law; but in deference to the authority of the judges who decided the *Vauxhall Bridge case*, they did not expressly overrule it, or expressly say that they disagreed with it, because they had another way of getting over the difficulty, which other way they adopted. One of the very same judges—namely, Blackburn, J., who in 1865 intimated his doubts as to the *dictum* in the *Vauxhall Bridge case*, and who had his attention called to the matter in 1871, in the case of *Griffiths* v. *Longdon Drainage Board*, laid down the law—*obiter*, it is true—but still in terms inconsistent with the contention of the respondents in this case; and he laid it down as I believe it should always have been understood, that the rule is that in the case of these rates made by sewers commissioners only those can be rated who derive benefit from the works. That is a rule very different from what the respondents in this case are contending, which is that within the district the commissioners may rate individual properties according to the proportion in which they derive benefit from the works. I come to the conclusion, therefore, on the authorities that the contention of the respondents fails, particularly having regard to the fact that in *Reg.* v. *Head*, Crompton, J., goes out of his way to say that he was not a party to the extra-judicial opinion; and Cockburn, C.J., to my mind says that all he meant was to repeat the doctrine of Callis on Sewers, which, stated simply, is that no person could be rated for these rates unless he got benefit from the works. He did not mean to say that the rate should be according to the benefit; and Callis certainly does not say that the land is to be rated in proportion to the benefit.

I ought also to refer to section 14 of the Sewers Act, 1833 (3 & 4 Will. 4, c. 22). I do not think that it gives us much help in deciding this case, but I refer to it because it may be that these commissioners would wish to proceed under that Act if they find that the view which I am expressing in this case is one which must govern their actions apart from the Act of 1833. I very much doubt whether it is competent for them, under that Act, 3 & 4 Will. 4, c. 22, s. 14, to constitute special districts by taking out individual properties here and there, and making some of them into special districts, according to the height they may stand above the marsh. If we look closely at section 14, we see that it is directed to a state of things that was well known, or became well known later—namely, the constitution of what were called special drainage districts — that is, districts in which the local expenditure was to be raised for the purpose of the special district by a fund levied in the special district and expended in the special district. I do not see how it would be possible to work out a levy and expenditure of moneys for sewerage purposes within a complicated and artificial district composed of isolated properties within any given area, separated from each other by other properties in the way in which it would be necessary to do it if any benefit were to be obtained by adopting and applying section 14 of the Act of 1833. It seems to me that it is impossible to do complete justice in all individual cases in this matter; and that all that can be done is to constitute districts within which the principle can be applied, so that each of such districts derives more or less benefit from the operations in question, as distinguished from dealing with individual cases. I think therefore that the justices were right.

DARLING, J.—I am of the same opinion, and in giving this decision we are plainly deciding contrary to what was the opinion of the court in the *Vauxhall Bridge case*. I do not quite agree that that opinion was ambiguous. I think it means what the drainage board have here contended for, and I am fortified in that opinion by finding that Crompton, J., when he came to consider the matter, found he was wrong in the doctrine to which he appeared to have given his assent, and did his best to withdraw from responsibility for that judgment by saying that he had not been in court all the time. That case is hardly binding, and cannot in fact be binding on this court, because the opinion there expressed is admitted to be extra-judicial so far as that particular point is concerned. The same remark, it appears to me, applies to the observations of Blackburn, J., in *Griffiths* v. *Longdon Drainage Board*, where he says: "But these objections seem to me quite untenable, for the Sewers Act, 32 Hen. 8, c. 5, has always received the construction that the rate is to be levied upon those who are benefited by works according to the value of their properties." Those observations were not necessary to the decision of that particular case, which turns upon other points, and the *Vauxhall Bridge case* is not therefore disposed of by a court of adequate jurisdiction, as was contended, and as would have been the case if those remarks of Blackburn, J., had been necessary to the decision of *Griffiths* v. *The Longdon Drainage Board*. So far as one can see, the principle which, I take it, was laid down in the *Vauxhall Bridge case* was not commonly act-d upon before or since that time, and to act upon it would be a very difficult and complicated matter. Therefore I am content to leave the law as I find it, saying that the *Vauxhall Bridge case* is not binding upon this court.

Order of quarter sessions affirmed; leave to appeal.

Solicitors for the appellant, *Geare, Son, & Pease*, for *Hill & Son*, Langport.

Solicitor for the respondents, *Louch*, for *Louch & Poole*, Langport.

Prob. Div. & Adm. Div. } Dec. 1, 2, 7.
Probate. }

CADELL AND ANOTHER *v.* WILCOCKS AND OTHERS. (*a.*)

Probate — Limited power of appointment — Will in exercise of power—Subsequent wills—No clause of revocation.

A testatrix made a will in 1890, *in which* (inter alia) *she exercised a limited power of appointment under her father's will. She made a second will in* 1894, *and a third will in* 1895, *neither of which contained words of revocation nor any execution of the limited power of appointment. Otherwise each of the later wills dealt with the whole of the testator's property, so that the* 1894 *will was revoked by the* 1895.

Held, that the wills of 1890 *and* 1895 *must be both admitted to probate.*

Hearing of probate action before the court itself.

The plaintiffs, executors of Mrs. Lucy Biddalph, widow, deceased, claimed probate of three testa-

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

mentary documents—viz., a will dated the 26th of April, 1890, which contained an exercise of a power of appointment amongst her children over £4,000 under the will of her father; a will dated the 5th of July, 1894, dealing with the whole of her property, but not expressly purporting to be in exercise of the said power; a similar will dated the 5th of September, 1895.

The defendants, Anne A. W. Wilcocks, Middleton Biddulph, Assheton Biddulph, and Lucy Biddulph Colclough, a grand-daughter of the deceased and an infant, by her guardian *ad litem*, asked that the third will only should be admitted to probate; and the first three defendants, who appeared separately from the last, alleged undue execution of all three documents.

Bargrave Deane, Q.C., and *Barnard*, for the plaintiffs, referred to *Methuen* v. *Methuen*, 2 Phillim. 416, at p. 426; *Lemage* v. *Goodban*, L. R. 1 P. & D. 57, 14 W. R. Prob. Dig. 21; *In the Goods of Merritt*, 1 Sw. & Tr. 112, 7 W. R. Div. Dig. 9; *Hughes* v. *Turner*, 4 Hagg. Ecc. 30, at p. 71.

Inderwick, Q.C., and *Priestley*, for the defendant L. B. Colclough, cited also *Jones* v. *Tucker*, 2 Mer. 533; *Andrews* v. *Emmett*, 2 Bro. Ch. Cas. 297; *Nannock* v. *Horton*, 7 Ves. 391; *Sotheran* v. *Dening*, 20 Ch. D. 99, 31 W. R. Dig. 227; *In re Kingdon, Wilkins* v. *Pryer*, 34 W. R. 634, 32 Ch. D. 604; *Foulkes* v. *Williams*, 42 Ch. D. 93, 37 W. R. Dig. 137.

Lambert Bond, for the other defendants.

Deane, Q.C., in reply.

Cur. adv. vult.

Dec. 7.—JEUNE, P., read the following judgment: The question in this case is, Which of the three wills, made respectively on the 26th of April, 1890, the 5th of July, 1894, and the 5th of September, 1895, by the testatrix, Mrs. Lucy Biddulph, should be admitted to probate? The father of the testatrix, Robert Bickerstaffe, left £16,000 among his four daughters in equal shares for life, with power of appointment to each of them by will amongst her children, and in default of appointment to her children equally. At the time of the will of 1890 the testatrix had two daughters—Anne, then married, and Gertrude, then single, and three sons—Middleton, Assheton, and Franc. By the will of 1890 the testatrix, after revoking all previous wills, gave her daughter Gertrude the sum of £4,000 absolutely for her sole use and benefit, describing it as "being the sum left to me by the will of my father the late Robert Bickerstaffe." She then bequeathed £50 to her steward Finton M'Donald and the residue of her property to her five children equally, and appointed her sons Middleton and Assheton executors. It was agreed in argument before me that this was a good execution by the testatrix of the limited power of appointment vested in her by the will of her father. Between the wills of 1890 and 1894 the daughter Gertrude married Mr. Nevill Cadell, and I understand that the sons Middleton and Assheton received a benefit under the will of an uncle, the testatrix's brother. By her will of 1894 the testatrix bequeathed to her daughter Gertrude "the sum of £4,000 for her own absolute use and benefit and to dispose of as she may think fit." She then gave £50 to her steward Findon M'Donald and the residue of her property to her children Franc and Gertrude equally, and appointed Franc, Gertrude, and the said Nevill Cadell executors. Between the wills of 1894 and 1895 Franc, the son of the testatrix, and also the steward died. A letter of the testatrix containing her instructions for the will of 1895 was produced to me, but I do not think it material. By the will of 1895 the testatrix made a bequest to her daughter Gertrude in these terms—"All the property, real, freehold, or personal, wheresoever situate of which I may die seised or possessed for her own absolute use and benefit and to dispose of as she may think fit"; and gave the same in case of her daughter predeceasing her to her daughter's husband, Nevill Cadell, and appointed her daughter and Mr. Cadell executrix and executor. Neither the will of 1894 nor the will of 1895 contained any words of revocation; and it was admitted, for the purposes of the argument before me, that neither the terms of the will of 1894 nor those of the will of 1895 were sufficient to effect a valid execution of the limited power of appointment vested in the testatrix.

I think that this case is governed by the familiar principle of law stated in Williams on Executors, 9th ed., p. 138, and approved by Lord Penzance in *Lemage* v. *Goodban* that the mere fact of making a subsequent testamentary paper does not work a total revocation of the prior one unless the latter expressly or in effect revoked the former, or the two be incapable of standing together; and if a subsequent testamentary paper, whether will or codicil, be partially inconsistent with one of earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent. In this case there was clearly no express revocation, in whole or in part, of the will of 1890 by either the will of 1894 or the will of 1895. I assent to Mr. Inderwick's contention that had there been a general clause of revocation in either the will of 1894 or that of 1895 it would have revoked the whole will of 1890, including the execution of the power contained in it. The opinion, indeed, of the delegates in the case of *Hughes* v. *Turner*, if correctly reported, would appear to be to the effect that a clause of revocation *per se* does not revoke the portion of an earlier will which has executed a power; and *In the Goods of Merritt* and *In the Goods of Joys*, 4 Sw. & Tr. 214, 9 W. R. Prob. Dig. 7, Sir Cresswell Cresswell expressed a similar opinion. It might be considered doubtful whether the case of *Sotheran* v. *Dening* in the Court of Appeal overruled those authorities because weight was given to the consideration which arose in that case, that by virtue of the 27th section of the Wills Act a general bequest operated on the subject-matter of the power of appointment, and so strengthened the evidence in favour of an intention to revoke its previous execution. But in *In re Kingdon* the question of revocation by a general revocatory clause arose simpliciter, there being no subsequent provision relating to the subject-matter of the power in question, and Kay, J., acting on the authority of *Sotheran* v. *Dening*, held that a will executing a power was revoked *in toto* by general words of revocation in a subsequent will. The effect of Kay, J.'s, decision is, I venture to think, that, on this point of law, common sense at last prevailed. I cannot understand why express words revoking all previous wills should be supposed to spare an execution of a power contained in one or more of them from the fate inflicted on all the rest of their contents. But in the present instance there are no express words to revoke the will of 1890.

Next, is there anything in the wills of 1894 or 1895 inconsistent with the execution of the power in the will of 1890, or, in other words, is there anything that by implication effects a revocation of that execution? It is not necessary to consider whether, if the power of appointment in this case had been general, and not as it was, limited, the general bequest in the wills of 1894 and 1895 would have been not only by virtue of the 27th section of the

Wills Act, effectual to execute the power, but also sufficient to revoke a previous execution of it. It is, I think, clear that these general words of bequest, which do not execute the limited power, as the 27th section of the Wills Act has no application, cannot revoke or affect its previous execution. The wills of 1890 and 1895 can, therefore, stand together, and, subject to proof in common form, there should be probate of both of them. The will of 1894 I regard as revoked by that of 1895, as both wills profess to deal with the whole of the testatrix's own property.

Solicitors for the plaintiffs, *Clarke & Blundell.*

Solicitors for the defendants Wilcocks and others, *Boxall & Boxall.*

Solicitor for the defendant Cololough, *E. R. Crump.*

Prob. Div. & Adm. Div. } Jan. 24.
Admiralty. }

"THE KNIGHT OF ST. MICHAEL." (*a.*)

Marine insurance—Policy on freight—Loss by fire—Meaning of general words "all other losses and misfortunes."

A portion of a cargo of coal, the freight on which was insured against loss by fire, and also against "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the subject-matter of the aforesaid subject-matter of insurance, or any part thereof," having become heated during the course of the voyage, on which freight was insured, was discharged and sold at an intermediate port, where the master, having discovered the heating of the cargo, had put in for the general safety of the ship, freight, and cargo. None of the cargo had been on fire, and the portion sold fetched the price of sound coals, less the expenses of discharging and an allowance for damage by handling.

The shipowners claimed from the underwriters for a loss of their freight on the portion of cargo so discharged and sold; and it was agreed that the underwriters would not rely on the defence that the ship was unseaworthy, or that the condition of the cargo improper.

Held, that the shipowners were entitled to recover the loss of freight claimed as a partial loss under the policy.

This was a special case stated by agreement in an action instituted on behalf of Robert L. Greenshields, on behalf of himself and others, the owners of the ship or vessel *Knight of St. Michael*, against underwriters on freight by *The Knight of St. Michael*, of recover a loss of freight amounting to £1,338 2s. 4d., as a partial loss under a policy by which the freight of *The Knight of St. Michael* from Cape Town to Newcastle, New South Wales, was insured by the defendants.

The averments in the special case, and the contentions of the counsel for the plaintiffs and defendants, appear from the judgment.

Of the questions which the special case stated for the opinion of the court, the only one at issue at the time of the hearing was the following: Are the defendants liable to make good to the plaintiffs the loss of freight mentioned in the special case as a partial loss under the above-mentioned policy.

Dec. 15, 16, 17.—*Carver, Q.C.*, and *Bateson*, for the plaintiffs.

Joseph Walton, Q.C., and *Scrutton*, for the defendants.

The following authorities were cited in addition to those referred to in the judgment: *The Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser, & Co.*, 36 W. R. 337, 12 App. Cas. 484; *Pirie* v. *The Middle Dock Co.*, 44 L. T. Rep. 426, 29 W. R. Dig. 202; Phillips on Insurance, ss. 1097-8, 1115; *Bondrett* v. *Hentigg*, Holt Nisi Prius Cas. 149; *Gordon* v. *Rimmington*, 1 Camp. 123; *Kidston* v. *The Empire Marine Insurance Co.*, 15 W. R. 63, L. R. 1 C. P. 535; *Aitchison* v. *Lohre*, 28 W. R. 1, 4 App. Cas. 755; *The City Fire Insurance Co.* v. *Corlies*, 21 Wendell (American) 367; Parsons on Insurance, vol. i., p. 562; *Ballantyne* v. *Mackinnon*, 45 W. R. 70, [1896] 2 Q. B. 455; *Levy* v. *Baillie*, 7 Bing. 349; *Stanley* v. *The Western Insurance Co.*, 16 W. R. 369, L. R. 3 Ex. 71; *Farnworth* v. *Hyde*, 13 W. R. 613, 18 C. B. N. S. 835.

Cur. adv. vult.

Jan. 24.—BARNES, J.—This case raises certain novel and interesting questions of marine insurance law, and it is necessary that I should first state the facts which I find, and upon which I base my judgment.

The plaintiff and others, on whose behalf he sues, are the owners of the sailing ship *Knight of St. Michael.* On the 1st of November, 1895, she was chartered by the owners to certain charterers to carry a cargo of coals from Newcastle, New South Wales, to Valparaiso at a freight of fifteen shillings per ton payable on delivery. The plaintiff, on behalf of himself and the other owners, effected policies of insurance with the defendants for £2,500 upon the freight valued at £2,500 on the voyage in question. The policies were in the usual form, and the perils insured against included perils "of the seas, fire, jettisons, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof."

The cargo, consisting of 3,206 tons of coal, was shipped at Newcastle in January, 1896, and the vessel sailed on her voyage from that port on the 1st of February. On the 2nd of February it was discovered that part of the cargo was hot, and that the heat was increasing rapidly; and thereupon the master, for the general safety of the ship, freight, and cargo, determined to put into the port of Sydney. The vessel was accordingly headed for Sydney, where she arrived on the 4th of February. Surveys were held on the cargo at various dates, and the reports of survey set out in detail the steps taken with regard to the cargo. In the result 1,706 tons of coal were discharged and sold upon the recommendation of the surveyors. The vessel finally sailed from Sydney about the 31st of March with the remaining 1,500 tons of coal, which she delivered at Valparaiso. No freight was paid or payable in respect of the coal sold at Sydney, and the plaintiffs and his co-owners have lost that portion of the freight, amounting to £1,338 2s. 4d., which otherwise they would have earned under the said charterparty.

In the special case it is said that the defendants do not rely on unseaworthiness of ship, or on improper condition of cargo, as a defence to any claim there may be. If the action had been by the cargo-owners against their underwriters for the loss of the coal, I presume that the claim would have been defended on the ground that the loss was due to the inherent vice of the coal; but the position of the shipowners with regard to the freight is different. I find that it was necessary for the safety of the whole adventure for the vessel to put into Sydney and discharge the coal landed there, and that it was reasonably certain that if she had continued on her direct voyage the temperature of the coal would have continued to rise until spontaneous combustion

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

ensued; and that had she so continued the ship and cargo would in all probability have been destroyed by fire. I further find that the coal landed at Sydney could not have been reloaded and carried with safety to Valparaiso, and was necessarily and properly sold at Sydney. I also find that no part of the coal was ever actually on fire.

The owners of the vessel, being the persons interested in the freight which has been lost by perils insured against by the policies, claim the right to recover directly from the defendants for the loss. The defendants, on the other hand, contend that there has been no loss of freight by perils insured against by the policies, and, although willing to concede that the freight lost was sacrificed to avert a probable loss by fire, and therefore should be made good in general average, they maintain that they are only liable for the share to be contributed in general average by the shipowners in respect of their interest in the freight.

These contentions raise the question whether, although no fire actually broke out on board the vessel, the defendants may be made directly liable for the loss on the ground that it was, in the circumstances, due to the operation of perils insured against and not merely for the share of the loss which would be borne by those interested in the freight if the loss should be adjusted as a general average loss.

It was formerly considered, in case of a sacrifice of property for the preservation of ship, freight, and cargo from losses for which underwriters would be liable, that the only liability falling upon the underwriters of the property sacrificed was to contribute their respective proportions to the amount required to make good the loss in general average; but it was decided in the well-known case of *Dickenson* v. *Jardine*, 16 W. R. 1169, L. R. 3 C. P. 639, that underwriters are directly liable for a partial loss of the subject insured, occasioned by a general average sacrifice, and that having paid the assured they are entitled to stand in his place with respect to the general average contribution. It was further, held, in *Price* v. *A1 Ship's Small Damage Insurance Association*, 37 W. R. 566, 22 Q. B. D. 580, that such partial loss as aforesaid is not a particular average loss. The distinction drawn by the defendants between these cases and the present is that in the former the losses were proximately caused by perils enumerated in the policies, the goods in the first case having been jettisoned in order to avert an existing peril of the sea, and in the second the ship's materials having been cut away and cast overboard in order to avert a similar existing peril, whereas in the present case the defendants contended that the loss was not caused proximately by an existing fire, but by the steps taken in consequence merely of fear of a fire breaking out. Cases were cited to show that a loss caused by steps taken in consequence of fear of peril and not to avert an existing peril is not covered by an ordinary marine policy. It was not disputed that if fire had in any degree actually broken out, and the loss in question had happened to avert its consequences, the plaintiffs could recover directly from the defendants.

Now, I have found that fire did not actually break out, but it is reasonably certain that it would have broken out, and the condition of things was such that there was an actual existing state of peril of fire, and not merely a fear of fire. The case is peculiar, and not exactly analogous to that of any other peril. The danger was present, and if nothing were done spontaneous combustion and fire would follow in natural course. In effect the concession of the defendants admits this, because they do not dispute their liability for the share of the loss in general average. But in order to give rise to general average there must have been imminent danger to ship and cargo—that is to say, real substantial danger. I have found that such danger existed in this case. Then, does it make any difference that the fire had not actually broken out? I think not in the circumstances. There was imminent danger of fire, and an existing condition of things producing this danger, and if this cannot, strictly speaking, be termed a loss by fire, it is, in my opinion, a loss *ejusdem generis*, and covered by the general words, "all other losses and misfortunes, &c."

This view is supported by the case of *Butler* v. *Wildman*, 3 B. & Ald. 398, where a master of a Spanish vessel, in order to prevent a quantity of dollars from falling into the hands of an enemy by whom he was about to be attacked, threw the same into the sea, and was immediately afterwards captured. It was held that the loss in that case was a loss by jettison or by enemies, and if not strictly a loss by either peril it was a loss within the general words. Best, J., said: "This loss comes within the general words of the policy. The use of these words is to enlarge the construction of the terms by which particular losses are before mentioned, and to extend them to cases coming very near but not precisely within the specified losses. Thus one of the losses particularly specified is a loss by enemies. If there had been no general words, the loss by enemies might be said only to include an actual taking or destruction by the hand of the enemy (although it may be observed that such a loss would fall within the words, takings at sea, men-of-war, letters of mart and countermart); the general words, however, afford a complete answer to such an argument, by including all losses which are the consequences of justifiable acts done under the certain expectation of capture or destruction by enemies. The loss in the present case is the consequence of one of those justifiable acts." In further support of this view I may refer to the judgment of Kelly, C.B., in *Stanley* v. *The Western Insurance Co.*, 16 W. R. 369, L. R. 3 Ex. 71; Porter's Insurance Law, 2nd ed., p. 123; the Canadian cases of *McGibbon* v. *Queen Insurance Co.*, 10 Lower Canada Jurist 227; *Harris* v. *The London and Lancashire Fire Insurance Co.*, 10 Lower Canada Jurist 268; and the case of *Nobel's Explosive Co.* v. *Jenkins & Co.*, 1 Com. Cas. 436, 45 W. R. Dig. 147.

I am therefore of opinion that the defendants are liable directly to make good to the plaintiffs the loss of freight as a partial loss under the policies. I may add that the case does not raise, and I am not asked to determine any question as to the right of the defendants to deduct in settling the loss the amount which the plaintiff and his co-owners, as owners of the ship, are liable to contribute in general average towards the loss of freight.

Solicitors for the plaintiffs, *Bateson, Warre, & Wimshurst.*

Solicitors for the defendants, *Hill, Dickenson, & Co.*

Privy Council.

(*From the Court of Appeal, New Zealand.*)

March 5.

ECCLES AND OTHERS *v.* MILLS AND OTHERS. (*a.*)

Lease—Landlord and tenant—Covenant—Specific devise of lease—Burden of covenant—Residuary legatee—Liability of lessor's estate.

By a deed dated the 2nd of September, 1868, a lessor covenanted as follows: "The lessor, his heirs or assigns, will, at his or their own expense, on or before 1st day of September, 1869, completely finish laying down in good English grass, and in accordance with the rules of good husbandry, the 1,000 acres which the lessor has already commenced laying down in English grass."

This covenant was followed by a declaration at the end of the lease in these words: "It is hereby declared that there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto."

The lessor died, and by his will specifically devised the land which was subject to the lease. The covenant was broken, and the damages assessed.

Held, that the covenant must be construed as qualified and controlled by the declaration, and therefore did not run with the reversion; and, moreover, that, since the covenant was not incident to the relation of landlord and tenant, the liability for the breach should be borne by the testator's general estate.

On the death of a lessor the burden of a covenant to ensure premises being put into a condition fit for occupation by a tenant should, as between the specific devisee and the testator's general estate, be borne by the general estate; but should the nature of the obligation constitute part of the relation of landlord and tenant, then the burden falls upon the devisee.

Mansel *v.* Norton, 31 *W. R.* 325, 22 *Ch. D.* 769, *and* Marshall *v.* Holloway, 5 *Sim.* 196, *considered.*

This was an appeal from the Court of Appeal in New Zealand.

The facts are set out in the judgment of their lordships.

Cozens-Hardy, Q.C., and *Butcher, Q.C.*, for the appellants.

Warrington, Q.C., *Russell Roberts*, and *C. A. Sargeant*, for the respondents.

The judgment of their lordships (Earl of HALSBURY, L.C., and Lords WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, SHAND, and DAVEY, and Sir RICHARD COUCH) was delivered by

Lord MACNAGHTEN.—The question in this case was whether a sum of money recovered more than twenty years ago by the lessee of a New Zealand farm from the executors of his lessor as compensation for the non-fulfilment of a certain covenant in the lease ought not to have been charged against the specific devisees of the farm instead of being paid as it was out of the lessor's general estate.

The claim, though it arose so long ago, is not barred by statute or by *laches* or by any rule of equity. The liability is not dealt with directly by any provision in the lessor's will. The answer to the question must therefore depend on the true meaning and nature of the covenant. Is the covenant one that runs with the reversion? If so, is that circumstance of itself enough to throw the liability on the reversion in exoneration of the general estate? If the covenant does not run with the reversion, does the reversioner necessarily escape all liability? or must the inquiry be carried further? May not the liability depend on other considerations than the rights and remedies of lessees under the statute of 32 Hen. 8 and the question whether the agreement is or is not under seal? May it not perhaps be that as between the objects of the testator's bounty the liability depends on the consideration whether the covenant is properly incident to the relation of landlord and tenant or is in its nature preliminary and introductory to the commencement of that relation—whether it is, so to speak, a condition of the letting or a condition of the lease? These questions were all debated more or less fully at the bar. They are certainly none of them free from difficulty, and there does not appear to be any authority applicable to the peculiar circumstances of the case.

By deed dated the 2nd of September, 1868, the lessor, John Jones, of Dunedin, in the Province of Otago, demised to Francis Dillon Bell a farm of some 4,000 acres in that province known as Meadowbank. The term was fourteen years from the 1st of September, 1868. The rent was to be £1,000 a year. The lease contained a covenant by the lessor for himself, his heirs, executors, administrators, and assigns, in the following words: "The lessor, his heirs or assigns, will, at his or their own expense, on or before the 1st day of September, 1869, completely finish laying down in good English grass, and in accordance with the rules of good husbandry, the 1,000 acres which the lessor has already commenced laying down in English grass." If there were nothing more in the lease bearing on the construction of this covenant, and nothing else to be considered, there would undoubtedly be implied in and by reason of the covenant to "finish" the operation in question an agreement on the part of the lessor to lay down in English grass and according to the rules of good husbandry so much and such parts of the 1,000 acres referred to as had not been laid down in that manner already. There would also be implied on the part of the lessee an authority or licence for the lessor to enter upon the land and cultivate it for that purpose. And if such an agreement and such a provision were implied in the lease it would be difficult to contend that the burthen of the covenant did not run with the reversion so as to give the lessee a right of action and a remedy against the persons who might be assignees of the reversion at the time fixed for the complete fulfilment of the covenant.

The covenant, however, does not stand alone. It is accompanied and apparently controlled by the following declaration which is inserted at the end of the lease: "It is hereby declared that there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties thereto." The effect of this declaration, if it means what it says, is to qualify the preceding covenant by shutting out every possible implication which the terms of the covenant would seem to suggest or require.

The result, therefore, is that by the covenant as qualified the lessor warrants that he will on or before the 1st of September, 1869, completely finish laying down the 1,000 acres in good English grass according to the rules of good husbandry, but that he does not bind himself further in any shape or way. He does not agree to break up the land or to lay it down, or to do anything on the land in fulfilment of the apparent intention of the covenant. He has reserved no power of entry, nor is he given any authority to enter for that purpose. Still, if the operation is not found finished on the prescribed day he must be answerable in damages. That is the bargain betwe

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

the parties. They stand to be bound by the strict letter of their contract. They chose to draw the line there. They would not go one step further. Whatever there might be beyond the mere letter of the contract depending on inference or implication that was deliberately excluded—a singular provision, no doubt, whether it proceeded from mutual distrust or sprang from the fancy of the draftsman, or was adopted as a means of avoiding some difficulty of the moment. But the declaration is not open to any ambiguity. The language is as plain and as positive as language can be. And after all, perhaps the explanation is not so very far to seek if Mr. Bell's letter of the 2nd of July, 1869, which is in evidence, may be taken as an accurate description of the surrounding circumstances, and the position of the parties at the time when the lease was executed.

The treaty for the lease was, it seems, a very protracted affair. The great matter to be arranged was the laying down of the 1,000 acres in English grass. Mr. Bell counted upon this improvement to make the rent. At Mr. Jones' request he laid down about 250 acres. Mr. Jones set about doing the rest of the work himself. He ploughed the ground and he sowed it. Then he wanted Mr. Bell to accept the land as he was laying it down. Mr. Bell refused. The quality of the seed was not what it should have been: the best seed in the world would come to nothing on a single ploughing: the work would have to be done all over again. Everybody said so, friends and neighbours as well as the incoming tenant. Heedless of warning and deaf to advice Mr. Jones went on in his own way. When he had once ploughed and once sown the specified number of acres though no grass was to be seen he maintained that he had done all that was required. Mr. Bell would not yield. Mr. Jones was firm or perhaps obstinate. Fortunately they both appealed to the future. Time would tell who was right and who was wrong. So when it came to the point of granting the lease "a year was given," as Mr. Bell says, "to *prove*" whether the work had been properly done or not. Mr. Jones was content to pay the penalty if the fates were against him. But apparently as a point of honour he would not set his hand to anything implying an agreement to do more than he had done without expressly negativing any such implication.

Whether this explanation be satisfactory or not everybody must admit that in construing a contract the court is bound to give effect to every part of it. If a stipulation is found in the bond it matters little how it got there. It is not to be rejected because it may be unusual or ignored because twenty years afterwards the court cannot guess why it was ever introduced.

Mr. Jones did not live to see the end of his experiment. He died on the 16th of March, 1869. By his will which was made on the 20th of December, 1868, he divided his property among his children. Some of their shares he settled, including the share in which Meadowbank was comprised. He appointed executors and made them also trustees of the settled shares.

The appellants who claim under a voluntary conveyance represent the inheritance in Meadowbank. The principal respondents are the persons interested in the testator's residuary estate.

At the end of the first year of his tenancy Mr. Bell claimed compensation for breach of the covenant in question. The claim was originally made against the testator's executors as trustees of Meadowbank. The matter was referred to arbitration. By an award dated the 2nd of March, 1871, the arbitrators found that the covenant had been broken. They assessed the damages at £2,296 7s. 4d., and directed that the parties contesting the claim should pay that sum to Mr. Bell as executors of Mr. Jones. The money with interest and costs was ultimately paid to Mr. Bell out of the testator's personal estate not specifically bequeathed.

The payment was directed to be borne by the testator's executors in deference to an opinion of Sir Roundell Palmer and Mr. T. D. Archibald, afterwards Archibald, J., who advised that the covenant did not run with the reversion, and that the damages would be payable out of the testator's general estate.

The learned counsel, of course, gave no reasons with their opinion. But it can hardly be doubted that they proceeded on the principle that effect ought to be given to every term of the contract.

The propriety of the payment was not questioned at the time or for many years afterwards. Lately, however, difficulties arose in regard to some items in the trustees' accounts, and two suits were instituted for partial administration of the testator's estate. In the course of the second suit the question now at issue came to be discussed. At the suggestion of the judge the pleadings were amended. All parties interested were brought before the court, and the suit was turned into a suit for general administration. Williams, J., was of opinion that Mr. Bell's claim ought to have been satisfied by the specific devisees and that the testator's general estate ought to be recouped by a charge on Meadowbank. A decree to that effect was accordingly pronounced with consequential directions. On appeal the court unanimously affirmed the decree.

Their lordships are unable to concur in the view taken by Williams, J., and the Court of Appeal in New Zealand. They think that the covenant in question must be construed as qualified and controlled by the declaration with follows it. On that construction the covenant does not run with the reversion, and inasmuch as in their opinion the covenant is not incident to the relation of landlord and tenant they think that the liability for the breach of the covenant properly fell to be borne by the testator's general estate.

The view taken by their lordships of the nature and meaning of the covenant renders it unnecessary to determine upon whom as between the different objects of the testator's bounty the liability would have fallen primarily if the covenant had been unqualified and uncontrolled by any other provision in the lease. But inasmuch as Williams, J., proceeded on the assumption that the covenant was unqualified and on the admission of counsel that the covenant ran with the reversion, and as his judgment in its entirety was approved by the Court of Appeal it would hardly be right for the board to pass the question by in silence.

The reasoning of Williams, J., in substance seems to be this: The covenant runs with the reversion. It is therefore not merely an obligation imposed by statute on the reversioner but a burthen or charge upon the reversion itself. A person who takes a benefit under a will must take the benefit with any burthen that happens to be attached to it. Then there are plenty of cases where legatees of leaseholds have tried in vain to chift the burthens incident to their leasehold interest and throw them on the testator's general estate; those cases are in point; there the burthen was incident to the lease; here it is incident to the reversion. The leaseholder bears the burthen incident to his holding; the reversioner must in like manner bear the burthen incidental to his estate.

This reasoning does not appear to their lordships altogether satisfactory. It does not perhaps keep

sufficiently distinct the two principal questions which on the assumption that the covenant runs with the reversion would present themselves for consideration —the question whether the covenant is a burthen or charge on the reversion itself, and the question whether the covenant is in its nature incident to the relation of landlord and tenant. In regard to both their lordships have some difficulty in accepting the view of the learned judge. Granted that the covenant runs with the reversion it does not follow that the liability under the covenant is a burthen upon the reversion. At common law no covenant ran with the reversion. By the statute of Henry 8 all lessees have "like action and remedy against all persons . . . having any gift or grant . . . of the reversion of the said lands and hereditaments so letten . . . for any condition or covenant expressed in the indentures of their leases" as they might have had against their lessors. They cannot have any greater right or any more extended remedy. In the lifetime of the lessor the covenant was not a burthen on the land in the hands of the lessor. After his death how can it be a burthen on the land in the hands of the specific devisee? The appellants do not dispute that if the covenant ran with the reversion the specific devisees of Meadowbank came under liability to Mr. Bell. Whatever liability the statute threw on the specific devisees as assignees of the reversion that they were bound to bear as between themselves and the lessee. But the testator's estate was also liable and residuary legatees take nothing until the testator's liabilities are satisfied. If the liability for the breach of the covenant was not a charge on the inheritance as Williams, J., seems to have thought it was why should the specific devisees bear it rather than the testator's estate merely because for the protection of tenants the statute gives the lessee an additional remedy against the lessor's assignees? The inquiry must go deeper. It would seem that the nature of the obligation in each particular case must determine the question. If it is in its nature incident to the relation of landlord and tenant it would only be fair that the burthen should be borne by the devisee as between him and the testator's estate, falling on him as landlord whether the agreement bears a seal or not. That seems to have been the principle of *Mansel* v. *Norton*, 31 W. R. 325, 22 Ch. D. 769, where it will be observed there was no covenant to run with the reversion, though, by some slip in the report the Master of the Rolls is made to say that there was. The lease was not under seal and therefore the statute had no application. The agreement there was that the lessor should buy the tenant's property at the end of the term, and it was held that as between the specific devisee and the testator's estate this obligation, incident as it plainly was, to the relation of landlord and tenant, fell on the devisee. On the other hand, if the covenant is not in its nature incident to the relation of landlord and tenant—if the thing to be done is something preparatory to the complete establishment of that relation it would seem to be fair and in accordance with the probable wishes of the testator that the burthen of the covenant unperformed by him in his lifetime should be borne by his estate rather than by the specific devisees. In the present case the object of the covenant was to ensure the premises being put into a condition fit for the occupation of the tenant under the lease. Such a covenant is intended to be performed forthwith, not to remain attendant on the lease during its currency. In its nature it seems to be very different from a covenant by the landlord to keep buildings on the demised land in repair, or to pay for unexhausted improvements at the end of the lease.

The cases cited at the bar where the question was between a specific legatee of leaseholds and the testator's estate, are of little or no assistance in determining the question now under consideration. The only one cited in which the covenant could possibly be regarded as otherwise than incident to the relation of landlord and tenant (if indeed any covenant in a lease on the part of the lessee can be regarded as otherwise than incident to that relation) was the case of *Marshall* v. *Holloway*, before Shadwell, V.C., 5 Sim. 196. There the lessee covenanted to make certain improvements in existing buildings and to erect certain new buildings on the demised land within a comparatively short period. The lessee died before the period expired without having completely performed his covenant. It was held that the devisee of the leasehold ought to be exonerated by the general personal estate from the cost of completing the unfinished work. That case, if it could be accepted as an authority, would appear to go far beyond the position which the appellants seek to establish. The report, however, is so confused that it is not easy to say upon which, if any, of the various grounds touched upon in the judgment his honour desired to rest his decision. It is certainly not surprising to find that subsequent judges have differed on the point. Turner, V.C., felt considerably embarrassed by *Marshall* v. *Holloway* in a case before him (*Fitzwilliams* v. *Kelly*, 10 Hare 266) where the covenant was meant to be in attendance during the whole term of the lease and to have a recurring operation—a case in this respect apparently as different from *Marshall* v. *Holloway* as well could be. He thought Shadwell, V.C., must have relied on a provision in the will as to the payment of the testator's debts. Sir John Romilly, M.R., however, considered that the principle in *Marshall* v. *Holloway* and the principle in *Fitzwilliams* v. *Kelly* were one and the same—the principle being that the obligation of completing the testator's interest in the subject-matter of the bequest falls on the testator's general estate: see *Armstrong* v. *Burnet*, 3 W. R. 433, 20 Beav. 424, at pp. 431, 437. The Master of the Rolls seems to have thought that the fulfilment of the repairing and building covenant in *Marshall* v. *Holloway* was required to complete the testator's interest as lessee, or, in other words, that the fulfilment of that covenant might be regarded as antecedent and preparatory to the complete establishment of the relation of tenant and landlord. Whatever may be the true explanation of *Marshall* v. *Holloway*, their lordships agree with Williams, J., in thinking that it would not be satisfactory to rely on a case about which there is so much obscurity, though they cannot see that *Marshall* v. *Holloway* was virtually overruled, or, indeed, affected, by the decision of the Court of Appeal in *Hawkins* v. *Hawkins*, 28 W. R. 526, 13 Ch. D. 470, which seems to have been a very plain case and is one in which their lordships entirely agree.

Their lordships will humbly advise her Majesty that the decision under appeal should be reversed and that the suit should be dismissed with costs in the courts below so far as it seeks to throw the liability for the breach of the covenant in question on the specific devisees of Meadowbank. The respondents who represent the residuary legatees will pay the costs of the appeal, including the costs of the respondents the trustees. The last-named costs will be taxed as between solicitor and client.

Solicitors for the appellants, *Pollocks & Co.*

Solicitors for the respondents, *Blyth, Dutton, Hartley, & Blyth*; *Paines, Blyth, & Huxtable.*

Court of Appeal.

From Q. B. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 7, 8; March 11.

SMITH AND OTHERS (OVERSEERS OF WORTHING) v. RICHMOND (SURVEYOR OF TAXES). (a.)

Poor Law—Rating—Market garden—Land covered with greenhouses—"Agricultural land"—"Buildings or other hereditaments"—Liability of land covered with glass, being part of a market garden—Agricultural Rates Act, 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 5, 6, 9.

Land covered with glasshouses erected for the purpose of its cultivation is, though used solely as a market garden, a "building or other hereditament," and not "agricultural land," within the meaning of section 1, *sub-section* 1, *of the Agricultural Rates Act,* 1896; *and is, therefore, not entitled to the partial exemption from rates granted by that Act to "agricultural land."*

Decision of the Queen's Bench Division *reversed* (Vaughan Williams, L.J., *dissenting*).

Appeal from the Queen's Bench Division (Collins, L.J., then Collins, J., and Ridley, J.).

The land the rateable liability of which was in dispute was situated in the parish of Worthing. A considerable part of such land was covered with glasshouses used for its cultivation as market gardens.

Under section 6, sub-section 2, of the Agricultural Rates Act, 1896, and under the Agricultural Rates Order, 1896, it was the duty of the appellants, the Overseers of Worthing, to furnish to the assessment committee and to the surveyor of taxes, statements in a prescribed form, showing how much of the hereditaments included in their statement consisted of "agricultural land," and how much of "buildings or other hereditaments."

In their statements the appellants inserted the gross estimated rental and rateable value of the whole of the market gardens, whether or not part was covered with glass, under the description of "agricultural land."

The assessment committee, on the objection of the surveyor of taxes, decided that the statement, so far as it included land partly covered with glasshouses, was incorrect, and they struck out that entry.

The appellants then appealed to the quarter sessions for West Sussex.

On the hearing of this and the subsequent appeals, the hereditaments included in the notice of appeal being practically identical in character, it was agreed that the hereditament of one Robert Piper should be treated as a test case. The agreed facts as to Piper's hereditament were as follows: Piper was a grower of fruit, vegetables, and flowers at Worthing, and described himself and was commonly known as a market gardener and nurseryman. He was the owner and occupier of a piece of land rather more than four acres in extent, on which fifty-seven glasshouses or greenhouses were erected. These houses were used by him for growing tomatoes, cucumbers, and grapes, and to a smaller extent other vegetables, for sale. The houses—all of which were built upon dwarf brick walls like ordinary greenhouses—occupied about half of Piper's four acres of land, the rest consisting of vine borders, paths, and the stoke-holes for heating purposes.

The quarter sessions allowed the appeal, but stated a case for the opinion of the High Court.

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

In the High Court the judges differed, Collins, L.J., thinking that the decision of the quarter sessions was right, while Ridley, J., agreed with the assessment committee. The surveyor of taxes appealed to the Court of Appeal.

Sir Richard Webster, A.G., S. H. Day, and *A. H. Trevor,* for the appeal, referred to sections 1, 5 (*c*), 6 sub-sections (2) and (3), and section 9 of the Agricultural Rates Act, 1896; and to *Purser* v. *Worthing Local Board,* 35 W. R. 682, 18 Q. B. D. 818.

Joseph Walton, Q.C., and *A. C. Salter,* for the overseers.—A market garden is still a market garden, and therefore agricultural land, though it is covered with glass. The reason of the relief given by the Act applies to a case like the present.

They cited *London and North-Western Railway Co.* v. *Llandudno Improvement Commissioners,* 45 W. R. 350, [1897] 1 Q. B. 287.

Sir Richard Webster, A.G., replied.

Cur. adv. vult.

March 11.—The following written judgments were delivered:

LINDLEY, M.R.—The question in this case is whether glasshouses in or on a market garden are to be rated as buildings, or as agricultural land, under the Agricultural Rates Act, 1896. The court of quarter sessions held that the glasshouses ought to be rated as agricultural land. On appeal to the Queen's Bench Division the members of the court were equally divided, and the appeal was dismissed, but leave was given to appeal to this court.

The glasshouses in question are clearly buildings in the ordinary legal meaning of the word. The case stated leaves no doubt on this point. The question turns entirely on the true construction of the Agricultural Rates Act, 1896, 59 & 60 Vict. c. 16. The 9th section contains a definition of agricultural land, but no definition of buildings, nor of market gardens or nursery grounds. The Interpretation Act, 1889, contains, in section 3, a definition of land, and this word, when used in subsequent statutes, is to include buildings, unless a contrary intention appears. The Interpretation Act, 1889 (52 & 53 Vict. c. 63), contains no definition of buildings, market gardens, or nurseries. The 9th section of the Agricultural Rates Act, 1896, clearly shows that land there, cannot possibly mean or include buildings in the earlier sections, for the definition is that agricultural land means any land used as arable, meadow, or pasture ground only; market gardens and nursery grounds are, however, also declared in that section to be agricultural land, and this is the enactment which gives rise to the difficulty with which we have to deal. The definition in section 9, however, must not be used to contradict other parts of the Act, or to introduce anomalies which the language of the enacting parts of the statute do not justify. Market gardens and nursery grounds may or may not have buildings upon them. If they have not, no difficulty arises; but if they have, then comes the question, How are those buildings to be rated? To answer this question we must look to the enacting clause, which is section 1. [His lordship read the section, and continued:] Here we have "agricultural land" used in connection with, and, as I think, plainly contrasted with, "buildings or other hereditaments." Similar language is used in sections 5 and 6. This express mention of buildings makes the whole statute perfectly clear to my mind, and removes the doubt caused by the use of the words "market gardens and nursery grounds" in section 9.

The only conclusion at which I can arrive is that buildings are not to be treated as agricultural land

for rating purposes under this Act of Parliament. The case of *Purser* v. *Worthing Local Board* does not, in my opinion, assist the court in construing this Act of Parliament. That case merely shows that a market garden *primâ facie* includes the buildings upon it used for market-garden purposes. To urge that market gardens and nursery grounds do not cease to be so because they are more or less covered with glasshouses, is to urge what is quite true, but is beside the mark. The question is, How are such houses to be rated under this Act of Parliament? My answer is, if they are buildings, they must be rated as such, and not as agricultural land. Mr. Salter, in his very able argument, suggested that buildings used only for covering land which was cultivated under their protection ought to be distinguished from other buildings, and ought to be held to be agricultural land. I can find nothing to justify a distinction between one class of buildings and another for any such purpose as his argument requires. Section 5, clause (*c*), speaks, no doubt, of buildings used only for the cultivation of land; but this clause in no way shows that such buildings, or any others, are to be rated as agricultural land. The case of *London and North-Western Railway Co.* v. *Llandudno Improvement Commissioners* turned on the construction of a provision in another Act of Parliament, and does not really assist me to arrive at the true interpretation of the statute with which we have to deal. In my opinion the appeal must be allowed, and the orders of the Queen's Bench Division and of the quarter sessions must be reversed.

RIGBY, L.J.—The question to be determined in this case is in substance whether buildings within a market garden are to have the benefit of the partial exemption from rates provided for by the Act in favour of agricultural land as defined by the Act.

It will be convenient to take a general view of the Act, distinguishing first of all those parts of the Act which are relevant to the question of exemption, from those which are not, and then dealing with the relevant parts. The relevant parts seem to me to be section 1 (1), section 5, and section 9. The other sections are either merely formal, or concerned only with the way in which the deficiency caused by the partial exemption of agricultural land is approximately to be made up or compensated for by an annual grant to be fixed once for all, and to be paid in manner pointed out in detail during the period prescribed by the Act. Of course there might have been in some of these sections, or in the order made by the Local Government Board, which is to be read as part of the Act, some provisions or expressions throwing light upon the construction of the Act as to the exemption; but, after a careful examination both of the remaining sections and of the order, I have not found anything, unless, possibly, clause (*c*) of section 5 referred to by the Master of the Rolls, in any of them to help me materially in the determination of the question before the court. At any rate there is nothing to throw doubt on the conclusion which I am led to by the sections of the Act above specifically referred to. Section 1 (1) is the clause of the Act which gives the partial exemption, and of course the real question is as to the meaning of that clause. Section 5 is the section providing for changes in the law of rating necessary for giving effect to, and defining more particularly the exemption given by section 1 (1).

Section 9 is the interpretation clause, and as far as it defines the expression "agricultural land" it is of great importance, as, of course, we have to deal, not with agricultural land in any merely common or popular sense, but with the meaning of it as explained and defined in the interpretation clause.

We must, however, throughout bear in mind that the interpretation clause is not absolute, but ceases to be applicable wherever the context otherwise requires—that is to say, is inconsistent with the literal application of the portion of the interpretation clause under immediate consideration. I will, in the first place, try how far it is possible to arrive at a reasonably clear construction of section 1 (1), and section 5, without knowing precisely what is included under the expression "agricultural land." [His lordship read section 1, sub-section 1, and continued:] Here we find an exhaustive mention of all rateable hereditaments. They are separated into two (apparently mutually exclusive) classes, "agricultural land" forming one class, and "buildings and other hereditaments" the other. The agricultural land (whatever that may mean) is to have the benefit of the exemption, and that exemption is measured by being fixed at one-half of the rate in the pound payable in respect of buildings and other hereditaments. The sentence is only intelligible by observing and acting upon the plain assumption that what I may call the full rate is a uniform rate payable equally in respect of buildings and other hereditaments not being agricultural land. It is impossible, I think, to avoid the conclusion that the word "buildings" here includes all rateable buildings whatsoever, and if that is so we have at once, with reference to the expression "agricultural land," a context which must modify any part of the interpretation clause which, literally applied, would give a different and less extensive meaning to the word "buildings" as here used. That extensive meaning plainly involves that "agricultural land," as here used, cannot have any buildings upon it.

Before dealing with the language of section 5, it may be observed first, that in fixing the basis or standard for a county rate the rateable value of each parish as a whole is taken without specifying the value of separate hereditaments in the parish; secondly, that in valuation lists—except, I suppose, in the possible case of an entire parish being in the occupation of one person, if that really be an exception—separate hereditaments are specified, though, independently of this Act there is in general no necessity for dividing up and separately specifying the parts of the hereditaments in the occupation of a single occupier. The holding by the same occupier of, say, two or more farms, though held under different landowners, might have been treated as a single hereditament without any subdivision. These observations being borne in mind, we find that section 5 expressly includes in its opening words "every valuation list, and the basis or standard for any county rate." Sub-section (*a*) deals with every valuation list where separate hereditaments are specified. It has hitherto been sufficient to value the whole of any hereditament separately specified. You must henceforward state the value of the agricultural land part of the holding separately from that of any building or other hereditament. It does not say you shall separately specify as different hereditaments agricultural land, and buildings or other hereditaments. It is an alteration in the law of rating introduced for the purpose of ascertaining the extent of the exemption given by section 1 (1). Except so far as the law is expressly changed it remains as it was before; and it seems to me that the strictly proper course would be to specify as a whole the land, say, a farm, or it might be farms, in the occupation of one occupier, giving, of course, the rateable value of the whole, and then to superadd what is, for the purposes of this Act, wanted—that is to say, the value of the agricultural land comprised in the holding separately from the value of the rent of the holding. As this

provision is for the purpose of carrying out section 1 (1), the terms "agricultural land" and "any building" ought to mean the same as did the corresponding expressions used in section 1, sub-section (1) of the Act, but I would point out that it seems impossible to read the expression "or any building" used in section 5, clause (*a*), as equivalent to "any building not standing on the agricultural land spoken of." The case here is even more clear than that of section 1 (1), and strongly corroborates the view above given as to the meaning of that clause. Sub-section (*b*) of section 5 includes everything included in (*a*), and also the cases in which no separate hereditaments are specified. Sub-section (*c*) deals with every case of a hereditament consisting in part only of "agricultural land." I see no difficulty whatever in the wording of the section. On the interpretation above given of sub-section (*a*), or even, I think, without it, the total gross estimated rental of the mixed hereditament would in every case be known, or can be at once ascertained by the simplest possible arithmetical calculation.

In my judgment section 5 strongly corroborates the conclusion already arrived at from the consideration of section 1 (1)—viz., that all buildings whatsoever are to be put on the one side, and only agricultural land without buildings on the other.

Going now to the interpretation clause (section 9), and dealing, in the first place, with what may be called the more general part of the definition contained in the words "any land used as arable, meadow, or pasture ground only," it seems to me reasonably clear that these words of their own force exclude any land which has any building upon it. However useful a farmhouse and farm buildings may be in connection with arable, meadow, or pasture, they cannot, I think, in any reasonable sense of the words, be said to be land used as arable, meadow, or pasture only. The same observation would apply equally to buildings of minor importance, such as a cartshed, a barn, or a cattleshed, standing in and held with an enclosure the rest of which may be arable, meadow, or pasture. It would be straining language very much to say that any one of these, however useful for the purposes of the adjoining arable, meadow, or pasture, is itself used as arable, meadow, or pasture only. So far from any buildings being included in this part of the definition, they seem to me to be purposely and deliberately excluded. Then come the extensions of the previous definition to special cases where it might be doubtful whether they were already included, and among others to the special case of "market gardens." Now, assuming, as I do, that without a context, or without a different context, "market garden" may include the whole area of a holding held for market gardening purposes, including the site of any buildings, the question is what it means in this context.

I do not see on what reasonable ground the policy of excluding from agricultural land any buildings whatsoever (which down to the present point is in my judgment satisfactorily made out) should be treated as suddenly abandoned and replaced by a policy of including what may (as in the present case) practically amount to by far the greater and more valuable part of the holding, with the result of giving the exemption provided for by the Act, to buildings of greater extent and value than would be found upon many farms. If "market gardens" necessarily involved buildings, there might be more difficulty in the matter; but there may be a "market garden" without buildings, and it is not necessary to assume that a market garden with buildings was intended. At any rate, if the construction which I have given to section 1 (1) and section 5 (*a*) is correct, then the context will show that "market garden," when introduced into those sections, must be interpreted as meaning market garden so far as it is without buildings. It would be contradictory to say in section 1 (1): "The occupier of a market garden with buildings shall pay one-half only of the rate in the pound payable in respect of all rateable buildings"; and a similar observation would apply with not less force to the corresponding passage or passages in section 5.

Finding, as in my opinion I do find, in the Act itself a sufficient ground for the construction at which I have arrived, I do not think it necessary, or even legitimate, to inquire how other statutes differently worded have been construed—I will only say that in section 211, sub-section 1 (*b*), of the Public Health Act, 1875, on the construction of which *Purser* v. *Local Board of Worthing* was determined, not only is there an absence of the antithesis between "agricultural land" and "buildings" which is the very foundation of the present Act, but the word "buildings" is not even used at all.

VAUGHAN WILLIAMS, L.J.—I am very sorry to differ from the other members of the court. The construction of the Act is very difficult. There is no construction which, in my judgment, does not lead to results which it is difficult to suppose that the Legislature contemplated. In such a case one must be guided by the words of the sections, and not by balancing the difficulties of the respective results one against the other. The question in the case is whether that part of the land occupied by a market garden which is covered with glasshouses of the character stated in the case, comes within the exemption mentioned in section 1, sub-section 1, of the Agricultural Rates Act, 1896, so as to render the occupier liable to pay one-half only of the rate in the pound payable in respect of other hereditaments. I think that the land in question does fall within the exemption. I agree with Collins, L.J., that the cases of *Purser* v. *Worthing Local Board* and *London and North-Western Railway Co.* v. *Llandudno Commissioners* show that *primâ facie* this land covered with these glasshouses is part and parcel of the market garden, and therefore is agricultural land, the occupier of which is entitled to the benefit of this exemption. The form or collocation of words used in this Act is not new as defining partial exemption in rating cases. It is to be found as early as the Public Health Act, 1848, and in the Public Health Act, 1875, and has uniformly received such a construction that the hereditaments catalogued in the definition have been held to include the buildings thereon, whenever the buildings in question are part and parcel of the specified hereditaments. It remains to consider if there is anything in the tenor and details of this Act to lead to the conclusion that "market garden" and the other collocated words ought to receive a different construction in this Act, so as to exclude from "agricultural land" the buildings on each hereditament, whatever their character. I see nothing in the tenor of the Act, or in its details, to lead to such a conclusion, and if it had been the intention of the Legislature, when employing this old precedent for the definition of hereditaments to be partially exempted from rates, to use the word in a new sense, and exclude from the exemption all land covered with buildings, it would have been very easy to do so; and this has not been done.

I will now deal with the sections chiefly relied on, in the arguments at the bar, as indicating an intention by the Legislature to use these words in this new

sense. [His lordship read section 1, sub-section 1.] It is argued that in section 1, sub-section 1, of this Act there is a manifest intention to contrast agricultural land with buildings—*i. e.*, the buildings thereon. I think not. There is a contrast, but it is a contrast between agricultural land as defined, and "buildings or other hereditaments," a contrast, that is, between different classes of rateable hereditaments. The right inference from this contrast seems to me not to be that all buildings are to be excluded from agricultural land, but only such buildings as can, by the existing law, properly be dealt with for rating purposes as separate hereditaments.

Next it is argued that section 5 shows this intention to exclude all buildings from "agricultural land." I think not. It is a difficult section to construe, but it seems to me to be a section giving directions as to the separation in valuation lists and bases of county rates, &c., of agricultural land as a rateable hereditament from buildings and other rateable hereditaments. Clause (*a*) deals with lists specifying the separate hereditaments in detail; clause (*b*) with lists dealing only with totals; clause (*c*) deals with the entry in the detailed valuation lists of the rateable hereditaments which form part of a hereditament consisting partly of agricultural land and partly of buildings—*i.e.*, in my judgment, buildings which ought by (*a*) to be valued as separate hereditaments. These parts will each of them appear in the valuation list as separate rateable hereditaments. The entire hereditaments of which they are parts will not appear in the valuation list at all. The rateable value of each of these parts, together with the respective gross estimated rental, will have to appear on the valuation list, for the rateable value of the gross rental less certain deductions, which rental and deductions have both to appear on the valuation list. The clause says that the gross estimated rental of the buildings shall, while the buildings are used only for the cultivation of agricultural land, be calculated on the rent at which they would be expected to let to a tenant from year to year, and not on their structural cost. This at first looks like a very useless distinction, since rent to be expected from the hypothetical tenant, and not structural cost, is always the basis of valuation in rating; but the section goes on to say that the total gross estimated rental of the entire hereditament shall not be increased by the separate valuation of the parts. This shows that the valuer, in addition to making a separate valuation of the rateable hereditaments consisting of buildings, must make a valuation of the gross estimated rental of the entire hereditament, which latter valuation will not appear in the valuation list at all, and then apparently he is to deduct from the gross rental of the entire hereditament the value of the rateable hereditament constituted by the buildings, and the gross estimated rental of the agricultural land will apparently be the residue. Then from the gross rental of these several hereditaments constituted by the agricultural land and the buildings respectively will have to be made the ordinary deductions for repairs, &c., to arrive at the rateable value. This latter part of the section, and the dual valuation which it necessarily imports, makes intelligible the portion relating to valuing not on the structural cost but on the rent which the hypothetical tenant might be expected to give, because, however plainly this may be the course to pursue according to the ordinary law, it is not so plainly the course to pursue when the Legislature directs that the nature of a hereditament shall be ascertained in reference to the gross rental of an entirety of which the hereditament to be valued is only a part—that is, in other words, where the valuation is arrived at by the apportionment of the sum of another valuation.

Now, what are the buildings which are to be separately valued according to these directions in clause (*c*)? Collins, L.J., thinks that they are buildings not part and parcel of the agricultural land—not part and parcel, that is, in the present case, of the market garden—but used in connection with it, and no doubt such buildings, although not forming part of the market garden or other agricultural land, might in rating law be described as a part of the hereditament consisting partly of agricultural land and partly of buildings, for there is no law which requires a separation of hereditaments according to the titles under which the occupier holds, or the use which the occupier makes of the parts; and unity of personal occupation and unity of parish is all that is necessary to constitute and determine the rating hereditament. If once you arrive at the conclusion that the definitions of agricultural land cover and include the buildings part and parcel thereof, it is not easy to avoid the conclusion that the buildings spoken of in this section must be some buildings other than those falling within the definition. One mode of avoiding this conclusion would be to read the words "partly of agricultural land and partly of buildings" to mean partly of agricultural land uncovered with buildings and partly of agricultural land covered by buildings; but this would be a somewhat violent construction, and in my opinion cannot be accepted as the true construction. Nor can I bring myself to think that if, apart from section 5, the definition of agricultural land or of market garden ought to be construed as including the buildings erected on the land for the cultivation of it, one provision of section 5, which, moreover, can be construed consistently with such construction, ought to make one reject it. Moreover, I do not think that to read clause (*c*) of section 5 as applying only to hereditaments not part and parcel of the agricultural land leads to any results inconsistent with the apparent intention of the Legislature; for supposing some building to have been erected which in addition to its use in assisting the cultivation of the agricultural land would serve another purpose—*e.g.*, which would serve as a residence for the farmer and his family, I do not think that there is anything in the cases which would necessitate or justify holding such a building to be part and parcel of the agricultural land, although it would clearly be part of the hereditament consisting partly of agricultural land and partly of buildings. It would, however, be, according to the general law of rating, a single hereditament, because occupied under one occupation by the same person or persons. On the other hand a hay-barn in a meadow, or a cow-shed, would be part and parcel of the agricultural land as serving for the cultivation thereof and nothing else.

I understand the decision in the *Llandudno* case to have been based on this principle. It is more reasonable to suppose that the Legislature intended such a result than to put a construction on the Act which necessitates treating a hay-barn or a cow-shed as a rateable hereditament separate from the agricultural land. I think, therefore, that the conclusion of Collins, L.J., is right, and that section 5, clause (*c*), only applies to buildings outside the definition of agricultural land, and gives a qualified exemption to such buildings when used only for the cultivation of land, and that there is nothing in this section to prevent the definition of agricultural land being read in accordance with previous decisions.

Section 6 only deals with returns to the Local Government Board, and seems to me to follow exactly the lines of section 5, clause (*c*), and throws no

further light on the construction of the definition clause.

The only remaining section which throws any light on the matter is the 9th, which contains the definition. I have already dealt generally with the words of the definition and the judicial decisions thereon, so far as the old precedent has been followed, but some index to the meaning of the Legislature is to be gathered from the words of the definition itself, both those which appear in the old form and those which are supplementary to it. First, there is the word "only," which qualifies "arable, meadow, and pasture ground." If you treat the word "only" as intended to exclude buildings on such land from agricultural land as defined, and from the benefit of the exemption, then it would seem to follow that in the case of market gardens, &c., buildings will not be excluded. But I do not think that the word "only" affects the question of the inclusion or exclusion of buildings from the definition. "Only" is meant to cover and exclude that class of cases in which the land, although used as arable, meadow, or pasture ground, might be used for some other ultimate purpose, and does not, in my judgment, cover or exclude from land used as arable, meadow, or pasture ground, the stables in which horses or cows shall stand, or a hay-barn in which the hay shall be stored; such user being merely a means to the user of the arable, meadow, or pasture ground as such.

As to the words in section 9, "but does not include land occupied together with a house as a park, gardens, other than as aforesaid," I think "other than as aforesaid" means other than market gardens and cottage gardens; and it might be argued that the definition of agricultural land does not include land occupied together with a house as cottage gardens or market gardens. If this is so, it is difficult to suppose that the Act meant land occupied together with a house as arable, meadow, or pasture ground not to fall within the definition of agricultural land.

The conclusion at which I have arrived on the question raised by the case is that such land does come within the exemption, because these buildings are part and parcel of the market garden, which, by the terms of the definition, is agricultural land, and are buildings used for the purpose of the cultivation of the agricultural land, and for no other purpose. I think judgment should be for the respondents, and that the appeal should be dismissed.

Appeal allowed.

Solicitors, *Solicitor of Inland Revenue; Ravenscroft, Woodward, & Hills,* for *Melvill Green & Charles,* Worthing.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 9, 10, 23.

KAYE *v.* CROYDON TRAMWAYS CO. (*a.*)

Company—Sale of undertaking—Bonus to directors—Ultra vires—Notice of purpose of extraordinary meeting—Sufficiency of notice—Companies Clauses Act, 1845 (8 *Vict. c.* 16), *ss.* 71, 85, 86.

The directors of the C. Co. entered into a provisional agreement for the sale of their undertaking and assets to the T. Co. One of the terms of the agreement was that a lump sum should be paid to the directors and secretary of the C. Co. as compensation for loss of office. The agreement was conditional upon its adoption by the shareholders of the C. Co. in general meeting. The notice convening the meeting stated that the purpose of the meeting was to consider and, if advisable, approve the terms of the agreement.

Held, (1) *that the agreement was not* ultra vires *on account of the compensation to be paid to the directors and secretary; but* (2) *that the notice convening the meeting did not sufficiently disclose the nature of the business to be considered at the meeting, and did not, therefore, comply with the provisions of section* 71 *of the Companies Clauses Act,* 1845.

Southall *v.* British Mutual Life Assurance Society, 19 *W. R.* 865, *L. R.* 6 *Ch. App.* 614, *discussed.*

Hutton *v.* West Cork Railway Co., 31 *W. R.* 827, 23 *Ch. D.* 654, *distinguished.*

Appeal of the defendant company from a decision of Kekewich, J.

The action was brought by a shareholder of the defendant company, on behalf of himself and all other shareholders in the company, to restrain the directors from carrying out a provisional agreement for the sale of the company's undertaking and assets to the British Electric Traction Co. The agreement made between the two companies provided for the sale of the undertaking, and continued as follows: Clause 2.—"In consideration of the said sale the traction company shall on the completion thereof pay to the tramways company the sum of £30,543. The traction company shall also pay the sum of £500 to each of the present directors other than Mr. W. J. Carruthers Wain, to whom the sum of £1,250 shall be paid, and £500 to the secretary of the tramways company, as compensation for loss of office." Clause 6.—"This agreement and all the provisions hereof are conditional upon the same being adopted by the shareholders of the tramways company, and in case of non-adoption it shall be lawful for the traction company, by notice in writing to the tramways company, to determine this agreement."

On the 26th of November, 1897, the tramways company gave notice of an extraordinary general meeting of the shareholders to be held on the 14th of December at twelve noon, "for the purpose of considering and, if thought advisable, of approving, the terms of an agreement to be made between the Croydon Tramways Co. of the one part, and the British Electric Traction Co. (Limited) of the other part, being an agreement for sale of the undertaking and assets of the Croydon Tramways Co. to the British Electric Traction Co. (Limited)."

On the 1st of December a circular was issued to the shareholders stating that the sale to the traction company would be at a price sufficient to pay off the preference capital at par, and return 60 per cent. to the holders of the ordinary stock.

The circular also stated: "The traction company, in addition, assume the responsibility for the debentures and other liabilities of the company, and as they are desirous of having the management in their own hands the directors and secretary have agreed to retire on being paid a lump sum as compensation for their loss of office."

A form of proxy was also enclosed in the circular. At the extraordinary general meeting the plaintiff opposed the confirmation of the provisional agreement; nevertheless, it was confirmed by a very large majority.

The plaintiff thereupon commenced his action, alleging that the provision to pay a lump sum to the officers of the company was *ultra vires,* and that the meeting was not duly summoned on the ground that the notice of the meeting and the circular did not

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

sufficiently disclose the real terms of the agreement which were to be considered.

This latter question depended upon the construction of section 71 of the Companies Clauses Act, 1845, which Act was incorporated in the Croydon Tramways Co.'s Act.

Section 71 is as follows: "Fourteen days' public notice at the least of all meetings, whether ordinary or extraordinary, shall be given by advertisement, which shall specify the place, the day, and the hour of meeting; and every notice of an extraordinary meeting, or of an ordinary meeting, if any other business than the business hereby or by the special Act appointed for ordinary meetings is to be done thereat, shall specify the purpose for which the meeting is called."

On motion for an injunction to restrain the directors from carrying out the terms of the provisional agreement, Kekewich, J., granted the injunction, being of opinion that the notice of the meeting was insufficient to satisfy the statute, and that a majority of the meeting could not, as against a dissentient shareholder, bind him to an agreement by which a large sum of money would pass into the hands of the officers of the company and confer no benefit on the shareholders of the company.

The tramways company appealed, and after the appeal had been argued, the court expressed an opinion that they could not do justice to the plaintiff in the absence of the purchasing company (the traction company).

The case stood over, therefore, for the writ to be amended by adding the traction company as defendants, and for them to be served with notice of motion before the Court of Appeal.

Cripps, Q.C., Warrington, Q.C., and *Rowden*, for the appellants.—There is a general power of sale given to the tramways company by the Tramways Act, 1870, s. 44. The notice of the meeting was a sufficeint compliance with the terms of section 71 of the Companies Clauses Act, 1845. The terms of the contract for sale were not *ultra vires*, as against a dissentient shareholder, so far as regards the remuneration to be paid to the directors and secretary of the company: *Southall* v. *British Mutual Life Assurance Society*, 19 W. R. 236, L. R. 11 Eq. 65, and on appeal 19 W. R. 865, L. R. 6 Ch. App. 614; *Hutton* v. *West Cork Railway Co.*, 31 W. R. 827, 23 Ch. D. 654.

Bramwell Davis, Q.C., and *Bradford*, for the plaintiff.—The agreement is *ultra vires* because the directors being interested in it could not bring an independent judgment to bear on it. A director vacates his office if he is interested in any contract of the company: sections 85 and 86 of the Companies Clauses Act, 1845. Under the general law these directors were disqualified by this contract: *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, 39 Ch. D. 339, 37 W. R. Dig. 117. The moment the directors put the seal of the company to the contract they vacated their office, and that being so, it was not in their power to convene a meeting of the shareholders.

They also referred to *In re Newman & Co.*, 43 W. R. 483, [1895] 1 Ch. 674; and *Marshall* v. *South Staffordshire Tramways Co.*, 43 W. R. 469, [1895] 2 Ch. 36.

Buckley, Q.C., and *Stewart Smith*, for the British Electric Traction Co.—We agreed the purchase price to be paid, on the footing of the directors and secretary being retained in their offices; we afterwards changed our minds and agreed to give them compensation for their loss of office. Even if this had been commission, nothing more nor less, paid to the directors by the purchasing company for their having carried through the business, the notice stating that the purpose of the meeting of the shareholders was to consider and approve the agreement would have been sufficient to comply with the terms of the statute: *In re Bridport Old Brewery Co.*, 15 W. R. 291, L. R. 2 Ch. App. 191. The money agreed to be paid to the directors was not part of the consideration given for the purchase.

Bramwell Davis, Q.C., in reply on the motion.—*Southall* v. *British Mutual Life Assurance Society* differs from this case, the sale there being under section 161 of of the Companies Act, and not under the Tramways Act. The effect of the Companies Clauses Act is to prevent such a bargain as this being carried out: *Ernest* v. *Nicholls*, 6 W. R. 24, 6 H. L. Cas. 401.

He also referred to *Aberdeen Railway Co.* v. *Blakie Bros.*, 1 Macq. 461.

Cripps, Q.C., in reply on the whole case, referred to *Grant* v. *Thompson's Switchback Railways Co.*, 37 W. R. 312, 40 Ch. D. 135.

LINDLEY, M.R.—This is an extremely important case, and one or two questions which have arisen are of very general importance to companies, not merely to the two involved in this present litigation. The substance of the litigation is to restrain the Croydon Tramways Co., and afterwards the company which has been joined as defendants (the traction company), from carrying out a certain agreement for the sale of the Croydon Tramways Co. to the purchasing company, and Kekewich, J., has granted an injunction restraining the Croydon Tramways Co. from carrying out that agreement until the judgment in this action. He has done that on the ground that the agreement is *ultra vires*—that is to say, one which any one shareholder in the Croydon Tramways Co. can say the company had no right and no legal power to enter into. That raises a question of very great importance indeed.

A subordinate question, but one also of very considerable importance is this, that, supposing Kekewich, J., has gone too far in saying that this is a contract which the company cannot legally enter into, have the shareholders so assented to it, and confirmed it, as to render it presently operative, or are the shareholders entitled to say that, owing to the defective notice which has been given to convene the meeting to confirm it, it is not yet to be treated as a confirmed agreement? That is another point which turns ultimately upon the sufficiency of the statutory notice.

The agreement itself is sealed by the two companies, but owing to a clause in it which I will read presently, it cannot be regarded as more than a provisional arrangement which was not to bind any of them until it was submitted to a meeting of the shareholders of the selling company. The agreement (I will call it an agreement for the sake of avoiding circumlocution) is dated the 25th of November, 1897, and is made between the Croydon Tramways Co. of the one part, and the British Electric Traction Co. of the other part. The directors of neither company are mentioned as parties to it. [His lordship read and commented on clauses 2, 6, and 7 of the agreement, and continued:]

Pausing there for a moment, it is quite obvious that the clause which I have read relating to the remuneration, or payments to be made to the directors and the secretary, is, to say the least of it, a very unusual clause, and it is not to be overlooked that what the agreement says is that that shall be paid to them as compensation for loss of office. Anybody reading this agreement, without the light of one of the affidavits made by Mr. Garcke, would not

gather from that, that what was meant was that the purchasing company originally proposed to take these gentlemen over, but afterwards agreed to give them this sum of money for not obtaining employment for them on the board of the purchasing company. Now, I will deal first of all with the question whether it is an invalid agreement in this sense, that if the two companies choose properly to adopt it, they cannot by law do so. Mr. Bramwell Davis has argued very strenuously that it is an agreement *ultra vires*, an agreement illegal in the sense that the company cannot enter into it, even if the shareholders wish it. I am not prepared to say that at all. I do not think there is any principle of law, or any authority, for going that length—that is to say, if the shareholders of the selling company choose, on proper notice and so on, to confirm this, I cannot conceive why they should not. Just see what it is. It is an agreement for purchasing their property upon terms which may or may not be advantageous. It cannot be fairly regarded as a mere agreement to pay the directors a certain sum of money apart from all the rest. It is not like the case of *Hutton* v. *The West Cork Railway Co.* at all, where there was nothing to be done except to vote remuneration for the directors, and, the company being wound up, the court said they could not do it. The broad question to be considered here is whether, having regard even to that clause about payment of directors, the terms upon which it is proposed to sell the business of the Croydon Tramways Co. are not so advantageous as that a majority of shareholders at a properly convened meeting cannot say, "We will accept them." I am not prepared to say that there is anything wrong in this which would prevent the shareholders confirming it; and if we look into authority, I think, so far as it applies, *Southall* v. *British Mutual Life Assurance Society* comes nearest. That goes to show that this is an agreement which is perfectly within the competence of these two companies to enter into if they choose. Mr. Bramwell Davis based an argument on sections 85 and 86 of the Companies Clauses Act, which he says shows that in companies of this kind such an agreement as this cannot possibly be valid. Sections 85 and 86 are two out of a group of sections under the heading, "With respect to the appointment and rotation of directors," and it is enacted at the end of section 85 that "No director shall be capable of accepting any other office or place of trust or profit under the company, or of being interested in any contract with the company during the time he shall be a director." Upon that it is argued that these directors are interested in this contract with the company, and as they are not capable of being interested in a contract with the company the contract itself must be beyond the powers of the company to enter into. That is putting upon section 85 a construction which has never been put upon it for the last fifty years, and it appears to me utterly inadmissible. The real truth is that the consequences of a director being interested in a contract with the company are as follows: First of all there is the statutory consequence that he ceases to hold office; and secondly, there is what I may call the general legal consequence that he cannot enforce, as against the company, any contract which he has entered into with that interest. But to say that a contract between two companies is to be treated as invalid, and beyond the power of one of the companies, because its directors are interested in it, is a proposition which I have never heard advanced before, and which appears to me to be entirely unsound. That is the first and great point of this case, whether this is an agreement into which the companies can validly enter, and I differ from the view of the learned judge below on that point. My opinion is that it is a contract which they can lawfully enter into if they go the proper way to work.

That brings me to the next question. As I said before, it is not a contract at all until it has been approved by the shareholders. The language is, "This agreement and all the provisions hereof, are conditional upon the same being adopted by the shareholders of the tramways company." What was done was this. This company being governed by the Companies Clauses Act, it was necessary to call a meeting in the manner prescribed by that Act for the purpose of obtaining the sanction of the shareholders of the Croydon Tramways Co. to the agreement, and accordingly a notice convening a meeting was issued. There is a section in that Act of Parliament relating to these notices which is very important. It is section 71. [His lordship read the section, and the notice, and continued:] Now, pausing there for a moment, what would anybody understand by that? He would understand that the meeting was convened for the purpose of considering a certain agreement for the sale of the undertaking and assets of the Croydon Tramways Co., and any man of business would assume as a matter of course that whatever the purchasing company was going to pay for the purchase of this undertaking and assets would be paid to the vendors—that is, would be paid to the selling company. That is not true, because a very considerable portion of that which is part of the consideration for the purchase is not to be paid to the vendors, but is to be paid to the directors and officers of the selling company. Now comes the question, and to my mind a difficult question, whether you can say, in ordinary fairness of language, that this notice does, to use the words of the Companies Act, "specify the purpose for which the meeting is called." Mr. Cripps has argued that it does—that the purpose is to confirm the agreement. That is true by the card, but to my mind this notice has been most artfully framed to mislead the shareholders. It is a tricky notice, and it is to my mind playing with words to tell shareholders that they are convened for the purpose of considering a contract for the sale of their undertaking, and to conceal from them that a large portion of that purchase-money is not to be paid to the vendors who sell that undertaking. I am perfectly alive to the danger of putting into notices, especially notices by advertisement, more than the Act of Parliament requires, and I agree with Mr. Cripps that all that the Act of Parliament requires is that the purpose shall be stated. But it must be stated fairly; it must not be stated so as to mislead, and it appears to me that one of the main purposes of this agreement, so far as the directors care about it, is that they shall get a large sum of money without disclosing the fact to their shareholders. It is not a notice disclosing that purpose fairly, and in a sense not to mislead those to whom it is addressed. It follows that, although in my judgment this contract is one which the companies can lawfully enter into, it is a contract which the selling company have not yet adopted—that is to say, that the resolution which was passed under this notice accompanied though it was by a circular, is not one which is binding upon absent shareholders or dissenting shareholders. The notice was accompanied by a circular, or rather a few days afterwards a circular was sent round which expanded a little the information given by the notice, and said: "The object of the agreement is to carry out a sale of the undertaking and assets of the company to the British Electric Traction Co. (Limited), at a price which will pay off the preference capital at par, and will return 60 per cent. to the holders of the

ordinary stock. The traction company, in addition, assume the responsibility for the debentures and other liabilities of the company, and, as they are desirous of having the management in their own hands, the directors and secretary have agreed to retire on being paid a lump sum as compensation for their loss of office. The near approach of the period at which the lines will become purchasable by the local authority, and the heavy expenditure which is inevitable on the reconstruction and equipment of the lines for electrical traction, which the directors understand the local authorities made a condition precedent to any extension of the term, has led your directors to believe that the shareholders will be wise in accepting the present offer, and securing for themselves what may be considered fairly satisfactory terms. A form of proxy is enclosed which, in the event of your being unable to attend the meeting, you are particularly requested to fill in, sign, and return to me on or before the 11th day of December instant." That is signed by the secretary. Of course one sees that it was sent out in order to get proxies quite as much as to give further information to those who should attend. What would anybody reading the notice and seeing the circular think about it? He might well think that there was to be a sale by one company to the other of the assets, and that there was to be some lump sum paid to the directors for compensation for loss of office, as the purchasing company were desirous of having the management, and he would say, "There is nothing particular in that; I shall sign the proxy and let directors use my name." I do not think that was a wholly fair disclosure to the shareholders of what was going on. They ran the risk; they took their chance of a good many shareholders signing the proxies in the dark, by reason of the ambiguity and insufficiency of notice by the advertisement, and when the resolution was passed, information was asked for and was not given.

It appears to me, therefore, that the appeal succeeds to a certain extent and fails to a certain extent, and that the right course to adopt will be to discharge the order of Kekewich, J., and to grant an injunction to restrain the defendant company from carrying this agreement into effect until duly sanctioned by the shareholders of the tramways company at a meeting duly convened for the purpose. If they choose, upon a proper notice, understanding what they are about, to sanction this, in my judgment they are at liberty to do so, and there I differ from Kekewich, J. As regards the costs, it appears to me that the costs of the original plaintiffs and the original defendants here and below ought to be costs in the action, and I think the costs of the purchasing company, who were served at our request, ought to be their costs in the action, so that they will not have to pay them, and may get them.

RIGBY, L.J.—I am of the same opinion. First of all, this is a contract not *ultra vires* according to my judgment. What is the meaning of an *ultra vires* contract? It is one which the company has no legal power to carry into effect at all, even although in the opinion of each and every shareholder it is a contract advantageous to the company and to them, and though each individual shareholder, being fully competent to agree for himself, approves of and agrees with it. I go so far as the language of James, L.J., in the case of *Southall* v. *British Mutual Life Assurance Society* when he says, for the sole purpose of deciding whether the agreement was *ultra vires*, that it would be monstrous to say that a provision of this nature would make a contract *ultra vires*. I say nothing here about the circumstances of that case except this, that that question was clearly raised both before the Master of the Rolls and the Court of Appeal, and by James and Mellish, L.JJ., in the Court of Appeal it was distinctly taken into consideration. And remembering that the question of *ultra vires* is not a question of comparison, not a question of saying this is more or less advantageous, but a question as to whether it is a contract which the company has a legal capacity of entering into —I do not see how any other conclusion, after full consideration of the matter, can be arrived at. In *Southall* v. *British Mutual Life Assurance Society* it was a payment of £600 to each director, and £5,000 to the secretary. If, instead of that, there had been even a trifling sum, I do not mean to say so trifling that it could be absolutely neglected, but a sum one-tenth or one-twentieth part of that, the same reasoning on the question of *ultra vires* would apply, and the court would have been obliged to say that the mere insertion of such a clause in an agreement for sale and purchase of the undertaking would make it an impossible contract for the company to adopt. It seems to me that this is an agreement which, if upon proper notice given to the shareholders the company in general meeting acting in a proper way approves of, is not an *ultra vires* agreement, and may be a very proper agreement.

But then, upon the question whether in this case there has been sufficient notice to the shareholders, and a sufficient approval at a general meeting duly convened for this purpose, to constitute an adoption of the contract, first of all I would say on that part of the argument as to sections 85 and 86 of the Companies Clauses Act, the true answer is this—that there was no contract at any time, there is not now any contract in which any director has any interest at all. If the notices given had been sufficient notices, and the meeting had been properly summoned, and the resolution regularly and properly passed, when that resolution passed, and not before, would be the time when the contract arose. Now, as to the actual notice, section 71 of the Companies Clauses Act, 1845, provides that if there is to be a meeting of the company there should be notice by advertisement of the time and place of the meeting. Without going to the very words of the section, it provides that when there is business which we are accustomed to call special business to be conducted at the meeting there should be notice of the purpose for which the meeting is to be brought together. Now, I do not wish to add in any way to the section of the Act of Parliament, or to take anything from it. If it can properly be said that the purpose of the meeting which is actually summoned is shewn in the advertisement, I do not think we have any right to impose upon the company or the board of directors the necessity of giving notice of anything more in detail than the purpose. The question that arises is, Was the purpose of this meeting fairly and in language that could be understood by ordinary people, disclosed? I think it was not. They are told that the purpose for which they are assembled is to consider, and, if they thought fit, to adopt, a contract for the sale of the undertaking of the company to the British Electric Traction Co. To a certain extent no doubt that did disclose the purpose, but not the whole purpose; and it is too clear, I think, for argument, that if there are several purposes, then the notice will not be sufficient as regards a purpose which is not indicated in the notice at all. There may be a sufficient notice for one purpose and not for another. I quite agree with what the Master of the Rolls has said, that no man of business would ever come to the conclusion that when a meeting was summoned for the purpose of sanctioning

a sale from the company to a purchaser, it was also intended at that meeting to do so different a thing as to sanction the payment of part of the consideration that was to proceed from the purchasers, not to the company, but to the directors of the company. I am bound to say that I think the directors went entirely wrong in the course they adopted. They may have wished that the public should not know of this payment to themselves. That might be one motive; but I cannot help thinking that they also wished that the shareholders should not have it called too clearly to their minds that such a payment was to be made. I cannot think that the notice actually given was either literally or in spirit within the meaning of section 71. I do not mean to say that it is necessary by notice to give full information as to the nature of the business to be transacted, but you must give at any rate a fair and candid and reasonable explanation of the purpose or purposes, whatever they may be, for which the meeting is summoned. I do not think it necessary to say anything more about the form of the circular, though I agree with what the Master of the Rolls has said as to that also. It is far from being a candid disclosure of what was proposed. I do not say anything either about the proceedings at the meeting beyond this, that I am not satisfied that even then there was a full and proper disclosure. It is not upon these points that I found my judgment. My opinion is that the notice actually advertised did not disclose the purpose—as distinguished altogether from the details or terms—for which the meeting was summoned, so far as it related to the payment of the officials of the company.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. With regard to the question whether this agreement was *ultra vires* or not, I have not a word to add to what has already been said. With regard to the insufficiency of the notice—the advertisement—the notice was misleading. In my judgment this meeting was in substance called for two purposes, and the notice of meeting was intentionally so framed as only to call the attention of the shareholders to one of those two purposes. But I wish to say one or two words upon another part of the case. Kekewich, J., held that the notice was insufficient as one of the grounds upon which he acted. So far as he so held, this court is not differing from him. Then it is said, with regard to another ground acted upon by the learned judge, that the entering into such a contract was *ultra vires* of the company. I am not quite sure that the learned judge meant so to decide, although he may have said some things in the judgment which point in that direction. It is plain that if you speak of something as being *ultra vires* of the company, and something else as being *ultra vires* of the directors or officers of the company, you have not exhausted all the possible cases, because there is another case which may arise, and frequently does arise—that is to say, the majority of the shareholders meet together, and they by resolution purport to bind the minority to do something as to which it is not competent for the majority to bind the minority. Now, such a resolution is not *ultra vires* in the sense in which that word is properly used, it is not *ultra vires* in the sense in which Mr. Bramwell Davis asked us to say that the words of the 85th and 86th sections of the Companies Clauses Act made this resolution *ultra vires*, because when anything is *ultra vires* in that sense the vote of all the shareholders, every one of them who were present assenting, would not make the matter one which it was competent for the company to carry through. There is another sense in which it might be said that a matter was *ultra vires* which is not *ultra vires* in the proper sense of the words "*ultra vires* of the company," nor *ultra vires* in the much more limited sense of the words "*ultra vires* of the directors," but *ultra vires* of the majority of the shareholders. The reason why I have mentioned this matter now in giving judgment in this court is this, that a great deal has been said about the decision of the court in *Southall* v. *The British Mutual Assurance Co.*, and it has been argued that the decision of the Master of the Rolls and James and Mellish, L.JJ., respectively in that case was a decision that there was nothing which would render invalid a resolution of the majority of the shareholders giving a bonus to the servants of the company, never mind what was the motive of giving the bonus. I do not think myself that *Southall* v. *The British Mutual Life Assurance Co.* decides anything of the sort. James, L.J., in dealing with this matter, says, "I agree that if this had been done secretly in all probability it could not be supported. But it was done openly and appeared on the face of the agreement. There was nothing in itself wrong in such an arrangement, and it was known to all the shareholders. They said, 'We are going to get rid of the chairman and the directors, and we think it right that we should give them some compensation.' It would be monstrous that a transaction otherwise reasonable could be vitiated by such a clause as this." Now, all that I understand that the Lord Justice is saying there is that, if the circumstances are such as not to import any impropriety in the gift which is being made by the shareholders of the company by the resolution to its officers, there is no reason why that resolution should be treated as an invalid resolution. Suppose the resolution had been passed under different circumstances, say, for example, under circumstances that should leave it beyond a doubt that the directors in entering into the contract with the purchasers (for there were purchasers in that case, or an amalgamating company, which is the same thing) had been actuated by the desire to carry through the contract, not because of the benefit which would result to the company therefrom, but because the terms of the contract, which provided for the payment to them of this money operated as a bribe to induce them to negotiate the contract irrespective of its benefit to the company; there is nothing in the judgment of the Lord Justice which sanctions such a transaction, or says that in such a matter the majority could bind the minority. I am anxious to say that in this case, because this action has not been tried yet. It may turn out when the facts are ascertained that this contract which was thus negotiated between the Croydon Tramways Co. and the traction company was a contract altogether advantageous to the Croydon Tramways Co. It may turn out that in truth and in fact there was some arrangement whereby the purchasing company had held out to the directors that they would employ them, and that changes had been made at such a time and under such circumstances as would account for the purchasing company making this payment to the directors. But it may turn out that in truth and in fact the traction company were willing to pay directly to the Croydon Tramways Co., as the purchase-money to go into the coffers of the tramways company, a larger sum by the very amount which it is provided should be given to these directors. Looking at the matter as a mere matter of business, I confess that I should always be very slow to believe that a purchasing company were not willing to give the selling company the full amount that they were prepared to pay by the terms of the contract that they entered into at the time of making the purchase, quite irrespective of whether it was to

go into the coffers of the company or into the pockets of the directors. I cannot help thinking that anybody familiar with business would be very slow to believe that the purchasing company were willing to pay what in effect is a larger price, if the price that they paid went into the pockets of the directors, than they would have been willing to pay if it went into the coffers of the company. If it does in fact turn out that really this money was a bonus given by the purchasing company to the directors of the selling company, in consideration of the directors of the selling company facilitating the contract, I wish to say emphatically on my part that there is nothing in the judgment in *Southall* v. *The British Mutual Life Assurance Co.* which says that the majority of the shareholders can bind the minority in respect of such a matter as that.

I do not want to go in detail into a case which in many respects is a different one from the present case, but I understand that the majority of the Court of Appeal and Fry, J., in *Hutton* v. *The West Cork Railway Co.*, although deciding the case upon another ground—namely, that the company there had already gone into liquidation, do one and all affirm this proposition which I have been attempting to state here—and that is that there are matters which are *intra vires*, but yet are of such a character that the majority cannot bind the minority, even though the notice might itself be in due form. I wish further to add that, although these matters might not affect the rights of a stranger generally, the traction company here is not in the position of a stranger, because the very terms of the contract which was proposed to be sanctioned by the meeting of the shareholders of the tramways company was notice to the traction company that the transaction was of such a character that the onus really would lie upon them of showing that the payment to the servants of the company with whom they were contracting was a payment of an innocent and justifiable nature.

Appeal allowed.

Solicitors, *Hugh C. Godfrey; Walter Webb & Co.; Sydney Morse.*

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — Feb. 2.

STEPHENSON *v.* GARNETT. (*a.*)

Practice—Staying proceedings—Frivolous and vexatious action—Action raising question decided in an interlocutory application in county court.

The defendant recovered judgment against the plaintiff in a county court for a sum of money. Before the costs were taxed the defendant, upon representations as to the plaintiff's poverty, agreed to accept a smaller sum, and executed a deed releasing the plaintiff from the judgment debt and costs. The defendant subsequently applied to the county court judge for an order to tax the costs, upon the ground that the release had been obtained by misrepresentation. The county court judge came to the conclusion that the release had been obtained by misrepresentation, and directed the costs to be taxed, and ordered the balance of the judgment debt and the taxed costs to be paid by the plaintiff. The plaintiff thereupon commenced an action in the High Court claiming a declaration that the defendant had released him from the judgment debt and costs, and an injunction to restrain the defendant from enforcing payment thereof. Upon an application by the defendant to stay the action,

Held, that, as the identical question sought to be raised in the action had been determined by the county court judge on the application to tax the costs, the court would stay the action as frivolous and vexatious and an abuse of the process of the court.

Appeal of the defendant from an order of Phillimore, J., at chambers.

The present defendant recovered judgment against the present plaintiff in the Leeds County Court for £45 16s. 6d. and costs.

Before the costs were taxed the defendant, in consequence of representations made to him as to the plaintiff's poverty, agreed to accept £25, payable by instalments, in satisfaction of the judgment, and he executed a deed of release covenanting not to tax the costs nor to take any proceedings under the judgment so long as the instalments were regularly paid.

After the instalments had been paid the defendant applied to the registrar of the county court to tax his bill of costs, alleging that he had discovered that the release had been obtained by misrepresentation.

The registrar referred the matter to the judge, who after hearing evidence and having the parties before him, came to the conclusion that the release had been obtained by misrepresentation, and directed the registrar to tax the costs, and ordered the plaintiff to pay the amount of the taxed costs and the balance of the judgment debt by instalments.

Subsequently, upon a judgment summons for non-payment of an instalment, the county court judge made an order of committal against the plaintiff.

The plaintiff brought this action in the High Court claiming in his statement of claim (1) a declaration that the defendant had released him from payment of the judgment debt and costs; and (2) an injunction to restrain the defendant from continuing proceedings or commencing any other proceedings to enforce payment thereof.

The defendant took out a summons to stay the action and to strike out the statement of claim on the ground that they were frivolous and vexatious and abuse of the process of the court.

The district registrar at Leeds made an order in accordance with the summons, which Phillimore, J., at chambers rescinded.

Longstaffe, for the defendant.—The plaintiff is estopped by the order of the county court judge from raising the question of the validity of the deed of release, the judge having jurisdiction under sections 9 and 67, sub-section 8, of the County Courts Act, 1888, to set aside the deed on the ground of fraud (see *Eden* v. *Naish*, 26 W. R. 392, 7 Ch. D. 781). The court will therefore dismiss the action as frivolous and vexatious: *Macdougall* v. *Knight*, 33 W. R. 553, 25 Q. B. D. 1. Secondly, apart from estoppel, the court will not entertain this question which the county court judge has already determined: *Reichel* v. *Magrath*, 14 App. Cas. 665, 38 W. R. Dig. 161; *Remmington* v. *Scoles*, 45 W. R. 589, [1897] 2 Ch. 1.

Compston, for the plaintiff.—The county court judge had no power, upon an interlocutory application to tax the costs, to set aside the deed on the ground of fraud: *Gilbert* v. *Endean*, 27 W. R. 252, 9 Ch. D. 259. There was no issue before him as to the validity of the deed. The plaintiff ought to be allowed in a properly-constituted action to set up this deed as a valid deed. The court will not therefore stay the action as frivolous and vexatious.

Longstaffe replied.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

A. L. SMITH, L.J.—In my opinion the order of the district registrar should be restored. I do not rest my decision upon the ground that the matter is *res judicata*, for I cannot think that it is. I rest my decision upon the ground that the identical question sought to be raised in this action was raised and determined by the county court judge upon the application to tax the costs. The judge had jurisdiction to determine the question—namely, whether the deed was obtained by fraud, and he determined it after hearing evidence upon the point, the plaintiff being present at the hearing and having every opportunity of putting forward his view of the case. That was the same issue as is now sought to be raised in this action, and it was decided by a court of competent jurisdiction. It would be an abuse of the process of the court to allow a suitor to litigate over again the very question which has been already decided against him. *Reichel* v. *Magrath* and *Macdougall* v. *Knight* show that, though the court ought to be slow to strike out a statement of claim or defence, yet when it is shown that the identical question sought to be raised has been already determined, it may properly do so. The appeal must be allowed.

CHITTY, L.J.—I am of the same opinion. I do not base my decision upon the ground that the question is *res judicata* in the strict sense of the term. The court has, however, an inherent jurisdiction to prevent frivolous and vexatious litigation, which is a mere abuse of the process of the court. The county court judge had jurisdiction over his own judgment—as is shown by *Gilbert* v. *Endean*—and he heard evidence whether the deed of release was or was not obtained by fraud. The plaintiff was present, though he was not represented by counsel or solicitor. The judge had jurisdiction under section 67, sub-section 8, of the County Courts Act, 1888, and he determined the question, and now the identical question is raised in the present action. In *Remmington* v. *Scoles* the statement of defence was struck out, not upon the ground of *res judicata*, but upon the ground that the defence was a sham one. This appeal, therefore, ought to succeed. This summary jurisdiction ought to be exercised with great caution, but the affidavits in this case, which are not answered, show a clear case of fraud.

COLLINS, L.J.—I am of the same opinion. There is a difficulty in bringing this case within the doctrine of *res judicata*. It is difficult to say that this interlocutory proceeding in which leave to proceed with the taxation of costs was obtained could be made the foundation of a defence of *res judicata* in an action on the covenants in the deed. It would be very difficult to apply to such a case the doctrines laid down by Knight-Bruce, V.C., in *Barrs* v. *Jackson*, 1 Y. & C. Ch. 585. I think, however, that we are at liberty to look at what happened before the county court judge, and I am satisfied that he had jurisdiction to deal with this deed on the application before him. The very same question that is now sought to be raised was determined by the judge, and that lets in the inherent jurisdiction of the High Court to stay the action as frivolous and vexatious, and we are properly exercising that jurisdiction in this case.

Appeal allowed.

Solicitors for the plaintiff, *Bell, Brodrick, & Gray*, for *Wormald & Atkinson*, Leeds.

Solicitors for the defendant, *Ward, Bowie, & Co.*, for *Walter & E. H. Foster*, Leeds.

High Court of Justice.

Chan. Div. } Wright, J. } Feb. 16; March 2.

In re DRIFFIELD GAS CO. (*a*.)

Company—Winding up—Distribution of surplus capital—Fully paid and partly paid shares—Nominal amount of shares—Equalization—Unlimited liability.

In the case of a company not constituted under the Companies Acts, reference must be made to the deed or instrument under which it is constituted as to the distribution of surplus assets in the winding up. If the deed or instrument contains any provision with regard to the surplus, effect must be given to it; but a provision governing dividends ought not of itself to govern a distribution of surplus. If the capital of the company is limited by shares of an equal or commensurable amount, the same consequences ought to follow as if it were so limited under the Companies Acts.

Thus, where a company was constituted under a deed of settlement in 1835, *and one of the clauses of that deed provided that upon a winding-up, the residue, after payment of debts, &c.,* "*was to be divided among the several proprietors for the time being in proportion to their respective shares,*" *and part of the shareholders had paid for their shares in full, and others in part only: on the winding up of the company after payment of all debts and return of the paid-up capital, the surplus should be distributed in proportion to the nominal amount of the shares without regard to the manner in which dividends were payable or had been paid.*

Somes *v.* Currie, 1 *K. & J.* 605, 3 *W. R. Dig.* 76, *and* Sheppard *v.* Scinde, Punjaub, and Delhi Railway Co., 36 *W. R.* 1, *distinguished.*

Originating summons by the liquidator in the voluntary winding-up of the company for the decision of the court upon what principle the surplus assets of the above company should be distributed after all debts and costs of winding up had been paid.

The Driffield Gas Light Co. was constituted in 1835 under a deed of settlement; it was registered under some or one of the old Joint-Stock Companies Acts, and afterwards also under Part VII. of the Companies Act of 1862, as a company without limitation of liability. Clause 1 of the deed of settlement provided "that the sums set opposite to the names of the parties hereto shall form the capital or joint stock of the company, and that the aggregate amount thereof shall be £1,800, or such other sum to be raised according to clause 21 as may be found necessary for the purposes aforesaid." Clause 19 provided that losses were to be made good by the proprietors "in proportion to their respective shares." Clause 20 provided "that profits of the concern should be divided amongst the proprietors . . . according to the amount of their respective shares," Clause 21 provided for an increase of capital; and Clause 32 provided that upon a winding-up, after payment of debts, &c., the residue was to be "divided between the several proprietors for the time being in proportion to their respective shares in the said undertaking."

The capital was divided into shares of £10 each. Before 1893 the capital of the company had been increased by the issue of 600 new fully paid-up shares of £10 each.

In 1893 600 further shares were created, with only £6 10s. per share paid up. The deeds creating the

(*a*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

issues of shares subsequent to the original issue recited the resolution of the company authorizing their creation on the terms that the holders of the new shares should be entitled to dividends on the amount from time to time called up thereon, but the deeds of covenant executed on the creation of these shares provided that the shares were to be subject to the provisions and stipulations contained in the original deed of settlement. The company had, however, since the new shares were created in 1893, paid dividends in proportion only to the amount paid up on these shares.

O. L. Clare, for fully-paid shareholders without premium.—When the paid-up capital has been returned to the fully-paid and partly-paid shareholders the residue should be distributed in proportion to the amount of capital paid up at the commencement of the winding up. *Birch* v. *Cropper*, 38 W. R. 401, 14 App. Cas. 525, is to be distinguished, for there the liability was limited; in the case of this company it is unlimited, and the surplus must be divided as if the company were a partnership: *Somes* v. *Currie*, 1 K. & J. 605, 3 W. R. Dig. 76; and *Sheppard* v. *Scinde, Punjaub, and Delhi Railway Co.*, 36 W. R. 1.

Brinton, for fully-paid shareholders who had paid premium, adopted the same arguments.

Hurrell, for partly-paid shareholders without premium.—*Birch* v. *Cropper* governs this case, and the surplus should be returned in proportion to the nominal amount of the shares.

Dunham, for partly-paid shareholders who had also paid a premium.—All the shareholders are entitled to participate equally in the dividend without regard to the amount paid up on each share: *Oakbank Oil Co.* v. *Crum*, 8 App. Cas. 65, 31 W. R. Dig. 37. This principle would apply to the distribution of surplus in this case. I do not press the point as to premium.

March 2.—WRIGHT, J., after stating the facts of the case, continued: In the case of *In re Anglesea Colliery Co.*, 14 W. R. 1004, L. R. 1 Ch. App. 555, it was held that apart from the Companies Acts it is the clear right of a partner when the partnership is wound up and the debts are paid to have contribution in order to repay to him capital which he has advanced in excess of his proportion, and that the Companies Acts must be construed in accordance with this principle so that a holder of fully-paid shares is to be regarded as a "contributory" entitled to have a call made on the partly-paid shares in order to equalize the capital account. In *Sheppard* v. *Scinde, Punjaub, and Delhi Corporation*, L. R. 6 Ch. App. 53n, and *Ex parte Maude*, 19 W. R. 113, L. R. 6 Ch. App. 51, it was established that in the winding up under the Companies Acts where after payment of debts and costs a balance remains, but insufficient for a complete return of capital paid up, the capital account must be equalized by a call on the partly-paid shares, and the assets must then in the absence of any different provision be distributed according to the nominal amount of the shares; and it was held that an express provision for the payment of dividends according to the amounts paid up on the shares did not prevent this rule from being applicable in the partial return of capital in the winding up. It was also decided that the holder of the fully-paid shares is not in the position of a shareholder who has paid calls in advance unless he has paid up on shares which have not been issued as fully paid or fully called up. In *Oakbank Oil Co.* v. *Crum*, where the company's articles of association provided that the shareholders should be entitled to dividends "in proportion to their shares," it was held that it was not competent to the company to declare a dividend in proportion to the amounts paid up on the different classes of shares, and the practice of five years was disregarded. Lastly, in *Birch* v. *Cropper* after payment of debts and costs of winding up there was a balance more than sufficient to return all the capital paid up. The articles of association provided for payment in proportion to the amounts paid up, but made no provision for distribution of surplus in a winding up. The Court of Appeal held that the surplus should be distributed on the same principle as the dividends; but it was decided by the House of Lords that the article which governed dividend did not govern the distribution of the surplus, and that, after equalization of the capital account, the assets must be distributed according to the nominal amount of the shares.

The effect of these decisions seems to me as follows: The winding-up sections (sections 109 and 133) of the Companies Act 1862 do not of themselves supply any rule for the mode of adjusting loss of capital or of distributing surplus, but only supply the necessary powers for giving effect to the rights and interests of the parties. Those rights in the case of a company constituted under the Companies Acts must in the absence of any provision in the memorandum or articles of association be ascertained, in the view of one of the noble and learned lords who took part in the decision of *Birch* v. *Cropper*, by recourse to general principles of equity; in the view of another of them by reference to the principles and provisions of the Companies Acts; but in either view the result is the same—namely, that the capital account must first be equalized, and then there appears no ground for appropriating the balance in any other way than according to the nominal amount of the shares in the capital; and a provision in the memorandum or articles of association regulating the distribution of dividends will not of itself govern the distribution of surplus in a winding up. In the case of a company not constituted under the Companies Acts it would seem to follow that reference must be made to the deed or instrument under which it is constituted; and if that deed or instrument contains any provision with regard to surplus, effect must be given to it; but a provision regulating the distribution of dividends ought not to be considered as of itself governing the distribution of surplus. If the capital of the company is limited by shares of equal or commensurable amount, the same consequences ought to follow as if it were so limited under the Companies Acts, the holder of each share becoming, in the words of Lord Macnaghten in *Birch* v. *Cropper*, "entitled to a proportionate part in the capital of the company; and unless it be otherwise provided by the regulations of the company as a necessay consequence to the same proportionate part in all the property of the company, including its uncalled capital."

In opposition to this conclusion, reliance is placed on two decisions, which happen to be the only reported decisions with reference to the distribution of surplus in the case of companies not constituted under the Companies Acts. The first is *Somes* v. *Currie*. There the charter of the company provided that "every person holding any shares in the capital stock in the said company . . . shall be entitled to the profits and advantages attending the said capital stocks in proportion to the number of shares as held by him." Yet it was held by Page Wood, V.C., that upon the dissolution of the company the surplus must be distributed in proportion to the amounts paid up on the different classes of shares, and this without any previous equalization

of the capital account. The ground for the decision seems to have been that on the particular facts of the case, and especially the fact that dividends had during three years been distributed according to the amounts paid up, the Vice-Chancellor held that there had in effect been a contract between the shareholders that "profits and advantages" should be so distributed.

It is pointed out by the Court of Appeal in *Sheppard* v. *Scinde, Punjaub, and Delhi Railway Co.* that *Somes* v. *Currie* cannot be considered as suggesting any general rule, and a disapproval of it, if so considered, is plainly implied. The other case is the one just mentioned of *Sheppard* v. *Scinde, Punjaub, and Delhi Railway Co.* There it was held, both in the Court of Appeal and in the House of Lords, that the surplus was divisible according to the amounts paid up on the different classes of shares; but that decision again was expressly based on its own peculiar circumstances, and it is explained in *Birch* v. *Cropper* as depending entirely on very special facts and not laying down any general principle, and not being an authority except where the circumstances are precisely similar. The very fact that *Soames* v. *Currie* and *Sheppard* v. *Scinde, &c., Railway Co.* have been so plainly treated as defensible only on special grounds shows that the general rule is not in accordance with them. I think, therefore, that in the present case effect must be given to the express provision of the deed of settlement in clause 32, and that, after equalization in the capital account by a return of the capital paid up, the surplus remaining must, according to the language of that paragraph, be "divided between the several proprietors for the time being in proportion to their respective shares in the said undertaking"—that is, in proportion to the nominal amounts of the shares. There was a contention that persons who took shares from the company at a premium should be allowed to share in the surplus in proportion to what they paid for the shares. This is so plainly untenable that I think the liquidator should have costs as against the parties, if any, who separately supported that view. All other costs must come out of the general assets.

Solicitors, *Oldman, Clabburn, & Co.*, for *Foster, Tonge, & Botterill*, Great Driffield; *Chester & Co.*, for *A. Pickering*, Hull.

Chan. Div.
Wright, J. } Feb. 2, 9.

In re ANGLO-CONTINENTAL CORPORATION OF WEST AUSTRALIA (LIMITED). (*a.*)

Company—Winding up—Surplus assets—Distribution—Articles of association—Repayment—Unequal contribution—Equalization.

If the articles of association of a company provide that, in the event of winding up, if the surplus assets (after payment of all debts and liabilities) shall be insufficient to repay the whole of its paid-up capital, such surplus assets shall be distributed so that, as nearly as may be, the losses shall be borne by members in proportion to the capital paid, or which ought to have been paid, at the commencement of the winding up other than amounts paid in advance of calls, and if at the commencement of the winding up some of the shares are fully and some partly paid up, the amounts paid up on the shares must be equalized by a call, actual or in account, on such partly-paid shareholders, and when the amounts paid by all the shareholders is thus made equal, the surplus assets are to be distributed equally.

Summons by the liquidator for the direction of the court as to the surplus assets of the company in the winding up.

The company was registered in 1895 under the Companies Acts, 1862 to 1890, with a capital of £500,000 in shares of £1 each. The articles of association, where material to the present case, were as follows:

15. The board may, if they think fit, receive from any member willing to advance the same, all or any part of the money unpaid upon any of the shares held by him beyond the sums actually called for, either as a loan repayable or as a payment in advance of calls, but such advance, whether repayable or not, shall, until actually repaid, extinguish, so far as it shall extend, the liability existing upon the shares in respect of which it is received. Upon the money so received, or upon so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company shall pay interest at such rate as the member advancing the same and the board may agree upon.

117. Subject to any priorities that may be given upon the issue of any shares, the profits of the company available for distribution shall be distributed as dividend among the members in accordance with the amount paid on the shares held by them respectively.

129. If, upon the winding up of the company, the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, the excess shall be distributed among the members in proportion to the capital paid or which ought to have been paid on the shares held by them respectively at the commencement of the winding up, other than amounts paid in advance of calls. If the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding up, other than amounts paid in advance of calls. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions.

125,000 shares only were issued; 25,000 of these were fully paid for in cash by the persons to whom they were issued. Of the remaining 100,000 only 5s. per share had been paid up. The company was being wound up voluntarily. After payment of all debts and liabilities there was still a surplus in the liquidator's hands, but not sufficient to return the capital paid up in full. The liquidator therefore took out a summons for direction of the court as to the distribution of the surplus.

A. Chitty, for the partly-paid shareholders.—What is the meaning of "surplus assets" in article 129? The latter part of the article was evidently framed with a view of doing away with the rule in *Ex parte Maude*, 19 W. R. 113, L. R. 6 Ch. App. 51, and the first part of this claim was evidently intended to avoid the result of the judgment in *Birch* v. *Cropper*, 38 W. R. 401, 14 App. Cas. 525. Paid-up capital must be capital paid up at the commencement of the liquidation. He also quoted from Palmer's Company Precedents, 6th ed., vol. 1, p. 380.

Kirby, for the liquidator.—"Paid-up capital" includes capital called up, or liable to be called up for the purpose of adjusting the rights of contributories. 15s. a share must, therefore, be repaid to the

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

holders of the 25,000 shares, when all the shareholders will be on a level. "Capital paid" means capital called up for the purposes of satisfying equities in repayment of capital: *Ex parte Lowenfeld*, 70 L. T. Rep. 3.

Beddall, for the holders of 25,000 shares.

Chitty, in reply.—The court will find meaning in the article if possible. *Ex parte Lowenfeld* is distinguishable.

He also referred to *In re New Transvaal Co.*, [1896] 2 Ch. 750, 45 W. R. Dig. 32.

Feb. 9.—WRIGHT, J.—This case raises a question of importance as to the proper construction of a form of surplus assets clause which has been adopted with variations since the decision of the House of Lords in the *Bridgewater Canal case—Birch* v. *Cropper*—with the view of avoiding the effect of that decision. In the present case 100,000 shares of 20s. each had been issued, with 5s. paid up, and afterwards 25,000 more were issued in one block to persons who paid them up in full. The company is now in liquidation. After providing for the debts and expenses, a considerable sum remains in hand, and the question is on what principle this sum is to be distributed, or rather returned, to the shareholders. In *Ex parte Maude* there was in the company's articles of association no express provision for regulating the distribution of surplus assets. The shares had been unequally called up. After payment of the debts and expenses there remained a balance, as in the present case, insufficient for the return of all the paid-up capital. It was held that the real question was, not how profits should be distributed, but how a loss should be borne, and that the uncalled capital was as much liable to be called up for the purpose of meeting this loss as it would have been for the payment of debts; and the result was that after the capital amount had been equalized by calling up or treating as called up unpaid capital, the whole resulting balance was returned in propor- to the amount paid up on each share—that is to say, to its whole nominal amount, and every shareholder lost the same percentage of what he had subscribed and paid. In *Birch* v. *Cropper* there was again no provision for regulating the distribution of surplus assets. The shares had been unequally called up. There was a large real surplus—*i.e.*, more than enough for the return of all the paid-up capital. North, J., and the Court of Appeal held that the paid-up capital must be returned, and the balance distributed in proportion to the amounts which had been paid up on the several classes of shares, but the House of Lords held that, after the capital paid had been returned, the balance must in the absence of any different provision in the memorandum or articles of association be distributed in proportion to the nominal amount of the shares. There all equities were satisfied by the return of all the capital paid, and there remained no reason for treating the surplus assets as held for the shareholders in proportion differing from the amounts of their shares. In the present case there is an express provision regulating the distribution of assets after payment of debts and expenses. Article 129 provides as follows: [His lordship read the article, and continued:] The shares are all of the same nominal amount of 20s., but they are unequally paid up. There is no real surplus, for although there is more than enough to pay debts and expenses there is not enough for the return of the capital paid up. Under these circumstances and under this article there is no room for the application of *Birch* v. *Cropper*; had there been a real surplus after returning the paid-up capital it would by the express terms of the contract have been divisible not according to the nominal amounts of the shares, but according to the amounts which had been paid up (subject to correction in respect of any arrears or advances), and which, therefore, had presumably had the principal merit in earning the profit. There being, however, no such surplus, but a deficit on the whole adventure, there still remains an equity to be satisfied in order to equalize the loss, and the uncalled capital ought, on general principles, to be called up or treated as called up so far as is necessary for that purpose unless the contract has otherwise provided. I think that it has not otherwise provided. It says that in the event that has occurred the surplus assets shall be distributed so that the losses shall be borne by the members in proportion to the capital paid (subject to correction in cases of arrears or advances) on the shares held by them respectively at the commencement of the winding up. Now, what is the meaning of "capital paid"? On a somewhat similar article the Court of Appeal in *Ex parte Lowenfeld* held that the words did not mean merely capital paid before the liquidation or called up in the liquidation for payment of debts and expenses, but included capital called up or to be treated as called up for the very purpose of satisfying equities in the repayment of capital. So in the present case there is not in truth a surplus at all but a mitigation of loss. The loss and the mitigation of it are to be distributed equally, but, subject to the equalization of the capital account, not irrespective of such equalization; and a call (actual or in account) is necessary for that equalization which is an essential part of a winding up unless excluded by the contract; and the amount of that call must be included in the words "capital paid or which ought to have been paid." The same thing may be put in another way as implied in the term "surplus assets," when used in relation to the subject-matter. So used the term *primâ facie* implies that the capital amount must have been properly equalized before any balance can exist for a general and equal return of capital or for equal division of profits.

Then how are the figures to be worked out? In my opinion the liquidator must proceed to make a call (either actual or imaginary, as the case may require) on the 100,000 shares sufficient to equalize the capital account. If all the shareholders are solvent the call will be in this case one of 3s. per share on the 100,000 shares, making them 8s. paid. The amount so obtained will be sufficient to repay the holders of the 25,000 shares 12s. per share, leaving them also with 8s. paid. The assets in hand will then be divided equally amongst the whole 125,000 shares, and the ultimate loss of each shareholder will be the difference between the 8s. and the dividend so paid. Assuming the money in hand to be £25,000, then each of the 100,000 shareholders will as a result of the whole have received back 1s. per share, and each of the 25,000 shareholders 16s. per share, and every shareholder will thus have lost 4s. on each share.

The only alternative that I can see is to hold that every 5s. paid up is to abate equally; but on this alternative the result will be just the same as on the other, if "paid up" is to have the meaning assigned to it in *Ex parte Lowenfeld*—that is to say, is to include sums called up for equalization of the capital account.

A contention was urged that the 15s. paid upon the 25,000 shares beyond the 5s. paid up on the 100,000 shares was an amount paid up in advance of calls. If so, the effect would be that no part of the loss would under this article be borne by the 25,000 shares in respect of the 15s. paid in advance, and they must be repaid the whole of this 15s. before there can be any return of capital. On the assumed figures, the

ultimate result seems to be the same. To repay the 15s. per share on the 25,000 shares, £18,750 will be required, leaving £6,250, or 1s. per share for return on the whole 125,000 shares. But as on other figures the result might not be the same, it seems necessary to express an opinion. I do not think that the expression "amounts paid in advance of calls" as used in this article is properly applicable to the 15s. paid up on the whole class of the 25,000 shares in excess of the amount paid up on the other shares. It seems to me more properly referable to individual prepayments made by special arrangements under the 15th article, just as the words "capital which ought to have been paid" seem properly referable to individual arrears of calls.

Solicitors for the liquidator, *Ashurst, Morris, Crisp, & Co.*

Solicitor for partly-paid shareholders, *J. J. Ridley.*

Solicitors for fully-paid shareholders, *Batchelor & Cousins.*

Q. B. Div.
(Wright and Darling, JJ.) March 26.

GAGE *v.* BRAELEY. (*a.*)

Metropolis — Street—Print distributed by way of advertisement—Metropolitan Streets Act, 1867 (30 & 31 *Vict. c.* 134), *s.* 9.

A printed sheet, consisting of a publication of news, which was distributed gratuitously with the object of advertising a newspaper, is not for that reason a print "carried or distributed by way of advertisement" within the meaning of section 9 of the Metropolitan Streets Act, 1867.

Case stated by an alderman of the city of London.

An information was laid by the respondent against the appellant charging him for that on the 19th of November, 1897, he distributed certain prints by way of advertisement in a street within the limits of the Metropolitan Streets Act, 1867, contrary to section 9 of that Act.

Section 9 of the Metropolitan Streets Act, 1867, provides: "No picture, print, board, placard, or notice, except in such form and manner as may be approved of by the Commissioner of Police, shall by way of advertisement be carried or distributed in any street within the general limits of this Act by any person riding in any vehicle, or on horseback, or on foot. Any person doing any act in contravention of this section shall be liable for each offence to a penalty not exceeding 10s. This section shall not apply to the sale of newspapers."

The appellant was a lad in the employment of the proprietors of the *Financial Times* newspaper.

On the morning of the 19th of November, 1897, he stood in Throgmorton-street, opposite the entrance to the Stock Exchange, and distributed certain printed sheets gratuitously. He was told by the respondent that he was not entitled to distribute them without having first obtained the leave of the Commissioner of Police. He thereupon moved to another part of the street and distributed the printed sheets indiscriminately to the persons in the street. The sheets contained two items of news from Johannesburg.

At the hearing before the alderman evidence was tendered on behalf of the appellant, but rejected by the alderman, that the sheets were issued as a supplement to the *Financial Times*, and contained news which arrived after the issue of the paper on the morning in question.

The alderman found that the printed sheets were distributed with the object of advertising the *Financial Times* newspaper and that they were not themselves newspapers; and, further, that the printed sheets had not been approved of by the Commissioner of Police, and he convicted the appellant.

Danckwerts (*Spensley* with him), for the appellant.—The printed sheet is merely a publication of news, and not within the meaning of section 9.

W. H. Leycester, for the respondent.—It is a question of fact whether the print is distributed by way of an advertisement or not. It is arguable that these sheets, which must be admitted to be "prints" within the Act, were so distributed, and the alderman so found. There was evidence to show that the sheets were distributed to advertise the kind of news which was supplied in the *Financial Times*.

WRIGHT, J.—The alderman has not found that this printed sheet is an advertisement, but only that the object of the distribution was to advertise a certain newspaper. It is a publication of news, and it would be wrong to hold that, because the object of distributing the sheet containing the news was to advertise a newspaper, it became a print carried or distributed by way of advertisement within the meaning of section 9. The section is directed against cases where the thing itself is an advertisement, and not where the object of carrying or distributing it is to advertise.

DARLING, J.—I am of the same opinion.

Case remitted.

Solicitor for the appellant, *J. E. Lichfold.*

Solicitor for the respondent, *The City Solicitor.*

Q. B. Div.
(Lawrance and Ridley, JJ.) Feb. 8.

In re THE MUNICIPAL ELECTIONS ACT, 1884.
Ex parte PENNINGTON. (*a.*)

Election law—Municipal election—Election of councillors —Unopposed candidate—Return of expenses—No expenses in fact incurred—Municipal Elections (Corrupt and Illegal Practices) Act, 1884, *s.* 21, *sub-sections* 4, 7.

Every candidate is required, under the Municipal Elections Act, 1884, *to send to the town clerk, within twenty-eight days of the election, a return of his expenses with the accompanying statutory declaration.*

By section 21, *sub-section* 4, *if, after the time for making such return, the candidate in default shall, before the date of the allowance of such authorized excuse as is mentioned in the Act, sit or vote in the council, he shall forfeit* £50 *for every day on which he does so to any person who sues for the same. By sub-section* 7, *if a candidate appeals to the High Court and shows that failure to make such return and declaration has arisen by reason of inadvertence or by any reasonable cause of a like nature, the court may make such order and declaration as to them seems just, notwithstanding the lapse of the prescribed statutory period for making the return.*

P. was returned unopposed at a municipal election for the county borough of H., and believing that as he had

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

incurred no expenses of any kind, no return and declaration was required, omitted to return his expenses as "nil" until after the statutory period for making such return and declaration had expired.

Held, that there was sufficient evidence before the court hat the omission had been under such circumstances as to amount to an authorized excuse under the Act, and that the relief sought ought therefore to be granted.

Ex parte Robson, 35 W. R. 290, 18 *Q. B. D.* 336, *followed.*

This was an application on behalf of Mr. J. D. Pennington, who was returned unopposed at the last municipal election of councillors for the Wellington ward of the county borough of Hanley, for relief from penalties he had inadvertently rendered himself liable to, under the Municipal Elections Act, 1884.

Mr. Pennington had in fact incurred no expenses, and he believed, until a short time ago, that he was not liable under the Act to make a return and declaration because the expenses he incurred were *nil*. When he discovered his mistake the statutory time for making a return had lapsed.

A. J. Bam.—A candidate at a municipal election who has omitted to make the statutory return of his expenses is liable to the penalty imposed by the Municipal Elections Act, 1884, unless he obtains relief from the court, although in fact he has incurred no expenses of any kind. At any rate it was so decided in *Ex parte Robson*, 35 W. R. 290, 18 Q. B. D. 336. In that case, the facts of which were precisely similar to those of this application, the court granted the relief sought and I ask your lordships to follow that decision.

LAWRANCE, J.—I think this is a case of simple inadvertence and the relief sought ought to be granted.

RIDLEY, J.—I am of the same opinion.

Order accordingly.

Solicitors, *H. G. Church*, for *Arthur Challinor*, Hanley.

C. C. R.
(Lord Russell of Killowen, C.J., and Grantham, Wright, Bigham, and Darling, JJ.) March 5.

REG. *v.* CLEMENS AND OTHERS. (*a.*)

Criminal law—Malicious damage to property—Damage done in assertion of supposed right—Unnecessary violence—Malicious Damage Act, 1861 (24 & 25 *Vict. c.* 97), *s.* 51.

On an indictment under the Malicious Damage Act, 1861, *for malicious damage to property, it was proved that the defendants wilfully damaged the property in question in exercise of a supposed right to remove the property from the land on which it stood, and that, in so doing, they interfered with the property more than was necessary for the assertion of the right.*

Held, that they were guilty of malicious damage.

Case stated by the chairman of the quarter sessions for the county of Cornwall.

In August, 1897, a company, the lessees of certain land at Newquay, in Cornwall, began to excavate the foundations of a hotel upon it, and erected upon it a wooden building as an office. On the 31st of August a large number of persons, among whom were the defendants, assembled at Newquay and proceeded to the place in question. They there fastened a rope to the wooden building, pulled it over, and broke it up. They then tied the rope to two sides of the wooden building, dragged them for a distance of 120 yards from the place where the wooden building had been erected, and threw them into the sea. They then returned, tied the rope to the remaining two sides of the said wooden building, and likewise threw them into the sea. The wooden building was thereby completely destroyed. They were indicted at quarter sessions under section 51 of 24 & 25 Vict. c. 97, for malicious damage to the wooden building.

For the defence, evidence was given that until about sixty years ago the land in question was part of a common on which the inhabitants of Newquay were accustomed to mend and dry their nets, and to dig sand and to cut rushes, and to go for the purposes of recreation and of access to the sea; that about sixty years ago the owner of the soil inclosed this part of the land, but, by agreement with the inhabitants of Newquay, put a stile in the hedge of such inclosure for the purpose of giving access to the land; and that the inhabitants and visitors to Newquay have been accustomed to use the stile and to wander at pleasure over the inclosed land.

It was contended for the defendants that they were not guilty on the ground that the acts done by them had been done *bonâ fide* in the assertion of rights over the land which they believed to be possessed by the inhabitants of Newquay.

The chairman directed the jury that if they found that the defendants acted in the exercise of what they believed to be a right to remove an obstruction, but did more than was necessary for removing an obstruction, or greater damage than they were bound to do for that purpose, they ought to find the defendants guilty.

The jury found the defendants guilty with extenuating circumstances, which, at the request of the defendants' advocate, they explained as meaning that they found that the defendants acted in the first place in the belief that they were asserting a right, but that by destroying the wooden building and throwing it into the sea they did more than was necessary to be done in asserting that right.

H. E. Duke, for the defendants.—The chairman was wrong in directing the jury that if the defendants committed excessive damage in asserting a supposed right their belief in the supposed right was no defence: *Perry* v. *Fitzhowe*, 8 Q. B. 757. Admitting that there was evidence that the defendants acted maliciously, yet, if they acted as the jury found, in the assertion of a supposed right, the fact that they did more than was necessary to assert that right is immaterial.

Bucknill, Q.C., and *W. T. Lawrance*, for the prosecution, were not called upon to argue.

LORD RUSSELL OF KILLOWEN, C.J.—In this case the court is called upon to express its judgment on a special case stated by the chairman of quarter sessions for the county of Cornwall as to the conviction of certain persons who were convicted, under section 51 of 24 & 25 Vict. c. 97, of malicious damage to property.

It seems (so far as the facts appear from the case) that there was at Newquay, in Cornwall, a meadow the ownership of the soil of which is not in question, but over which certain rights were claimed by the inhabitants. The suggested nature of those rights is set out in the case. Some of those suggested rights appear to be profits *a prendre*, which could not be claimed by a community, and the case does not

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

ell us which of these suggested rights the defendants ere, as a matter of fact, asserting. But I gather at there was no evidence before the court of quarter ssions of the existence of any of these suggested ghts except the right of access to the sea and of ing the land for the purposes of recreation.

Again, we are not expressly told who the defenants are, and whether they claim rights as habitants or as occupiers of particular tenements. n the whole, however, I think that we are justified assuming that they were inhabitants of the town Newquay, and that they claimed such rights as ey did claim in that capacity. On the meadow in uestion a temporary wooden structure was erected hich was ancillary to a contemplated building. e defendants clearly went upon the land in sertion of what they believed to be their rights; t what they did was to absolutely demolish this ructure, and deliberately to haul first one part of it d then the remainder to the edge of the cliff, and throw those parts into the sea. It is not and it nnot be denied that on that state of facts there was idence on which the jury might have found the fendants guilty of unlawfully and maliciously mmitting damage, injury, and spoil within the aning of section 51; but it is contended that the airman misdirected the jury, and that, therefore, is conviction cannot stand.

It seems to me that the proper direction to give to jury in such a case is that they should ask themves this question: Did the defendants do what y did in the exercise of a supposed right? But on the facts before them, the jury come to the nclusion that the defendants did more than they ld reasonably suppose to be necessary for the ertion of that right, then that amounts to evidence which the jury are bound to find the defendants lty of malicious damage. That is, as it seems to , in substance and effect what the jury were told the chairman in this case. Very possibly there y be some remarks in his summing-up which do quite accord with this view, but on the whole I nk that his charge conveyed to the jury with icient precision the points that it was necessary them to consider before arriving at their verdict; nd, therefore, that this conviction must be affirmed.

GRANTHAM, WRIGHT, BIGHAM, and DARLING, JJ., oncurred.

Conviction affirmed.

Solicitors for Crown, *Graham & Graham*, Fowey.

Solicitors for prisoners, *Carthew & Wheeler*.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — March 4, 10, 11, 30.

UABON STEAMSHIP CO. *v.* LONDON ASSURANCE. (*a.*)

surance, marine—Repairs to ship in dock—Survey for Lloyd's classification—Apportionment of expenses between shipowners and underwriters.

A ship owned by the plaintiffs was placed in dry dock, r the purpose of repairs for which the defendants, as nderwriters on the ship, were liable. The plaintiffs ok advantage of the ship being in dock to have her rveyed for the purpose of retaining her class at Lloyd's, which they were entitled to have done at any time within twelve months of the date when the survey was due.

Held that the dock dues for the time when the survey was being done must be borne equally by the plaintiffs and the defendants.

Held, also, by Chitty *and* Collins, L.JJ. (A. L. Smith, L.J., *dissenting*), *that the cost of getting the ship into and out of the dock must be borne equally by the plaintiffs and the defendants.*

Marine Insurance Co. *v.* China Transpacific Steamship Co., 35 *W. R.* 169, 11 *App. Cas.* 573, *followed.*

Appeal of the plaintiffs from the judgment of Mathew, J.

The action was brought to recover the balance of expenses incurred by the plaintiffs on the repair of their ship *Ruabon*, which had been insured by the defendants.

In the course of a voyage *The Ruabon* sustained damage through perils insured against. In order to repair this damage it was necessary to place the vessel in dry dock. While the vessel was in dock the plaintiffs took the opportunity to have her surveyed for the purpose of her classification in Lloyd's Register of British and Foreign Shipping.

By Lloyd's rules a vessel in order to retain her class must be surveyed at certain intervals of time, but the owner may have his ship surveyed at any time during the twelve months previous to the date when the survey is due.

In the present case the survey took place about eight months before the actual date when it would have been due.

The defendants contended that as the plaintiffs had taken advantage of the ship being in dock to have her surveyed, the plaintiffs must bear one-half of the dock expenses while the joint operations of repairs and survey were going on, and also one-half of the expenses of getting the vessel into and out of the dock; the defendants had paid all the other expenses of the repairs.

The plaintiffs brought this action to recover the balance.

Mathew, J., held that the case was covered by *Marine Insurance Co.* v. *China Transpacific Steamship Co.*, 35 W. R. 169, 11 App. Cas. 573, and gave judgment for the defendants.

The plaintiffs appealed.

Cohen, Q.C., and *Montague Lush*, for the plaintiffs.

Joseph Walton, Q.C., and *L. L. Batten*, for the defendants.

Cur. adv. vult.

March 30.—A. L. SMITH, L.J., read the following judgment: The real and important point which it is desired to have determined in this case is whether, when a ship puts into dry dock (in the present case into a wet dock with a pontoon therein) in order to repair damage occasioned by a sea peril for which underwriters alone are liable, the cost of piloting, towing, and other expenses for getting the ship into dock for repair and of getting her out again when repaired are to be borne by the underwriters, or whether these expenses are to be shared between the shipowner and the underwriters, if the shipowner after the ship is in dock takes advantage of its being there to get her surveyed so as to enable her to keep her class, or for any other purpose of his own. It is said on behalf of the underwriters, who assert that these pilotage, towage, and other expenses are to be shared between the shipowners and themselves, that the principles laid down by this court and affirmed in the House of Lords in what is called the *Vancouver case* (*Marine Insurance Co.* v. *China Transpacific Steamship Co.*, 35 W. R. 169, 11 App. Cas. 573) show

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

that these expenses are to be shared. It becomes therefore necessary to ascertain what the *Vancouver case* actually decided and what principles are therein laid down, for unless these principles cover this present case I have no doubt that these expenses fall wholly upon the underwriters. From what is reported to have been the argument of counsel for the underwriters in the *Vancouver case*, 11 App. Cas., at p. 584, I was at first under the impression that the question of sharing the pilotage, towage, and other expenses necessary to take the ship into and out of dock had been under consideration in this court and the House of Lords; but this is not so, and Mr. Joseph Walton, who appeared for the underwriters, frankly admits this, and he agrees with Mr. Cohen, who was for the plaintiff, the shipwner, that the only question argued and determined in the *Vancouver case* was the sharing between the shipowner and underwriters of the dock dues payable to the dock after the ship had arrived therein, which dues were incurred during that portion of time when the concurrent operations of the shipowner and underwriters upon the ship were going on.

This question of pilotage, towage, and other expenses of getting the ship into dock, and which in the present case were not payable to the dock at all, but to third parties, was clearly not decided by this court or the House of Lords, and the *Vancouver case* is no actual authority thereon, but it is said that the principles underlying the decision are such that they cover the real point now raised in the present case. What the *Vancouver case* decided was that where a ship is insured against perils of the sea, and the ship is placed in dry dock in order to carry out repairs which the shipowner for his own purposes desires to execute (*i.e.*, scraping and painting the ship's bottom), which expenses the shipowner alone has to bear, nevertheless if when the ship gets into dry dock it is discovered that, by reason of a peril insured against, damage has been occasioned to the ship which has to be repaired at the expense of the underwriters, and of them alone, the dock dues incurred during these concurrent operations for the respective purposes of the shipowner and underwriter must be shared between them. That is the decision. The principle upon which this decision is founded I will state hereafter.

It is said by the plaintiffs, the shipowners, that their ship *The Ruabon* put into dock solely to repair damage for which the underwriters were alone liable, and not for any purpose of the shipowners, and that the pilotage, towage, and other expenses necessary for getting her into dock were incurred solely on the underwriters' account; and this is true. It is said on behalf of the defendants, the underwriters, that if these expenses had not been incurred the ship would not have been in dock, and the shipowners would not therefore have had the benefit of her being there to get her surveyed for her class; and this is also true. But the *Vancouver case* does not lay down that whenever a person incidentally obtains a benefit he must necessarily share expenses with another, which expenses had not been incurred on his account. If the pilotage, towage, and other expenses necessary for getting the ship into dock had been incurred in the present case for the purposes of both the shipowners and underwriters, for instance, to get the ship painted in dock, which is owner's repair, and also to get sea damage repaired, which are underwriters' repairs, the case of *The Vancouver* would have applied; but as the expenses in question were not so incurred, it is here that I think that the present case as to the real point to be decided, parts company with the *Vancouver case* and any principle laid down therein. Take, for instance, the case of a ship damaged by perils insured, fifty or twenty miles, or it may be one mile, from a dock into which it is necessary to take her for repairs for which the underwriters alone are liable, being piloted and towed into dock for that purpose. Are underwriters on ships to escape the payment of these pilotage, towage, and other expenses for which they are undoubtedly liable because after the ship is placed in dock, when dock dues first begin to run, the shipowner utilizes the occasion and occupies a day in dock conjointly with the underwriter in getting her surveyed so as to retain her class, or as in the *Vancouver case* occupied three days conjointly with the underwriter to get her painted and scraped, whereby there has been a common user of the dock? It will be noticed that the expenses when there was not this common user of the dock, I mean the remaining five days, were not shared in the *Vancouver case*. As regards the dock dues I agree that these must be shared, for they have been incurred by reason of the common user of the dock for the purposes of the two. If the £25 claimed in this case are for dock dues, then the *Vancouver case* covers them, but as the pilotage, towage, and other expenses necessary for getting the ship into dock were not so incurred, but only for the purpose of the one, in my judgment they are altogether outside not only the decision, but any principle laid down in the *Vancouver case*. I can find nothing in the *Vancouver case* which lays down that the well-known rule in marine insurance law as to "on whose behalf are expenses incurred" is done away with. It is, too, worthy of remark that in the *Vancouver case* the plaintiff and his eminent counsel, who were seeking to recover a particular average loss under a policy, and were trying as best they could to swell their claim against the underwriters so as to escape a warranty therein "free from average under 3 per cent. unless general or the ship be stranded," never so much as suggested that the expenses of pilotage, towage, and other expenses necessary for getting the ship into dock could be charged against the underwriters, for, it appears to me, the simple reason that these expenses had been incurred solely on behalf of the shipowner. They did claim the expenses in dock as having been incurred by reason of a common user of the dock for the purposes of both shipowner and underwriter, and they claimed the whole of the dock expenses, and if they could not get the whole, then they claimed the half as being expenses incurred by reason of the common user for the purposes of the two, and in the last they succeeded as regards the three days during which the joint expenditure was going on. It is now left for underwriters on ship, for the first time as far as I know, to set up that where there is no expenditure solely on their own behalf this expenditure is nevertheless to be divided or otherwise shared between them and the shipowners. I do not agree with this contention. Lord Herschell, L.C., in the *Vancouver case* I think pointedly lays down what is the principle upon which that case is decided. He says, "I have not lost sight of the fact that the vessel was put into dock only for the purpose of being scraped and painted, but I cannot think that this is material. The injury to the stern post was immediately discovered, and she remained and was kept there, and the dock was employed for both purposes. Once this conclusion is arrived at, and also that the cost of repairing the damage caused by the perils insured against is the true test, all the rest I think follows." What does this passage mean? It means, I think, that the expenses of putting into dock being only for the purpose of the shipowner, those expenses would fall upon him alone, but that was not material to the case then in hand, because the

injury to the stern post, for which the underwriters had to pay, was discovered immediately after the ship got into dock, and the dock was then employed for both purposes; that is, for the purpose of shipowner and underwriter, and these costs must be therefore divided between the two. The Lord Chancellor says: "Once this conclusion is arrived at"—what conclusion? why, that the dock was employed for both purposes—"then all the rest follows." The principle upon which this case was decided was that if there had been an employment for two purposes, and expenses for these two purposes are incurred in common, then each person who utilized the occasion must bear his share of the expenses incurred; but if the employment is only for one purpose, then the old principle, that he for whom the employment takes place must pay the costs, is left untouched. What I have said as to taking the ship into dock applies to taking her out. If all or any part of the £25 mentioned in the admissions is for dock dues whilst the common user was going on, these, as before stated, will come within the decision of the *Vancouver case;* but this is not the real point the parties wish decided. I need not say it is with regret that I find myself disagreeing with my brother Mathew and my brethren in this court, but as I have an opinion upon the matter, I am bound to express it, and I do. For the reasons above I think that the appeal should be allowed.

CHITTY, L.J., read the following judgment: The amount in controversy is small, but the question is one of importance to shipowners and underwriters. It is whether the expenses in taking the steamship *Ruabon* into and out of the pontoon dock and placing her there, and the dock dues whilst she was there, ought to be apportioned between the owners and the underwriters in the circumstances of the case. The particulars of the expenses in controversy are set forth in the admissions. They amount to £55 and consist of boat hire to and from the pontoon and Roath basin, piloting the vessel on and off the pontoon, towing the vessel on and off the pontoon, labour taking the vessel from the East dock to the pontoon, and taking her from the pontoon to the Roath basin, and docking and undocking, including tide on, tide off, and use of patent shoring. This last item (£25) was paid to Cardiff Pontoon Co., and appears to be for dock dues. The other items were paid to other persons. It is admitted that the charges are proper and that all the items were necessarily incurred in connection with the docking. My reason for mentioning the items with some particularity will presently appear. For the shipowners it is contended that the whole of these expenses fall on the underwriters. If they ought to be apportioned, it is conceded that the apportionment should be in equal shares. The ship was taken to and placed on the pontoon for the purpose of repairs, the burden of which fell on the underwriters. While the ship was on the pontoon, and after she had been opened out, the owners availed themselves of the opportunity of having her surveyed for the purpose of maintaining her classification, and they obtained the required certificate. The time had arrived when they were entitled, according to Lloyd's rules, to have her examined for classification, though there still remained some months to run before she would have lost her classification if not re-surveyed. It is admitted that docking was necessary for the vessel to pass her survey. In the *Vancouver case* the ship was taken into dock by the owner for the purpose of repairs, the expense of which fell on the owner alone; while there it was discovered that she had sustained injury while at sea to her stern post, the burden of these repairs fell on the underwriters exclusively. There were three common days while the ship was in dock during which both sets of repairs were being done simultaneously. Neither set of repairs interfered with or delayed the execution of the other. Each set required the whole of the three days. The Court of Appeal and the House of Lords held that inasmuch as the dock was in fact being used for both purposes during the three days, the dock dues for those three days had to be borne by the owner and underwriters in equal shares.

The question, then, on this appeal is whether this case is governed by the *Vancouver case.* Mathew, J., has held that it is. On the arguments for the appellants before us, a distinction which does not appear to have been taken before Mathew, J., was drawn between the expenses of taking the ship to and from the pontoon on the one hand, and the pontoon dues (the £25) while the ship was actually on the pontoon on the other hand. It was argued for the appellants that whatever the decision might be as to the latter, no part of the former ought in any event to be thrown on the shipowners. The report of the *Vancouver case* seemed to leave it in doubt whether the expenses of taking the ship into and out of the dock were then in question, but Mr. Joseph Walton, who had obtained the papers, was in a position to inform us—first, that these expenses were not in controversy in the action; and, secondly, that the cost of docking and undocking had before the action been apportioned on the average statement.

It appears to me that this case is indistinguishable from the *Vancouver case.* First, as to the pontoon dues, I think these dues fall within the actual decision. I understand the decision of the House of Lords to be that on the question of the actual user of the dock while the ship is in dock and the dock is being in fact used simultaneously for shipowner's purposes and underwriters' purposes, it is immaterial for whose purposes she was first brought into dock. This does not touch the question as to the expenses of taking her in and out. In the case before us, the pontoon was used for the classification, which is the owner's purpose; and for repairs for sea damage, which are underwriters' purpose. Both the owners and underwriters gained an advantage and received a benefit from the common user. Had the owners postponed the classification survey, they would have had to bear the whole of the expense of docking, necessarily within a short period of time. This time they anticipated. It was said by Mr. Cohen that during this period of time she might have been lost at sea. Granted; but the owners did in fact use the pontoon for their own purpose, acting in this respect as a prudent owner would do.

Secondly, I think that the principle of the decision in the *Vancouver case* covers the expenses of taking the ship into and out of the dock. These expenses, as is admitted, were necessarily incurred in connection with the docking. I draw the line definitely at this point. They seem to me to be mere accessories which ought to follow the principle. As I understand the facts they were not in any way occasioned by the condition of the vessel or by reason of her having been disabled by sea damage for which the underwriters were liable. Had they been made more onerous in the whole or in part by reason of the ship's disability arising from sea damage within the policy for which the underwriters alone were responsible, the case would have stood differently, and they would have fallen in the whole or in part, as the case might be, on the underwriters exclusively. I entirely agree with what Smith, L.J., has said with reference to a ship being disabled at sea at a distance from a port and requiring the assistance of a tug to tow her in.

The expenses of any such towage would undoubtedly fall upon the underwriters. I absolutely exclude anything in the nature of a voyage and any expense arising from the disability of the ship within the policy. If there should be any such expense included within any of the admitted items the parties whose object it is to obtain a decision on the main points will no doubt readily adjust it. I add that, in my opinion, it makes no difference whether the necessary expenses of getting the ship in and out are paid to the dock company or to some other person. It will be seen that I differ in some respects from the judgment of Smith, L.J. So far as I differ, I differ with reluctance. For these reasons I think that the appeal ought to be dismissed.

COLLINS, L.J., read the following judgment: I think this case is concluded by *The Vancouver*. I think the principle of that case is that when repairs in respect of damage for which underwriters are liable have been executed simultaneously with repairs as to which the owner is uninsured, and an expense has been incurred which would have been necessary for either purpose alone, such expense is not to be wholly attributed to one set of repairs alone, but forms a factor in the cost of each, and must therefore be divided between them in some proportion which *primâ facie* would be equal. The problem really is to find the cost at which each set of repairs has been executed. Each has been executed at a less cost because there is a common factor in the expenses which has inured to the benefit of both, and in stating an account of the cost of each, the person carrying out the repairs would be bound to debit each set with a proportion of the common items. This is a perfectly simple and intelligible principle, and applies to this case. It gets rid of all questions as to what was the sole or primary motive of incurring the common expenditure, or whether it was necessary at that time, and substitutes the simple test, "What was the cost of the work in fact done?" for nice questions as to whether the doctrines of subrogation, salvage, implied request arising from compulsion, can be made to apply.

This test—viz., What did the work cost?—seems to me to cover the expense of taking the ship into and out of dock, just as much as the expense of using the dock. It would have been necessary to get the ship into dock for the purpose of making the survey, and putting her in involved taking her out; so likewise as to the repairs of sea damage, and no fair statement of the cost of either operation could have omitted this element of expenditure. Therefore it has to be apportioned. The passage cited from the speech of Lord Herschell, so far from being inconsistent with this view, I venture to think establishes it. It eliminates the intention with which the operation of docking was undertaken as a factor in the discussion, and makes the fact that the opportunity was utilized the governing consideration. The benefit of antecedent expenditure by which the opportunity was created is just as much enjoyed by the person who elects to avail himself of the opportunity as is the expense by which the opportunity is prolonged during such time as he requires it. Lord Herschell's very words seem to cover it. He says: "Once this conclusion is arrived at"—*i.e.*, that the dock was employed for both purposes—"and also that the cost of repairing damage caused by the perils insured against is the true test, all the rest follows."

It has been suggested that this principle would cover the whole cost of towing a disabled ship from mid-ocean to port, and thence to dock, but I think that, as a practical question, there would be no difficulty in drawing the dividing line at the point where the expenses properly applicable to the operation of putting the ship into dock began, and a share of such expenses only would enter into the cost of a survey made, as here, because the ship was in the most convenient position for making it. The cost of towing the ship to port would be no more part of the cost of the survey than would be the cost of navigating the ship to the same port, had she met with no accident. The expenses in this case embrace nothing not incidental to the operation of docking. I think the judgment of Mathew, J., was right and ought to be affirmed.

Appeal dismissed.

Solicitors for the plaintiffs, *Botterell & Roche*, for *Vaughan & Hornby*, Cardiff.

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

From Q. B. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 8, 9, 11.

CALCRAFT v. GUEST. (a.)

Practice—Discovery—Production of documents—Privilege—Copies—Secondary evidence.

A document once privileged is always privileged.

After the trial of an action certain documents relating to the same subject-matter in a previous action were discovered at the office of a solicitor, who had obtained them from the representatives of the solicitor of the plaintiff's predecessor in title. The defendant, having appealed from the judgment, sought production of the documents on the hearing of the appeal.

Held, that the documents were privileged from production.

Minet v. Morgan, 21 *W. R.* 467, *L. R.* 8 *Ch. App.* 361, *followed.*

Wheeler v. Le Marchant, 30 *W. R.* 235, 17 *Ch. D.* 675, *explained.*

But held, further, that the defendant, having had an opportunity of taking copies of some of the documents, was entitled to give secondary evidence of such as he had copies of.

Lloyd v. Mostyn, 10 *M. & W.* 478, *followed.*

Appeal of the defendant from a decision of Collins, J., at the trial without a jury in Middlesex.

The action was brought to try a right of fishery, and since the trial a number of documents relating to the subject-matter of a previous action of a similar nature which had taken place in 1786 had been discovered at the office of a solicitor to whom they were handed by the executors of a solicitor who conducted the action for the plaintiffs' predecessor in title.

The documents consisted of (*inter alia*) the record in the action of *Fry* v. *Stevens*, tried in 1786, the briefs of counsel, proofs of witnesses, and notes of their evidence in the case. That action had been brought against the lessee of one of the predecessors in title of the plaintiffs and had been defended by such predecessor.

The appellant's solicitors had obtained copies of some of the documents from the persons in whose custody they had been, and thereupon asked that the documents might be produced.

The plaintiffs objected to produce them, claiming that they were privileged.

The appellant then asked for leave to give secondary evidence of those documents of which he

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

had copies. Although the documents had been prepared for the trial of *Fry* v. *Stevens* it did not appear whether they had actually been used or not.

Cozens-Hardy, Q.C., *Bosanquet, Q.C.*, and *Macaskie*, for the appellant, cited the cases which are referred to in the judgment of the court; and also referred to *Cleave* v. *Jones*, 20 L. J. Ex. 238; *Bishop of Meath* v. *Marquis of Winchester*, 4 Cl. & F. 445; and Taylor on Evidence, 9th ed., vol. 1, p. 600, s. 922.

Cripps, Q.C., and *Stuart Moore*, for the respondent. —It would follow from the appellant's argument, if it is correct, that if the brief of counsel were stolen and the other side got hold of it, they could produce it. The privilege is not destroyed if a document is handed over improperly to a third person. They referred to *Nordon* v. *Defries*, 30 W. R. 612, 8 Q. B. D. 508.

[LINDLEY, M.R., referred to *Jenkyns* v. *Bushby*, 14 W. R. 531, 17 W. R. Ch. Dig. 116, L. R. 2 Eq. 547.]

Cur. adv. vult.

March 11.—LINDLEY, M.R.—In the course of this appeal a question has arisen whether certain documents are privileged, and whether, if they are, secondary evidence can be given of some of them. We must be a little cautious of what we say, and we shall have to consider each particular document as it comes before us, as it may be that some of them may not be admissible on other grounds; but we can see whether they come within the principles upon which professional privilege is allowed. Looking at the authorities, the case seems to be covered by *Minet* v. *Morgan*, 21 W. R. 467, L. R. 8 Ch. App. 361, and if there are documents which were originally privileged owing to their confidential nature that privilege has not been lost. The privilege has not been waived. It has been said that *Wheeler* v. *Le Marchant*, 30 W. R. 235, 17 Ch. D. 675, is to the contrary. I do not think so. That case has been a little misunderstood, but I think it was quite right. That case has given rise to a good deal of controversy, but what was held I think appears from the form in which Cotton, L.J., said he thought the order there ought to be made. In *Kennedy* v. *Lyell*, 31 W. R. 691, 23 Ch. D. 387, referring to *Wheeler* v. *Le Marchant*, Cotton, L.J., said: "All that was decided was that communications between the solicitors and the surveyor of the client before any litigation was contemplated were not protected." The case was again referred to in *Lowden* v. *Blakey*, 38 W. R. 64, 23 Q. B. D. 332, before Denman and Charles, JJ., and it was again pointed out that there was nothing in *Wheeler* v. *Le Marchant* inconsistent with the decision in *Minet* v. *Morgan*. The question was also very carefully gone into by Stirling, J., in *Learoyd* v. *The Halifax Joint-Stock Banking Co.*, 41 W. R. 344, [1893] 1 Ch. 686, and he came to a similar conclusion. I think that *Minet* v. *Morgan* is right, and that *Wheeler* v. *Le Marchant* is right, and that so far the plaintiff is right, and the documents in question here are privileged.

Then comes the question whether the appellant can give secondary evidence of such of them as he has copies of. That, I think, is covered by the decision in *Lloyd* v. *Mostyn*, 10 M. & W. 478. In that case it was held that a certain bond was privileged from production, and it was then proposed for the plaintiff to put in evidence a copy of it as secondary evidence of its contents. That the judge at the trial allowed. The defendant moved to enter a non-suit on the ground that the evidence was improperly admitted. Reference was made to a passage in 1 Phillipps on Evidence (8th ed.), p. 182, founded on a decision of Bayley, J., in a case of *Fisher* v. *Hemming* in 1809, which is not reported anywhere else. The passage is: "If a deed deposited confidentially with an attorney has been obtained out of his hands for the purpose of being produced in evidence by another witness, it cannot be received." Thus in a case tried before Bayley, J., the plaintiff's counsel having proved a certain deed in the possession of the defendant, and the defendant refusing to produce it, though he admitted having received notice, the counsel of the plaintiffs offered in evidence a copy of the deed, which had been obtained from one who many years ago acted as an attorney for the person under whom the defendant claimed, and who had been intrusted by him with the original deed in his professional character. The counsel on the part of the defendant objected that this evidence ought not to be received, as the original deed had been deposited confidentially with the attorney; and Bayley, J., refused to admit it. He said the attorney could not give parol evidence of the contents of the deed which had been entrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or verbal communication. It is the privilege of his client and continues from first to last." Parke, B., said: "I have always doubted the correctness of that ruling. Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?" Lord Abinger, C.B., said, "It is impossible to say this copy was not evidence," and the rule was refused, in which all the court concurred. That is a distinct authority that secondary evidence can be given in a case of the kind which we have before us. These are the answers which we give to the two questions raised.

RIGBY and WILLIAMS, L.JJ., concurred.

Solicitors. *Nicholson, Graham, & Graham*, for *Preston & Francis*, Bournemouth; *Meynell & Pemberton*.

High Court of Justice.

Chan. Div. North, J. } Dec. 3.

In re DOUGLAS NORMAN & CO. (*a*.)

Solicitor—Costs—Security taken—Waiver of lien.

A solicitor who takes from his client a declaration charging the client's reversionary interest with payment of the solicitor's costs of negotiating a loan, is not entitled to a lien upon the client's documents in his possession for that purpose, in the absence of explanation to the client that he intended to assert his lien, notwithstanding the security given by the client.

In re Taylor, Stileman, & Underwood, 39 *W. R.* 417, [1891] 1 *Ch.* 590, *followed*.

Motion, asking that Messrs. Douglas Norman & Co., solicitors, might be ordered to deliver up to the applicant (upon oath if required) all deeds, books, papers, and writings in their custody or possession belonging to the applicant.

The applicant, a lady, was desirous of raising a loan on her interest in a sum of £3,000, appointed to her by her father under his marriage settlement,

(*a*.) Reported by R. SILLEM, Esq., Barrister-at-Law.

subject to her father's and mother's and the survivor's life interest therein.

On the day the lady came of age she gave the solicitors the following letter: "Dear Sirs,—Will you please negotiate for me a loan of £1,000, or such other sum as you can arrange and I am willing to accept, upon security of the interests and property after mentioned, and I request you to make all inquiries and obtain all information, valuations, and papers necessary for the above purpose, and I charge the aforesaid interests and property with the payment of your proper costs, charges, valuer's fees, and expenses thereof, and of any moneys I may now or hereafter owe you on any account."

The solicitors succeeded in raising a loan for the lady, and claimed a lien on the papers which came into their possession for that purpose.

Swinfen Eady, Q.C., and *Stewart Smith*, for the applicant.—The taking of security for his costs raises the presumption that the solicitor waives his lien, and there is nothing here to rebut that presumption (*In re Taylor, Stileman, & Underwood*, 39 W. R. 417, [1891] 1 Ch. 590; *Robarts* v. *Jefferys*, 8 L. J. Ch. 137; *Balch* v. *Symes*, T. & R. 87).

Buckmaster, for the solicitors.—There has been no waiver of lien in this case, and to hold so would be to go further than the cases warrant. In each case where the lien has been lost it has been because the nature of the security taken was inconsistent with the intention of relying on the lien; in the majority of the cases the solicitor got a negotiable security.

He referred to *Cowell* v. *Simpson*, 16 Ves. 275; *Stevenson* v. *Blakelock*, 1 M. & Sel. 535; *In re Taylor, Stileman, & Underwood*; and *Robarts* v. *Jefferys*.

Swinfen Eady, Q.C., replied.

NORTH, J.—I cannot distinguish this case from *In re Taylor, Stileman, & Underwood*. I cannot see that there is any distinction in principle between the promissory note given as security in that case and the charge on the reversion given in this. Moreover, the bargain in this case was made on the very day the lady attained twenty-one, and under circumstances which made it incumbent on the solicitor to fully explain to the lady her position in the matter, and that he was entitled to a lien on her papers, and intended to exercise it in spite of taking the security. This was not done, and, besides, the charge is on a reversionary interest, and it might be a long time before it could be realized, and it is impossible to suppose that it was intended that all that time the solicitor should keep the lady's papers.

Solicitors, *Mear & Fowler; Douglas Norman & Co.*

Chan. Div. Stirling, J. } March 31.

In re NICKELS.
NICKELS *v.* NICKELS.

Trustee—Appropriation of trust estate—Infant beneficiaries—No express power to appropriate.

Executors and trustees can, even where there is no express power enabling them so to do, make an effectual appropriation of any portion of a testator's estate, if such appropriation be made bonâ fide, *though it is safer for them to make the appropriation only with the sanction of the court.*

This was a summons which raised the question as to whether executors and trustees could in the absence of an express power make an effectual appropriation of any portion of a testator's estate.

The facts were these:

The testator, Christopher Nickels, gave all his residuary estate to his trustees upon trusts for sale and investment, and to pay an annuity to his wife during her life. Then he directed one half of one sixth to be invested and accumulated for twenty-one years, and during that period to pay the income of the other half to his son Edward Nickels, and after the expiration of the twenty-one years to pay the income of the whole to Edward Nickels for life, and after his death to his widow, and after her decease upon trust to transfer the capital of the trust funds to the children of Edward Nickels who attained twenty-one years in equal shares. Then came a power of maintenance and also a power to advance to any child of Edward Nickels a share not exceeding one half of the presumptive share to which such child would be entitled. The testator also empowered the trustees to apply for the benefit of Edward Nickels any portion not exceeding one half of his sixth share. Then came similar trusts and provisions as to four other sixth shares for the benefit of the testator's other sons. The remaining one sixth was given upon similar trusts for the benefit of the testator's daughter and her children, except that there was no power to apply one half of the daughter's share for her own benefit. The trustees were further empowered to apply any portion not exceeding one third part of the share or shares of the trust fund to the income of which any of the testator's six children should be entitled for or towards putting him, her, or them in business or otherwise advancing him, her, or them.

The testator died in 1860.

The period of accumulation came to an end in 1881, and the sons and daughter applied for advances.

The sons received one half of one sixth and the daughter one third of one half of her sixth.

The trustees also set aside £300 London and Greenwich 5½ per Cent. Ordinary Stock and £1,053 London, Chatham, & Dover 4½ per Cent. Debentures, and paid the income on these stocks to the daughter during her life.

In the trustees' cash book these stocks were entered as "allotted to Mrs. Morton as the balance remaining two thirds set aside for her children."

Under the powers in the will the trustees made advances to the children of the sons and the daughter.

The advances to the daughter's children were all made out of the Greenwich stock.

On the daughter's death her share became divisible, and a question was raised whether these stocks had been validly appropriated towards her share.

Coldridge, for the present trustees of the will.

Rowden, for the children of Edward Nickels.—The setting apart of these stocks was a mere matter of book-keeping, and there was never any effectual appropriation. Neither *In re Lepine*, [1892] 1 Ch. 210, 40 W. R. Dig. 89, nor *In re Richardson*, 42 W. R. 279, [1896] 1 Ch. 512, cover this case.

He also referred to section 4 of the Land Transfer Act, 1897.

Gatey, for other grandchildren.—Neither *In re Lepine* nor *In re Richardson* are direct authorities that the trustees could make such an appropriation. The law on the subject is stated in Lewin on Trusts, 9th ed., p. 667.

Stewart Smith, contra.—In re Richardson is an authority that the trustees could appropriate, and I submit that on the facts they have done so.

Buckmaster, for a purchaser from Mrs. Morton's

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

children, also supported the view that there had been an effectual appropriation.

STIRLING, J., stated the facts, and continued: Now the first question is whether, in point of fact, there was then (in 1881) made an irrevocable appropriation on the part of the trustees. What is suggested on behalf of the present trustees and on behalf of the children entitled to the other five sixths is that this was a mere book-keeping arrangement in order to avoid any question as to what rate of interest was to be charged on the advances made to Mrs. Morton and her children. It seems to me that that is not a sufficient explanation of what was done and of the entries made. If it was a mere book-keeping entry that might be, but it has been acted upon, and if the appropriation was not made or intended Mrs. Morton and the other children have ever since that time been receiving the income on a wrong footing. The income of these appropriations has been applied to Mrs. Morton. That could not be right if it was not meant as an effective appropriation; whether she got too much or too little does not matter, the other parties have conversely received too little or too much. The fund has been dealt with on that footing ever since the year 1881, and it seems to me, upon the evidence, the trustees did mean in the year 1881 to make a final and complete appropriation of this stock and of these shares, and that no explanation suggested in this case is adequate to account for what they did both in their books and by their acts.

Then comes the question, Is this appropriation one which the trustees were entitled to make? Now, there is no question raised here as to the *bona fides* of the transaction. It was done in perfect good faith, and the sole question is whether it was within the power of the testator's trustees. No authority has been cited to show it was not. What has been relied upon is a statement in Mr. Lewin's well-known book, where this is said: "Where the residue consists of a great variety of securities, the question arises whether the trustees, in the absence of any special power, can *virtute officii*, where infants are concerned, divide the residue by apportioning some securities to one residuary legatee, and other securities to another, but so that the distribution is a fair one according to the market price of the day of the funds so appropriated. The court can make such apportionment, for in a suit guardians *ad litem* of the infants are appointed, and are heard on their behalf, to protect their interests; but out of court, where the voice of the infants cannot be heard, it would be unsafe for trustees to make such apportionment on their own responsibility. However, where trustees are directed to invest the infant's share on any particular securities, they might accept securities of the value prescribed at the market price, as the transaction when resolved would be the payment of so much money, and the investment of it by the trustees in the requisite securities. Where there are no special powers, the trustees should turn the whole of the irregular species of property into money, and divide the proceeds." Now that is merely a statement to this effect, that the trustees where there is no express power would not act wisely in making an appropriation without getting the sanction of the court. That is very sound advice for a conveyancer to give to a trustee who was about to act by making an appropriation, but the question is, Supposing he does it, is it bad? and Mr. Lewin does not say so. He says the court can make such an appropriation, and that seems to me to imply that it is within the power of the trustee to make it, because the court has no power to alter the rights of parties and property. It has simply power to administer trusts. Beyond that there are two cases which I agree do not, in point of decision, govern the present case, but at all events go a long way to support the view which is contended for—namely, that the trustees have power in a proper case to make such an appropriation.

The first is in *In re Lepine*. I do not propose to deal with the specific facts, but the present Master of the Rolls, dealing with the case, says this: "One of the persons entitled to one sixth was a person who was of age and capable of entering into an agreement with the executor as to how he should take his sixth; and instead of taking it in cash, he and the executor agree together that he should take a mortgage for £700 in part payment of his legacy. Assuming for the moment that there were assets and that the £700 in in addition to what he got in cash or other securities did not exceed the amount due to him, what is there amiss with that? What is there to prevent the trustee or the executor making such a transaction? It is said he cannot do it. But why? If the assets are amply sufficient to satisfy the other five-sixths, why cannot one legatee at once say, 'I will not trouble you to turn my share into cash; give me something instead of it, which I will take.'" So that it is there laid down that where one legatee comes and wants payment of his share, the executor or trustee without the assent of the persons entitled to the other shares may take a specific asset and hand it over at a proper value to that legatee. Then Fry, L.J., says: "Supposing that an executor or trustee divides the estate in such a manner as that he gives to one legatee or *cestui que trust* property or securities worth twenty shillings in the pound, and he gives to another rubbish and trash which is not worth its nominal value, or the value at which he takes it, I have no doubt that such trustee or executor is guilty of a breach of trust, and that any legatee who takes the good securities with notice of what has been done may be made liable for that breach of trust." He does not say that the executors acting fairly may not divide the property in the proper shares between the legatees. The subsequent case of *In re Richardson* was before North, J. There there was an appropriation by executors to themselves of a certain portion of the property although certain of the shares were settled and although there was no corresponding appropriation in respect of the settled shares, and North, J., makes this remark: "It has been suggested that there could be no appropriation of this stock to the daughters' shares till the final division. I do not assent to that. I have heard no authority and see not reason for such proposition. I see no reason why, if part of the estate can be distributed before the final division, it should not be distributed among all the shares, proper investments being appropriated to the trust shares without waiting for the final division."

What happened in the present case was that in effect the sons got a division of one half of their share, and in order to put the daughter and her children on an equal footing with the sons, there being no power to make over an equal amount to the daughter and her children in cash, they set apart a fair amount of the estate to put the daughter and her children on the same footing as the sons. It seems to me, having done that in fact, it was within their power to do it, and I think, therefore, the appropriation was good.

Stewart Smith.—How does your lordship propose to answer the questions? As to the first question on the summons, I take it your lordship will say the trustees had power to sever the trust funds?

STIRLING, J.—Yes.

Solicitors, *E. G. Saunders; T. W. Hall; Douglas Norman & Co.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Mathew, J.) March 29.

ANDREW v. ST. OLAVE'S BOARD OF WORKS. (a.)

Metropolis—Nuisance—Defective sewer—Notice served on owner—Abatement of nuisance by owner—Right of owner to recover expenses incurred from sanitary authority—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 11.

The plaintiff was the owner of two adjoining houses at which a nuisance existed caused by defective drainage. The defendants, the sanitary authority of the district, served a notice in respect of each house, under sections 2 *and* 4 *of the Public Health (London) Act,* 1891, *addressed to the owner or occupier of the premises, requiring the nuisance to be abated by the construction of a new drain. The ground was opened up by the plaintiff, and it was discovered that the pipe in question carried off the drainage of both houses; but the plaintiff, under the erroneous impression that the two houses were so drained under the authority of an order for a combined system of drainage, did the necessary work for the abatement of the nuisance. It was subsequently ascertained that the draining of the two houses into one drain was unauthorized, and consequently the pipe in question was a sewer, for the repair of which the defendants were responsible.*

Held, that the plaintiff had been legally compelled to expend money in doing work which the defendants were liable to do, and was entitled to recover from the defendants, under section 11 *of the Act, the amount expended by him in abating the nuisance.*

Gebhardt *v.* Saunders, 40 *W. R.* 571, [1892] 2 *Q. B.* 452, *followed.*

Appeal of the plaintiff from the judgment of the judge of the Southwark County Court.

The action was brought to recover £24 under the following circumstances.

The plaintiff was the owner of two houses, Nos. 5 and 6, Vine-street, Southwark. The defendants, who were the sanitary authority for the district in which the plaintiff's houses were situate, served two notices under the Public Health (London) Act, 1891, ss. 2 and 4, one in respect of each house, addressed to the owner or occupier of the premises, stating that the board, being satisfied of the existence of a nuisance at the premises arising from defective drainage, required the abatement of the nuisance by the removal of the defective drain and the construction of a new drain into the common sewer.

The plaintiff commenced the necessary work, and, on the ground being opened up, it was discovered that the two houses were drained into one drain. The plaintiff's surveyor searched the records of the sanitary authority and found an order for a combined system of drainage which he erroneously thought related to these premises, and the plaintiff accordingly completed the work at a cost of £24. After the work had been finished it was ascertained that there was no order for a combined system of drainage in respect of these premises. Consequently the defective pipe was a sewer, for the repair of which the defendants were liable. The plaintiff then brought this action to recover the £24 paid by him for the execution of the work. The county court judge gave judgment for the defendants.

By section 4, sub-section 1, of the Public Health (London) Act, 1891: "On receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues; or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice and to execute such works and do such things as may be necessary for that purpose." By sub section 3 (*a*): "Where the nuisance arises from any want or defect of a structural character, or where the premises are unoccupied, the notice shall be served on the owner." By sub-section 4: "Where a notice has been served on a person under this section and . . . such person makes default in complying with any of the requisitions of the notice within the time specified he shall be liable to a fine not exceeding £10 for each offence, whether any such nuisance order as in this Act mentioned is or is not made upon him."

By section 11, sub-section 1: "All reasonable costs and expenses incurred in serving notice, making a complaint, or obtaining a nuisance order, or in carrying the order into effect, shall be deemed to be money paid for the use and at the request of the person on whom the order is made; or . . . if no order is made, but the nuisance is proved to have existed when the notice was served or the complaint made, then of the person by whose act, default, or sufferance the nuisance was caused; and in case of nuisances caused by the act or default of the owner of premises, such costs and expenses may be recovered from any person who is for the time being owner of such premises."

W. E. Ball, for the plaintiff.—The defendants are liable to the plaintiff for the expenditure incurred by by him in complying with the notice, for the plaintiff was compelled to spend the money in doing work which the defendants were legally compellable to do. If the plaintiff had not complied with the notice he could have been proceeded against and fined under section 4, sub-section 4 (*b*), of the Public Health (London) Act, 1891. Moreover, apart from the common law principle, the plaintiff can recover under section 11, for it was decided in *Gebhardt* v. *Saunders*, 40 W. R. 571, [1892] 2 Q. B. 452, that the cost "of carrying the order into effect" includes the cost of complying with the notice where a notice has been served under section 4, and no order under section 5 has been made. In this case "the person by whose act, default, or sufferance the nuisance was caused" was the defendants, and the case therefore comes within the language of section 11. The whole scheme of the Act is to procure the speedy abatement of nuisances, and the object of section 11 is that a person who has been served with a notice, and who has forthwith proceeded to do the work necessary to abate the nuisance, may recover the cost of so doing from the person who is subsequently discovered to be really liable.

He also referred to *Florence* v. *Paddington Vestry*, [1895] W. N. 143.

Macmorran, Q.C., for the defendants.—The plaintiff cannot recover in this action, for, not being liable for the nuisance caused by a defective sewer, he was not legally compellable to comply with the notice and do the work necessary to abate the nuisance. The service of a notice does not determine the question of liability: *Self* v. *Hove Commissioners*, 43 W. R. 3[illegible], [1895] 1 Q. B. 685. Before a person can be fined under section 4, sub-section 4, for non-compliance with a notice, the sanitary authority must clearly establish that he is responsible for the existence of the nuisance. *Gebhardt* v. *Saunders* was wrongly decided, and ought not to be followed. Section 11

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

does not apply to a case such as this, but to cases under section 8, which section gives power to the sanitary authority to do the necessary work itself if the person by whose act the nuisance is caused cannot be found.

Lord RUSSELL OF KILLOWEN, C.J.—The question in this case is one of considerable difficulty and complication, and it is with some doubt that I give my decision.

The plaintiff is the owner of two houses, 5 and 6, Vine-street. In connection with these houses a nuisance arose attributable to defective drainage. The matter was one which required to be promptly dealt with, for otherwise danger to health would result. Accordingly the defendants, who are the sanitary authority, issued a notice addressed to the owner or occupier of the premises. At that time no one could tell from a casual inspection of the premises whether the defective conduit, to use a neutral word, causing the nuisance was a pipe draining one house only, in which case it would be a "drain," and the plaintiff would be liable; or whether the conduit conveyed the sewage matter from two or more houses, and was, therefore, a "sewer" for which the sanitary authority would be responsible, unless the pipe had been made under an order for a combined system of drainage. Upon receiving the notice from the sanitary authority the plaintiff caused his surveyor to make inquiries in order to try and ascertain upon whom lay the responsibility of remedying the state of things which was causing the nuisance. The surveyor searched the records of the district, and found, as he thought, an order for a combined system of drainage applying to these premises, the result of which would be to make the conduit in question a drain, for the repair of which the owner would be liable. The surveyor communicated the result of his researches to the sanitary authority, and then proceeded to get the necessary work done. It is not suggested that the defendants were in any way prejudiced, or that these matters constitute an estoppel against the plaintiff. It subsequently turned out that the facts were not as the surveyor thought, for it was ascertained that the numbering of houses had been altered since the date of the order for combined drainage, and consequently the order did not relate to the plaintiff's two houses at all. It is now admitted that this conduit carries off the sewage of the two houses without any order of the sanitary authority, and is consequently a sewer, and the sanitary authority were therefore responsible for the defect which caused the nuisance. Before the surveyor's mistake had been discovered the plaintiff had spent money in doing the necessary work, which if the facts had been known ought to have been expended by the defendants. The plaintiff now seeks to recover from the defendants the money so spent by him, and the question we have to determine is whether he is in law entitled to do so.

The first question is as to the effect of section 4, sub-section 4, of the Public Health (London) Act, 1891. The argument for the defendants is that when proceedings are taken under that sub-section for non-compliance with a notice, the magistrate is not empowered to make any order on the owner who has been served with the notice by the sanitary authority unless absolute and clear proof is given that the nuisance is due to the act or default of the person upon whom the notice has been served. Until that has been proved it is said that the magistrate has no jurisdiction to deal with the matter. I do not suggest that it is not competent for the person served with the notice to give evidence to show that he is not the person liable to comply with it; but, supposing that he is not in a position to give any such evidence, I am not convinced that th magistrate may not, in the absence of such evidence, give effect to the notice and require the person who has been served to comply with it. In other words, the liability of that person is not established finally and for all time; he is made *primâ facie* liable, and the further question as to who is ultimately to be held liable is left to be dealt with subsequently. That was the view of Day and Charles, JJ., in *Gebhardt* v. *Saunders*. I am not at all insensible to the arguments which have been addressed to us on behalf of the defendants; but, on the whole, I am not prepared to differ from the views expressed by the learned judges in that case. I am not prepared to say that that case was not rightly decided.

The consequence is that the plaintiff in this case has been legally compelled to do something for which the defendants were liable. Now, does that view give a just and reasonable scheme for applying the provisions of this act? I think it does, because when I turn to section 11 I find a provision which applies to such a case as this. [His lordship read section 11.] Amplifying the language of that section, it seems to me that it means that where no order has been made but a nuisance existed at the date when the notice was served, then any money paid for the purpose of abating the nuisance is to be deemed to be money paid for the person by whose default the nuisance was created. I think that that is not a constrained, but a perfectly reasonable construction of that section. Mr. Macmorran says section 11 may be satisfied by applying it to cases arising under section 8 where the work is done by the sanitary authority without any order at all. I agree that section 11 would cover such a case, but the section covers other cases also, and there is no reason why it should be restricted to cases under section 8. I think section 11 may be applied to this case. The result is that as the plaintiff was compelled to do work which the defendants might have been compelled to do, he is, in my opinion, entitled to recover from the defendants the money spent by him in doing the work. The appeal, therefore, must be allowed.

MATHEW, J.—I am of the same opinion and have nothing to add to the reasons given by my lord, with which I entirely concur.

Appeal allowed.

Solicitors for the plaintiff, *Andrew, Wood & Purves.*

Solicitors for the defendants, *Bayley, Adams, Hawker & Noble.*

Prob. Div. & Adm. Div. Probate. } Nov. 8.

In the Goods of WYATT (DECEASED). (*a.*)

Probate—Witness—Order for examination of—Costs—Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 26.

Where a witness attends in court for the purpose of being examined pursuant to an order made under section 26 *of the Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *he is not entitled to conduct-money before being examined.*

Examination of Thomas Hill, who attended for the purpose of being examined as to his possession or knowledge of the will of the deceased, pursuant to an

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

order obtained under section 26 of the Court of Probate Act, 1857, by a niece of the deceased who alleged that she took an interest under the will.

Thomas Hill, who had come from Swindon, was in court, but

Woodfin, on his behalf, objected to his giving evidence until he had been paid conduct-money as upon a trial in court, and relied on ord. 37, r. 9, of the Rules of the Supreme Court.

Pritchard, for the applicant, referred to ord. 38, r. 28.

JEUNE, P.—I do not think those orders apply. This proceeding is taken under a special power of the Court of Probate, under which the court orders the witness to attend. He may be entitled to his costs, but not to conduct-money.

The witness was examined, and at the conclusion,

Woodfin applied for costs, as being in the discretion of the court by section 26, and his application was ordered to stand over to the hearing, if proceedings taken within a reasonable time; otherwise liberty to apply.

Solicitors for the applicant, *Ward, Bowie, & Co.*
Solicitor for the witness, *F. Ridley*.

Prob. Div. & Adm. Div. } Oct. 25.
Probate. }

In the Goods of PIAZZI SMYTH. (a.)

Probate—Mutual and joint will—Death of one—Grant of probate of operative part.

A husband and wife made a will which contained mutual dispositions in favour of the other on the death of one, followed by joint dispositions to take effect on the death of the survivor, but with full power to the survivor to alter the same.

On the death of the wife the court granted probate to the husband of so much of the will as then became operative.

Motion for probate of so much of the will of Professor and Mrs. Piazzi Smyth as had become operative by the death of Mrs. Piazzi Smyth.

The will made on the 14th of May, 1888, began: "We, Charles Piazzi Smyth, and spouse, Jessie Duncan, or Piazzi Smyth, do declare this will and writing to be our last will and testament"—then followed a disposition by the husband of all his property in his wife's favour if she survived him, and on the second sheet a similar disposition by the wife of all her property in her husband's favour if he survived her, and they then nominated and appointed the survivor to be the sole executor and universal legatary of the one who should predecease the other, and then followed provisions and dispositions to be carried out on the death of the survivor unless the survivor should make a new will as he or she was thereby empowered to do.

There were three joint codicils dealing with these provisions and dispositions.

Priestley, in support of the motion.—Professor Piazzi Smyth does not wish what is really now his will to be known for various obvious reasons, and therefore does not wish the last part of the will to be admitted to probate. This case is distinguished from *In the Goods of Raine*, 6 W. R. 816, 1 Sw. & Tr. 144, which was a joint will, and only took effect where both parties were dead. This is a mutual will so far, and then a joint will.

JEUNE, P.—The order will be for grant of probate of the will so far as it has become operative. That will be the principle.

Motion allowed.

Solicitors, *Palmer, Eland, & Nettleship.*

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). } July 5, 1897.

VAN GRUTTEN v. FOXWELL. (a.)

Will—Real estate—Devise—Rule in Shelley's case—*Heirs taking by descent or purchase—Equitable or legal estate—Execution of disentailing deed by person afterwards found lunatic by inquisition.*

A testator devised real estate to trustees in trust to receive the rents and profits to and for the use and benefit of such of his child or children as should be living at the time of his death, and to pay and apply such rents and profits, or so much thereof as the trustees should deem right and proper, in and about the maintenance and education of such child or children until majority or marriage, and in trust to permit such child or children, as they should severally attain the age of twenty-one or be married, to receive and take the rents and profits, if more than one, in equal shares and proportions, for her, his, and their own use and benefit, and for the term of her, his, and their life or lives; and if he left only one child, then to permit and suffer such one child to receive the rents and profits for her sole use and benefit for the term of her life. The testator declared that his will was that, from and after the death of such child or children, the trustees should stand seised of the lands devised to them in trust unto and to the use of the heirs of the body and bodies of such child or children, if more than one, to be equally divided among them, such lands to be legally conveyed and assured unto such heirs of any child or children, if more than one, to be equally divided among them, such lands to be legally conveyed and assured unto such heirs of any child or children in equal shares, as they should severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever. And the ultimate gift over was introduced in these terms: "And if it shall happen that I shall depart this life leaving no child or children, or issue of any child or children as I shall leave, and the issue of such child or children shall die before he, she, or they shall attain the age of twenty-one years or be married"; then over.

The testator died in 1815, *leaving an only child, a daughter, who married and had an only child, a son, who survived her.*

Held, that the legal estate remained in the trustees, and that the life estate of the testator's daughter, as well as the estate limited to the heirs of her body, were both equitable estates; that there was nothing in the context to indicate that the words "heirs of the body" were used in any sense different from their ordinary legal meaning of a line of descent; and that consequently the rule in Shelley's case *applied, and the testator's daughter took an estate tail.*

Harton v. Harton, 7 *T. R.* 652, *approved.*

The rule in Shelley's case *considered.*

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

A deed executed by a married woman, who was certified at the time to be of competent understanding, will not be invalidated because a jury some years afterwards find that her insanity dated from a time prior to the execution.

Appeal from a decision of the Court of Appeal (Lord Halsbury, L.C., Lopes and Rigby, L.JJ.), which affirmed a judgment of Vaughan-Williams, J.

The respondents brought this action to recover possession of certain lands and hereditaments in the county of Cornwall, claiming as heirs of William Harris.

William Harris, who died in 1815, by his will dated the 31st of October, 1804, devised the property in question to trustees.

In trust, in the first place, to have, receive, and take the rents, incomes, issues, and profits of all and singular my said freehold lands and tenements to and for the use and benefit of such of my child or children as shall be living, or wherewith my wife may be *ensient* at the time of my death, and to pay, apply, and dispose of such rents, incomes, and profits, or such and so much thereof as they shall deem right and proper, into and about the maintenance and education of such child or children until he, she, or they shall severally and respectively attain the age of twenty-one years or be married; and from and after such child or children shall have attained the age of twenty-one years or be married, then in trust to permit and suffer such child or children as they shall severally attain the said age of twenty-one years or be married to have, receive, and take, if more than one, in equal shares and proportions the said rents, incomes, and profits of all and singular my said freehold lands and tenements to and for her, his, and their own use and benefit for and during the term of her, his, and their natural life and lives. And if I leave only one child and my wife not *ensient*, or if *ensient* and such child or children wherewith she may be *ensient* shall not be born alive or die before he, she, or they shall attain the age of twenty-one years or be married, then to permit and suffer in like manner such one child to have, receive, and take the said rents and profits of my said freehold lands and tenements to and for her or his sole use and benefit for and during the term of her or his natural life. And from and immediately after the death of such child or children then my will is that my said trustees shall stand seized and be possessed of all and singular my said freehold lands and tenements hereinbefore devised to them, in trust unto and to the use of the heirs of the body and bodies of such child or children lawfully begotten, if more than one to be equally divided between them, such freehold lands and tenements to be legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever; the rents, issues, incomes, and profits of such freehold lands and tenements in the meantime to be paid and applied by my said trustees in and about the maintenance and education of such heirs of my child or children lawfully begotten in such manner and in such portions either in part or in all as my said trustees shall deem proper to order and direct.

The remaining facts appear sufficiently from the judgments.

Haldane, Q.C., T. H. Carson, and *J. H. Boome*, for the appellant.

Crackanthorpe, Q.C., and *J. H. Foote*, for the respondents.

Lord HERSCHELL.—The decision of this case turns principally upon the construction of the will of William Harris, dated the 31st of October, 1804. The question is, whether his daughter Mary took under his will an estate tail or only an estate for life. The lands were devised to trustees in trust to receive the rents and profits to and for the use and benefit of such of his child or children as should be living at the time of his death, and to pay and apply such rents and profits, or so much thereof as the trustees should deem right and proper, in and about the maintenance and education of such child or children until majority or marriage, and in trust to permit such child or children, as they should severally attain the age of twenty-one, or be married, to receive and take the rents and profits, if more than one, in equal shares and proportions, for her, his, and their own use and benefit, and for the term of her, his, and their life or lives; and if he left only one child then to permit and suffer such one child to receive the rents and profits for her sole use and benefit for the term of her life. The testator declared that his will was that from and after the death of such child or children the trustees should stand seised of the lands devised to them in trust unto and to the use of the heirs of the body and bodies of such child or children, if more than one, to be equally divided among them, such lands to be legally conveyed and assured unto such heirs of any child or children in equal shares as they should severally and respectively attain the age of twenty-one years, or be married, and to their several and respective heirs and assigns for ever. Power was given to the trustees in the meantime to apply the rents and profits in and about the maintenance and education of such heirs of his child or children. The gift over was introduced in these terms: "And if it shall happen that I shall depart this life leaving no child or children, or issue of any child or children, or if such child or children as I shall leave, and the issue of such child or children shall die before he, she, or they shall attain the age of twenty-one years or be married, then," &c. The testator left an only child, a daughter, who married, and became Mary Hartley. She, again, had only one child—a son.

The question is whether, upon the true construction of the provisions I have referred to, the rule in *Shelley's case*, 1 Rep. 88*b*, applies, so that the testator's daughter took an estate tail, or whether, as contended by the appellant, the son of that daughter took the fee by purchase. It is well settled that, if the estate taken by the person to whom the lands are devised for a particular estate of freehold, and the estate limited to the heirs of that person are not of the same quality—that is to say, if the one be legal and the other equitable—the rule in *Shelley's case* has no application. If they are either both legal or both equitable the rule applies. Although the legal estate is in the present case vested, in the first instance, in the trustees, there is no doubt that the language of the will by which the trustees are to permit and suffer his child (if only one) to receive the rents and profits for her sole use and benefit, is sufficient, if those words stood alone, to pass the legal estate to the testator's child. It is equally clear, however, that the trusts of the will require that, prior to his child attaining twenty-one, the legal estate should be in the trustees, and that it should again be in the trustees after his child's death. Where there are such dispositions as are to be found in the present case, I think that the true view is that the legal estate remains throughout in the trustees, and that the estate of the beneficiaries

is equitable only. This view is supported by the authority of *Harton* v. *Harton*, 7 T. R. 652, and other cases, and I think it both a convenient and a sound one. I proceed now to consider whether the terms of the devise vested in Mary Hartley an estate tail. If the devise had ended with the words "unto and to the use of the heirs of the body and bodies of such child, if more than one, to be equally divided between them," it would have been, I think, beyond controversy that Mary Hartley took an estate tail. The rule in *Shelley's case* cannot, I think, be regarded as a mere rule of construction designed to carry out the intentions of the testator, which will therefore yield to any indication of a contrary intention to be found in the will. It is a rule of law, that where an estate is devised to the heir or heirs of the body of a person to whom a prior estate of freehold has been given, the heirs take by descent, and not by purchase, and that an estate in fee simple or in fee tail is created in the ancestor. A testator can no more make such a devise and direct that it shall not have this operation, than he can, in terms, create an estate in fee simple or an estate tail, and then direct that these estates shall not have the incidents which the law annexes to them. If words be superadded purporting to have that effect they must be treated as absolutely ineffectual. So, too, must words inconsistent with the possession of an estate tail or in fee simple by one to whom a life estate has been devised, with a subsequent limitation to his heirs, special or general. At the same time, if the words which are added, or, indeed, any provisions to be found in other parts of the will, show that the expression "heirs" or "heirs of the body" was not intended to be used in the ordinary legal sense, but was intended to designate some individual person or particular class of persons, effect may be given to the intention of the testator thus expressed. The rule in *Shelley's case* does not then apply, because the limitation after the estate for life is not upon the true construction of the will to the heirs or heirs of the body of the tenant for life in the legal sense of those words, any more than it would have applied if the gift had been in terms to a designated person or a designated class. I do not propose to travel through the authorities. They certainly cannot all be reconciled, but the decisions in this House by which your lordships are governed, to my mind, amply support the view which I have expressed. Since writing the above I have had the advantage of reading the opinion prepared by Lord Macnaghten. I entirely agree with the observations which he makes as to the origin and scope of the rule. A study of the authorities had led me to the same conclusion, and I find it quite unnecessary to repeat in language probably less felicitous the reasons which he has so pithily and lucidly expressed. I think that the introduction of a notion of a "general intent" and a "particular intent" on the part of the testator, the latter intent yielding to the former, tended to put matters on the wrong track, and to suggest that the estate which the devisee took depended after all on the intention of the testator, and not on the effect which the law gave to a devise in particular terms.

I have then next to inquire whether there is anything to be found in the present will which interprets the expression "heirs of the body and bodies of such child or children," and shows that those words were not employed in their legal sense? Mr. Haldane relied mainly for this purpose on the provisions which immediately follow. He did not, indeed, contend that the words "to be equally divided between them" would of themselves suffice to have this effect. The authorities were too strongly against him for such a proposition. But he maintained that, taken in conjunction with the subsequent direction to the trustees to convey to "such heirs" in fee, and with other provisions of the will, there was enough to show that the testator could not have used the words "heirs of the body and bodies of such child or children" in their legal sense, or intended thereby to designate the whole stock of inheritable descendants of his child or children in due course of succession. I am unable to accede to this argument. I can find nothing in the will which inevitably leads to the conclusion that the testator used the word "heirs" in a sense other than its ordinary legal one. Indeed, so far from demonstrating that the testator cannot have employed it in its legal signification, the provisions relied on appear to me to be quite consistent with the creation of an estate tail or estates tail in his child or children. The difficulty said to be occasioned by the use of the words "to be equally divided between them" is only a difficulty if you assume that they are intended to apply in case the testator has only one child, and that child has more than one son—a gratuitous assumption, as it seems to me, for the words are properly applicable in the case of more than one child of the testator having an heir of the body, and this sufficiently explains their presence in the will without supposing that by "heirs of the body" the testator meant something else. Again, what is there inconsistent with the creation of estates tail in his children, that the testator should direct his trustees to convey the reversion in fee to the heirs of the tenants in tail at a particular time? It is, no doubt, a peculiar provision, but it is not nonsensical or incapable of legal operation, though it might, of course, be defeated by his children barring their estates tail.

The testator's daughter Mary did, by an instrument bearing date the 28th of February, 1835, purport to bar her estate tail. Vaughan Williams, J., held that she had not effectually done so, inasmuch as he thought it was proved that she was not at that date of sound mind. The law required that, before executing the deed, she should be examined before commissioners, and it could only be executed if they certified that she was of full age and competent understanding, and if an affidavit was lodged containing a statement to that effect. All this was done, and against this testimony in favour of her sanity the only evidence was the finding of a jury on an inquisition of lunacy taken in December, 1843, that Mary Hartley was then of unsound mind, and had been in the same state of unsoundness of mind from the 31st of October, 1834. I agree with the Court of Appeal in thinking that this finding is not sufficient to outweigh the evidence afforded by the circumstances to which I have called attention. It would, in my opinion, be very dangerous to allow a deed executed by a married woman who was certified at the time to be of competent understanding, to be treated as null and void merely because a jury more than nine years afterwards found that her insanity dated from a period prior to its execution. I agree, then, with the Court of Appeal in thinking that an estate tail vested in Mary Hartley, that it was converted into an estate in fee simple by the disentailing assurance if that deed was valid, and that, in that case, descent must be traced from her as the last purchaser. The respondents claimed as the heirs of William Harris, treating him as the last purchaser. Although the Court of Appeal came to the conclusion that Mary Hartley, and not William Harris, was the last purchaser, they affirmed the judgment for the respondents on the ground that they were the heirs of Mary as well as of William. It appears that, in the course of the argument before the Court of Appeal, the

point was made that, if Mary Hartley had effectually converted her estate tail into an estate in fee, and if she had by will validly disposed of her estate, the title of the respondents would be ousted, and it was alleged that such a will existed. The appellant's counsel thought that this point was reserved to them, and I gather that it was so intended by the court, and that owing to some oversight—due probably to the court being differently constituted when the judgment was delivered—the judgment was simply affirmed, which deprived the appellant of any opportunity of raising it. I think that he is entitled to that opportunity. The respondents claimed as heirs of William Harris. If they had been right in this, it would have been immaterial whether Mary Hartley had made a testamentary disposition or not. But if they are permitted—and I think quite rightly—to claim by descent from Mary, this is a different case, and I think that the appellant must be allowed, on the other hand, to meet it in any way he can, which he has hitherto not had an apportunity of doing. I think, therefore, that the respondents should be allowed to amend their pleadings by claiming in the alternative from Mary Hartley as the last purchaser, and that the appellant should be allowed to make any amendments to meet this case that he may think fit, and that there should be a new trial to determine the issues thus raised. I think that it should be made a condition that the appellant should admit the pedigree which the jury found proved, but that it should be open to either party to produce additional evidence on the question whether Mary Hartley was of unsound mind when she executed the disentailing deed.

Lord WATSON concurred.

Lord MACNAGHTEN.—The point in this case turns upon the effect of the first set of limitations in the will, dated the 31st of October, 1804, of William Harris, who died in 1815. And that depends upon the question whether those limitations are so framed as to attract the rule commonly known as the rule in *Shelley's case*. The subject, which was discussed at the bar, so rarely comes up for discussion nowadays, that I make no apology for reminding your lordships of the precise terms in which the rule was stated in the case from which it takes its name. The statement is this: "It is a rule of law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate and not words of purchase." Every part of that statement is, I think, deserving of attention, from the opening words, which declare the rule to be a "rule of law," to the last clause, which says that heirs can never take by purchase in a case to which the rule applies. It is hardly necessary to observe that any expression which imports the whole succession of inheritable blood has the same effect in bringing the rule into operation as the word "heirs," though perhaps it was not so always, and, though it seems to have been thought at one time, and, indeed, it was argued as late as 1844, that, in the absence of technical words, the governing principle was not the rule in *Shelley's case*, but the doctrine of *cy près*—see 1 Rep. 106 *b* n. (I. 5), and *Harrison* v. *Harrison*, 7 Man. & G. 938.

The rule has a curious history. No one can tell who its author was. It may be traced in the year-books as far back as the time of Edward II., but no one can fix the date when it was first recognized. No one knows for certain how it came to be laid down. Even the purpose of its being, has been the subject of controversy. The better view seems to be that it is a rule of tenure founded on feudal principles, and that its purpose was to prevent the lord being defrauded of the chief fruits of seignory. It has been said that the rule was intended to protect the inheritance from abeyance, which either means the same thing or else means very little. Others—rather, I think, in anticipation of the course of events and the development of modern ideas—have discovered that it was designed to facilitate the alienation of property and the satisfaction of the ancestor's debts; while one very learned writer is of opinion that its main object was to exclude the possibility of creating "an amphibious species of inheritance," calculated to introduce confusion and disorder into the system of our law. Nor are learned writers on the subject agreed as to the mode in which the rule operates. On the one hand, it is assumed that the limitation to the heirs by virtue of some force of attraction unites and coalesces with the limitation of the freehold to the ancestor, and thus operates to vest in him a fee simple or a fee tail, as the case may be, divided or split by intervening limitations, where there are any. On the other hand, it has been maintained with much plausibility that there is no such union or consolidation, but that the limitation to the heirs is executed in the ancestor, to whom a gift is implied, so as to vest in him another and a larger estate, in which the particular estate of freehold becomes merged when there are intervening limitations. That was Mr. Hayes' view, and I rather think it was Mr. Preston's view, too. It has some support in expressions used by Yates, J., and other judges, and it has, at least, the merit of getting rid of the stumbling-block which the opponents of the rule find at the very threshold. If the rule operates by merger, it cannot matter, in any view of the rule, how anxiously or how strictly the particular estate is tied down and confined to a mere life estate. Whatever may have been the origin of the rule, and whatever may be its mode of operation, it cannot, I think, be denied that the rule was accepted without question in the earlier period of its existence. So much was it part and parcel of the law of England, that for a long time it had no distinctive name of its own. There could have been little hostile criticism then. And, indeed, we know, from what Lord Eldon himself has said, that that great judge, whose habitual caution justifies or illustrates Lord Coke's aphorism—see Co. Lit. 338*a*—that "the most learned doubteth most," was convinced that there was at least one case about which he would have no sort of hesitation, if only his lot had been cast in the clearer atmosphere of olden days. If he had lived, he says, two hundred years earlier, he would have had no doubt that such limitations as were to be found in *Jesson* v. *Wright*, 2 Bli. 1, would have given an estate tail. But before the time of *Jesson* v. *Wright* there had come a change. Things were not going well with the rule. Its feudal origin was a disgrace. Its antiquity was a reproach. Some judges thought that on these grounds it ought to be "discountenanced" (1 Coll. Jur. 297). Then it was constantly made a matter of complaint that the rule disappointed the intention, as if that were not its very end and purpose; as if it had not been at the outset "levelled against the views of the parties" (Preston, Succinct View, p. 13). It was always being disparaged, and, what was perhaps worse, it was always being explained. It led to some profound discussions and some very pretty quarrels. One object of Mr. Fearne's famous book was to refute Lord Mansfield's heresies in *Perrin* v. *Blake*, 4 Burr. 2579, then under appeal to this

House. Unfortunately in a later edition the author suggested or proved that Lord Mansfield had not always been true to his own mistaken creed. That, of course, was an imputation not to be borne—it was resented and repelled from the bench; and so Lord Mansfield and Mr. Fearne differed and quarrelled: *Hodgson* v. *Ambrose*, 1 Dougl. 336. Lord Thurlow and Mr. Hargrave agreed in everything, and they quarrelled too. They had been friends. "The rule in *Shelley's case*," so Mr. Hargrave tells us, "had often been discoursed upon between them" (3 Juriscon. Ex. p. 406). Their friendship stood that strain. But when Mr. Hargrave laid the fruits of his labours before Lord Thurlow, and proposed a complimentary reference to the Chancellor who had shown in *Jones* v. *Morgan*, 1 Bro. C. C. 205, that he once enjoyed a vision of the true doctrine in its primitive simplicity, Lord Thurlow felt it was time to draw back. He acknowledged the imperative character of the rule. On that point he was as sound as Mr. Hargrave himself, whose treatise would have borne the proud motto, *Aut Cæsar aut nullus*, but for fear that some unkind critic might misread the allusion and mock the author. So far those great lawyers were at one. But Lord Thurlow thought that Mr. Hargrave was making too much fuss about his work of discovery or restoration, and he was not, I fancy, altogether certain what part was being reserved for the Lord High Chancellor—whether he was to come in as the master or the disciple. At any rate, his reply was cold and distant. He sends his best respects to Mr. Hargrave. "For himself," he writes, "he really does not remember the time when he thought the application of the rule in *Shelley's case* could depend upon anything else but the question whether the word 'heirs' was the designation of some particular person or included successively all who might pretend to inheritable blood" (3 Juriscon. Ex. p. 360). That was putting the case in a nutshell. But it is one thing to put a case like Shelley's in a nutshell and another thing to keep it there. In spite of the simplicity of the view which commended itself to Mr. Hargrave and Lord Thurlow, and, indeed, was never at any time wholly obscured, there grew up a mass of decisions so numerous and so perplexing that, in Lord Eldon's opinion, in *Jesson* v. *Wright*, "the mind is overpowered by their multitude and the subtlety of the distinctions between them." Some have attributed this result to that most unsatisfactory doctrine of "particular intent" and "general intent," which practically destroyed both by rejecting the one and placing the other at the mercy of the first taker—a great favourite with Wilmot, C.J., and with Lord Kenyon—but a doctrine that, in my opinion, if I may be permitted to say so, has all the merits and some of the dangers of those nostrums which are advertised as universal remedies. Others have traced the mischief, in part at least, to that impatience of criticism which at one time led the learned judges of the King's Bench when returning their certificates to withhold their reasons. Others, again, think that it may have been due to a more praiseworthy motive. Courts of law, it is said, in course of time became ambitious of keeping pace with courts of equity in discerning the intention of the testator and giving effect to it. The eminent judge who always strove to be foremost in that race seems to have acted, not unfrequently, under the apprehension which he expressed in *Perrin* v. *Blake*, that "if courts of law will adhere to the mere letter of law, the great men who preside in Chancery will ever devise new ways to creep out of the lines of law and temper with equity." Indeed, Lord Mansfield, as Lord Redesdale says in *Shannon* v. *Bradstreet* 1 Sch & Lef. 52, "seems to have considered that it manifested liberality of sentiment to endeavour to give the courts of law the powers which are vested in courts of equity." The result is to be seen in a number of decisions which would be intelligible enough, and perhaps appropriate, if the court were moulding limitations in order to give effect to executory trusts, but are difficult to follow and apparently out of place in the construction of legal devises. But then Lord Mansfield thought that the distinction between an executory trust and a trust executed was a distinction not "founded in sense."

At length, by the decision of this House in *Jesson* v. *Wright*, in 1820, the law was restored, at least for a time. That decision, as it seems to me, starts with the principle that the rule in *Shelley's case* is a rule of law—"inflexible," as it was termed by one of the noble lords in the subsequent case of *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 823, operating invariably and, so to speak, automatically, whenever the limitations are such as to call for its application. Proceeding on that footing, this House had only to construe the words of the will according to the established rules of construction. The most important of those rules for the purpose in hand was stated by Lord Redesdale in *Jesson* v. *Wright* in the following words: "The rule is," said his lordship, "that technical words shall have their legal effect unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." What is to be understood by "otherwise" is shown, I think, by the last words of the passage in which the rule was repeated in *Roddy* v. *Fitzgerald*. "It is another and most important rule," said Lord Wensleydale, "in the construction of the words used in a will, that technical terms, or words of known legal import, should have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to show what that sense is." The decision in *Jesson* v. *Wright* covers, I think, the whole field of the controversy. It makes it almost a work of supererogation to consult the earlier authorities. "No man can reconcile the decisions," as Sir E. Sugden very truly observed in *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47. The only touchstone one can use in trying to separate the true metal from the dross is the ruling in *Jesson* v. *Wright*. And, therefore, as new cases arise it seems to me to be safer to apply the ultimate test at once. For a time *Jesson* v. *Wright* was loyally followed. In *Doe* v. *Harvey*, 4 B. & C. 610, the Court of King's Bench acknowledged their error, and recalled their former decision. But very soon cases occurred, such as *Right* v. *Creber*, 5 B. & C. 866, in which proper effect does not seem to have been given to the authority of *Jesson* v. *Wright*. The most disappointing case of all, I think, is the Irish case of *Montgomery* v. *Montgomery* before Sir Edward Sugden in 1835, on which Mr. Haldane so much relied. Everybody must acknowledge Sir Edward Sugden's profound learning. He was himself one of the counsel for the appellant in *Jesson* v. *Wright*; but though successful in the appeal he does not seem to have welcomed the short and simple grounds on which the decision was rested (see Sugden on the Law of Real Property, 251, *n*). Perhaps the editor of Gilbert on Uses would have preferred that something should have been left of the old labyrinth through which he, at least, knew his way in the dark. His observations in *Montgomery* v. *Montgomery*, as he tells us, were made "with a view to clear up the doubts on this branch of the law." The result was unfortunate. No difficulties were cleared up, no

doubtful points explained; and *Montgomery* v. *Montgomery* is never cited except when it is desired to minimize the effect of *Jesson* v. *Wright*, and it is always cited then. There is a good deal in the earlier part of the judgment which is difficult to follow. In my opinion, it is not an accurate view of the decision of this House in *Jesson* v. *Wright* to say that it "only decided that the words 'heirs of the body' should operate as words of limitation where otherwise the issue could not take estates of inheritance." Except for the purpose of making that point good, I cannot understand why Sir E. Sugden should have suggested that *Doe* v. *Goff*, 11 East 668, was not really overruled, and that "a similar case would be open to consideration." One of the two noble and learned lords who spoke in *Jesson* v. *Wright* condemned *Doe* v. *Goff* in plain and direct terms. The other said that it was "difficult to reconcile" with the case before the House. Sir Edward Sugden on this, remarks that the Lord Chancellor did not say that it was impossible; he said that it was difficult. But the language is Lord Eldon's, and, as was observed of another judge in another case, "it was a great deal for him to say." Over and over again in this House *Doe* v. *Goff* has been treated as no longer law. In *Fetherston* v. *Fetherston*, 3 Cl. & F. 67—which, by the way, is not referred to in *Montgomery* v. *Montgomery*—Lord Brougham observed that it was "entirely displaced," and it is spoken of in the same way in *Winter* v. *Perratt*, 9 Cl. & F. 606, and *Roddy* v. *Fitzgerald*. Again, it is difficult to understand how the words "heirs of the body," when construed to mean children, can have the effect of giving an estate of inheritance in a case under the old law where a gift to children, under the designation of children, would not carry the fee, and I must say I do not think that the case of *Burchett* v. *Durdant*, 2 Vent. 311, is any authority for such a singular proposition, which seems to be taken from the notes to Gilbert on Uses, published by Mr. Sugden shortly after he was called to the Bar. Lastly, I cannot think that the passages which Sir Edward Sugden collected from the argument of Blackstone, J., in *Perrin* v. *Blake*, and pieced together in his judgment in *Montgomery* v. *Montgomery*, convey an accurate representation of the meaning of that learned judge. Undoubtedly Blackstone, J., refers to the rule in *Shelley's case* as a rule of a flexible nature. But he did not, I think, mean that the rule as we understand it, and as it was understood in *Roddy* v. *Fitzgerald*, was otherwise than imperative. You may have a gift of an estate of freehold to the ancestor, and in the same will a gift to the heirs, so that the case is within the letter of the rule, and yet the rule will not apply, because the legal meaning of the word "heirs" has to yield to an explanatory context (*Poole* v. *Poole*, 3 Bos. & P. 520). It seems to me that all Blackstone, J., meant was what Lord Alvanley expressed when he said, "The rule was not so rigid as to preclude the testator himself from explaining the words used." I think that this would have been tolerably clear even from the extracts given in *Montgomery* v. *Montgomery*, if an important sentence had not been unfortunately omitted. "I am far from maintaining," observes Blackstone, J., in the sentence to which I refer, 'that by a devise to a man's heirs or the heirs of his body they shall never take as purchasers in any case. but I have never observed it to be allowed except in one of these four situations." And then follow the four cases which Sir E. Sugden summarizes and refers to, apparently as demonstrating an intention to put an express negative on the general rule of law which vests in the person of the ancestor (when there is a grant of the freehold) an estate that is given to the heirs of his body." Now, it will be observed that the first two cases are not within the rule in *Shelley's case* at all. The rule has nothing to do with cases where there is no estate of freehold given to the ancestor, or no estate of inheritance given to the heirs. The last two cases fall outside the rule as soon as it is ascertained by the ordinary rules of construction that the words "heirs of the body" are the designation of a particular class of persons, and do not comprehend the whole line of succession. I may observe that in the old books it is not at all uncommon to find the rule in *Shelley's case* spoken of in this loose kind of way, and indeed I cannot help thinking that much of the "profound and animated" discussion about the rule in *Shelley's case*, in which the greatest lawyers of the day contended for victory, was little more than a verbal controversy. In connection with Sir Edward Sugden's view of Blackstone, J.'s, opinion, it is interesting and perhaps instructive to turn to what Lord Thurlow says of it in his correspondence with Mr. Hargrave. Blackstone, J.'s, judgment was not published in his lifetime, nor was it prepared for publication by him, nor was it among the papers which he directed his executors to publish. Lord Thurlow thought that it had not received his final corrections, and therefore ought not to have been published at all. He points out that there is some confusion in Blackstone, J.'s, classification of rules of law, and that he put the rule in *Shelley's case* in the wrong category. The mistake, says Lord Thurlow, has occasioned some few incorrect expressions in the sequel of his argument. "All this, however," he adds, "by no means shows that he understood the rule in *Shelley's case* to be a mere rule of interpretation; on the contrary, it is treated throughout as a rule of legal policy, and the question is fairly put, whether there be any expression plain or necessary implication to control the sense in legal idiom of the word 'heirs'" (3 Juriscon. Ex. 363). Lord Thurlow's views, as judicially declared, do not differ from the views contained in his correspondence with Mr. Hargrave, though they are not perhaps, so simply or so clearly expressed. In the case of *Jones* v. *Morgan*, to which I have already referred, Lord Thurlow says, "I take the rule in *Shelley's case* never to have been shaken at all. I take that rule to be, that where the heir takes in character of heir he must take in the quality of heir. I take the question always to have been as to the import of the word 'heir' in the proposed case." And, again, in his final judgment, he says, "All heirs taking as heirs must take by descent. In cases where I can bring it to the point that the testator by the word "heirs," as used in the will, means first, second, third, and other sons, there I change the words of the will. . . . The cases have been laboriously argued on points which I, therefore, dare not call immaterial. I think the argument immaterial that he meant the first estate to be an estate for life. I take it that in all cases the testator does mean so. I rest it on what he means afterwards. . . . All possible heirs must take as heirs and not as purchasers." The authority of *Jesson* v. *Wright* was restored, and its supremacy finally established, in *Roddy* v. *Fitzgerald*. And the question now in every case must be whether the expression requiring exposition, be it "heirs" or "heirs of the body," or any other expression which may have the like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting.

I turn then to the first set of limitations in William Harris's will. To begin with, there is a sufficient

estate of freehold given to the ancestor. It is hardly necessary to say anything about the estate or estates for life. The testator had one child at the date of the will, and he provides for the possibility of future issue. For the purpose of this case it is immaterial to consider whether the life estates of the testator's children, if there had been more than one, would have been followed immediately by estates of inheritance in the heirs of their bodies, or whether in point of enjoyment the estates of the heirs special would have had to wait until the death of the last survivor of the tenants for life—a possible, but, in my opinion, rather an improbable, construction on the face of this will. Then we come to the gift to "the heirs of the body and bodies of the child or children" of the testator. It may be conceded that "the heirs of the body," whatever that designation means, were intended to take as the stock of a new descent, and to take by purchase. But that is immaterial. The first question seems to be, Is there anything to prevent the words "heirs of the body" being understood in their proper and legal sense? Mr. Haldane said there was. He said he could put his finger on four different places where the testator had shown a desire to depart from the regular course of descent in an estate tail. His point was, that although one or two, or even perhaps three, inconsistent or repugnant directions may be insufficient to control the proper meaning of the technical words, yet no case had ever combined so many eccentricities as this; the testator had tripped so often that there must be a method in his tripping, and the court was bound to find out the secret. If Mr. Haldane's premises were correct, would the circumstance on which he relied make any difference in the construction of the will? Would it not be just one of those "petty distinctions" reprobated in this House in *Jesson* v. *Wright* and in *Roddy* v. *Fitzgerald*. But I differ from Mr. Haldane altogether. I cannot see any mistake in this part of the will, or any flaw in these limitations. The testator has used four different expressions, "children," "heirs of the body," "heirs," and "issue," and he has not made a slip in the use of any one of them. From first to last I can find no direction inconsistent with the regular course of an estate tail. It was said that though the draftsman was a lawyer he was a very poor one, and that, as he has blundered in the devise to the trustees of his will, you cannot place much reliance on his handiwork. There, again, I differ. It is quite true that he has made a mistake in the devise to the trustees, giving a contingent estate in fee to the survivor. But that, I fancy, was not a very uncommon mistake at the time, and it is one of little or no practical importance (Co. Litt. 191*a*, note 1). As far as these limitations go, I think that the draftsman has shown himself a very competent lawyer. When you can give effect to every word, attributing to each expression its proper legal signification, and the result, though perhaps unexpected or unusual, is not irrational or absurd, I do not think that you ought to approach the construction of the will with the idea that the testator probably did not mean what he has said. "The good sense of all these cases," said Lord Thurlow in *Jones* v. *Morgan*, "is to believe that where persons have expressed themselves right they knew what they meant." If I may say so, I think that a wholesome rule, and a rule which we ought to adopt in construing the will now before us. The devise is to the heirs special if more than one, as tenants in common. That, I think, is the very thing that the testator meant. If more than one of his children left heirs special, the heirs in each line were to take in equal shares as tenants in common. To suppose that the words in question were meant to apply in the case of there being only one child is, I think, to violate the "good sense" of the case. It is like building a wall for the pleasure of running your head against it. Next comes a direction contained in a parenthesis. The testator directs his trustees to convey the fee simple in equal shares to the tenants in tail in possession in each line on marriage, or at majority. That is a perfectly good direction. Being subsequent to the estate tail, and taking effect during its continuance, it is not too remote. The estate tail would not merge in the fee. It would be protected by the statute *De donis*. The heirs of the body would still claim *per formam doni*, though the ancestor by levying a fine might bar his issue, and acquire a bare fee which would merge. But in any event the ulterior limitations would be superseded. That is a result which, as it seems to me, a prudent testator in the position of William Harris might well have had in contemplation. Why should the testator not have intended what he says? Why should you suppose that he did not know what he meant? To construe the words "heirs and assigns" as meaning heirs of the body, or to reject them as inconsistent or repugnant, seems to me to be contrary to every sound rule of construction. A direction to trustees invested with the legal estate in a certain property bidding them convey and assure that property on the occurrence of a certain event to a certain designated person, "his heirs and assigns," is a direction which requires some ingenuity to understand in any sense but one. Nor can I see that any difficulty is caused by the circumstance that the person to take has already an estate tail. The gift is not, nor was it, I think, intended to be, in defeasance of the estate tail. What the testator says in effect is this: If one or more of my descendants, being tenants in tail, or tenants in tail in possession, should marry or attain twenty-one, I cancel all ulterior limitations in favour of collaterals, and give him or them the fee simple expectant on the determination of the estate tail. Surely there is nothing unreasonable in that. It may be said it is an unusual direction. So it is; but that does not make it bad. And it is perfectly consistent with the words introducing the gift over at the end of this set of limitations. It may be said that the direction is not wanted, for a tenant in tail can acquire the fee. So he can. He could do so then; but there was some trouble in doing it, and a recovery could only be suffered in term time. In *Seale* v. *Barter*, 2 Bos. & P. 485, where there was a power to make a settlement so as to pass the fee, the same argument was used and failed. It was pointed out, among other things, that the power would enable a disposition to be made of the estate without going through the forms of a recovery. Here there is the additional circumstance that the fee is to be conveyed either on marriage or at majority. And I may observe in passing that in the event of there being a tenant by the curtesy, his concurrence would be necessary if the tenant in tail wished to acquire the fee. In the meantime, and until marriage or majority, there is a provision for maintenance. I do not think that any objection can be made to the provision. And then come the words introducing the ulterior limitations. The estate is to go over if the testator leaves no issue, or if such child or children he should leave, and the issue of such child or children, should die before attaining twenty-one or marriage. Those words seem to me to fit in with the direction to convey the fee to the tenant in tail in possession on attaining twenty-one. On either of these events occurring, the ulterior limitations are displaced, so far as regards the property to which the direction applies. Of course you must imp

cross-remainders, and then the scheme of the will is complete, and the property must either come to one or more of the testator's descendants in absolute ownership, subject to the estate tail, or go over within a very limited period. If the words "heirs of the body" are to have their proper meaning, the rule in *Shelley's case* must apply, even though the testator had said in so many words that the heirs special were to take by purchase (*Coape* v. *Arnold*, 3 W. R. 187, 4 De G. M. & G. 575). The result is that Mary Harris, the testator's only child, took an estate tail if the estate limited to her and the estate limited to her heirs special are both of the same quality. I think they are. The estate limited to the heirs special is an equitable estate. On the authority of *Harton* v. *Harton* I think that the estate limited to Mary Harris is equitable too. *Harton* v. *Harton* is a very old case. It was decided in 1798. Possibly it might just as well have been decided the other way. But *Harton* v. *Harton* has never been overruled, and as it has been, I believe, followed in practice, I see no reason for disturbing it now. Mary Harris, who became Mrs. Hartley, disentailed. If the disentailing assurance was valid, it barred the limitation or direction under which her son, on her death, would have taken the fee by purchase. There was a question as to her sanity at the time; but, fortunately for the respondents, as it seems to me, they have, so far, not succeeded in establishing her incapacity. On this view there would be an end of the case, and the appeal would fail altogether except for one circumstance. It would appear that at the beginning of the argument in the Court of Appeal the appellant proposed to show that if Mrs. Hartley acquired the fee she made a disposition of the property which, at any rate, would defeat the title of the respondents. It was not disputed that the appellant was in time to raise the point; but the Court of Appeal very properly thought that the legal argument on the construction of the will ought to be disposed of first. It happened that when judgment was given the constitution of the court was not quite the same as it was at the hearing, and, through some misapprehension on the part of the court, or perhaps on the part of counsel, the appellant was not afforded an opportunity of establishing the point which he desired to raise. I think that he ought to have this opportunity now, and therefore I think that there ought to be an order for a new trial, limited so as not to reopen matters of agreement, or the cause ought to be remitted to the court of first instance, with a direction that the question should be tried either by an issue or an inquiry, and that further consideration should be reserved. As regards costs, I think, on the whole, that the existing directions as to the costs of the original hearing and the costs in the Court of Appeal should not be disturbed, but that there should be no costs of the hearing in this House.

Lord SHAND concurred.

Lord DAVEY.—The primary question in this case is, What estate did Mary Hartley take under the will of her father, William Harris, in the lands in question? I will first dispose of one point raised on behalf of the appellant—namely, that the estate in fee limited to the child of the testator for his or her life was a legal estate, whereas the estate limited to the heirs of the body was an equitable estate, and therefore the rule in *Shelley's case* was inapplicable so as to give the testator's child an estate tail. It is admitted that during the minorities of the testator's children the purposes of the will require that the trustees shall take the legal estate. It is also admitted that after the death of the children the trustees must take the legal estate in order to enable them to convey to the "heirs" of the children at twenty-one, and in the meantime to receive the rents, issues, and profits, and provide for the maintenance and education of "such heirs." But it is said that the words of gift to the children or child after attaining majority are such as to give them the legal estate during their lives. The words applicable, in the event which happened, are: "If I have only one child, then to permit and suffer such one child to have, receive, and take the said rents, &c., for her or his sole use and benefit for and during the term of her or his life." No doubt the words "permit and suffer" are sufficient to pass the legal estate, but it is not an absolute rule, and the words are not inconsistent with the legal estate remaining in the trustees, though they have no duties to perform. It is a convenient rule that where there are recurring occasions for the exercise of active duties by the trustees, and no repeated devises to them to enable them to perform the duties, the legal estate, if once in the trustees, is to be deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would, but for the recurring duties, be construed as uses executed in the beneficiaries. This rule was first laid down in *Harton* v. *Harton*, 7 T. R. 652, and was recognized and acted upon in *Brown* v. *Whiteway*, 8 Hare 145, and *Toller* v. *Attwood*, 15 Q. B. 929, and, as the editors of Mr. Jarman's book observe, must now be considered as established. I do not feel disposed to advise your lordships to differ from it. I think, therefore, that the estates both of the children or child and of their heirs of the body are equitable.

The more serious question is whether the rule in *Shelley's case* is applicable to the terms in the devise, assuming that the devises are of the same quality. Vaughan Williams, J. (who tried the action) and the Court of Appeal have held that the point is concluded by authority, and that Mary Hartley consequently took an estate tail. I feel very strongly the importance of adhering to the rule that technical expressions and words of known legal import shall receive their ordinary legal meaning. The neglect of this rule, in my opinion, tends to increase uncertainty in the construction of instruments, and to multiply the difficulties of those who have to advise upon them, and therefore to foster litigation. Instead of interpreting the words of the instrument, the court is too frequently invited to embark on a fruitless speculation as to the testator's intention. The testator may no doubt tell you that he uses any particular words in a sense of his own, or (as it has been said) makes his own dictionary; but he must do so in such a manner as to make it plain to the mind of the tribunal which has to construe the instrument, not only that the words are used in other than their ordinary legal signification, but also in what sense they are used. In my opinion, the rule in *Shelley's case* is a rule of law, and not a mere rule of construction—that is, one laid down for the purpose of giving effect to the testator's expressed on presumed intention. The rule is this, that, wherever an estate for life is given to the ancestor or *propositus*, and a subsequent gift is made to take effect after his death in such terms as to embrace, according to the ordinary principles of construction, the whole series of his heirs or heirs of his body, or whole inheritable issue taking in a course of succession, the law requires that the heirs or heirs male of the body or issue shall take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary. Wherever, therefore, the court comes to the conclusion that the gift over after the life estate includes the whole line of heirs, general or special, the rule at once applies, and an estate of in-

heritance is executed in the ancestor or tenant for life, even though the testator has expressly declared that the ancestor shall take for life, and no longer, or has endeavoured to graft upon the words of gift to the heirs or heirs of the body, additions, conditions, or limitations which are repugnant to an estate of inheritance, and such as the law cannot give effect to. The rule, I repeat, is not one of construction, and usually overrides and defeats the expressed intention of the testator.

But the question always remains, whether the language of the gift after the life estate, properly construed, is such as to embrace the whole line of heirs or heirs of the body or issue; and that question must be determined apart from the rule, according to the ordinary principles of construction, including those to which I have already referred. The testator may conceivably show by the context that he has used the words heirs or heirs of the body or issue in some limited or restricted sense of his own which is not the legal meaning of the words—for example, he may have used the words in the sense of children, or as designating some individual person who is the heir or heir of the body at the time of the death of the tenant for life. If the court is judicially satisfied that the words are so used, I conceive that the premises for the application of the rule in *Shelley's case* are wanting, and the rule is foreign to the case. But I repeat that in every case the words are to be interpreted in their legal sense as words of limitation, unless it be made plain to the mind of the court that they are not so used, and in what sense they are used by the testator.

Turning to the will before us, it is obvious that although the draftsman was acquainted with legal phraseology, he was not master of the language that he has used, or able to use it with accuracy. It is quite possible, therefore, that the legal meaning and effect of the words of the will will not carry out the testator's intention; but what we have to do is to construe the language. I do not find it necessary to say what would be the proper construction of the devise to the testator's children if there had been more than one. It is certainly open to the contention that the gift over after the death of such children to their heirs of the body did not take effect until the death of the survivor of them. The construction of gifts in a somewhat similar form to the present has been discussed in many cases before the courts, the most recent of which is *In re Hutchinson Trusts*, 21 Ch. D. 811, 31 W. R. Dig. 219. Kay, J., in that case, reviewed all the previous decisions, and came to the conclusion that he was bound on the balance of authority to hold that the gift over took effect in favour of the issue of each tenant for life on his own death without awaiting for the death of the survivor. In this case it is not necessary to decide the point, because the testator has himself provided for the event which happened of there being only one child. The words are (reading them short): "If I have only one child, then to permit and suffer such one child to receive and take the said rents and profits for her or his sole use and benefit for her or his life." For the purpose of construction, this is precisely the same as if he had said, "to my daughter Mary for her life." The next gift must, I think, be read *reddendo singula singulis*, and so read it is as follows: "From and immediately after the death of such child (or of Mary) my trustees shall stand seised and be possessed of the hereditaments hereinbefore devised to them in trust unto and to the use of the heirs of the body of such child (or of Mary), if more than one to be equally divided between them, such hereditaments to be legally conveyed and assured unto such heirs of my child (or of Mary) as they shall severally and respectively attain the age of twenty-one years, or be married, and to their several respective heirs and assigns for ever." I have assumed, as the construction most favourable to the appellant, that the words of division between the heirs apply to the heirs of the body of a single child; and I think, on the whole, that they do so apply, but they may be read as applying only to the heirs of the body of children if more than one. The ultimate gift over is in these terms: "If I shall die leaving no child or children, or issue of any child or children, or if such child or children as I shall leave, and the issue of such child or children, shall die before he, she, or they shall attain the age of twenty-one years, or be married." Notwithstanding the able argument of the appellant's counsel, it is not made clear to my mind that the words, "heirs of the body," are used in any sense different from their ordinary legal meaning of a line of descent, or, if they were intended to be words of purchase, in what other sense the words are used. To hold otherwise would, I think, be frittering away the sound rule of construction to which I have already referred, and introduce fresh uncertainty and confusion into questions which are now settled by authority. It is plain that the direction that the heirs shall take as tenants in common, assuming that it applies to the heirs of a single child, is not sufficient. One need only mention *Jesson* v. *Wright*. Nor will the terms of the direction to the trustees to convey the legal estate, in my opinion, afford any sufficient reason for construing the words heirs of the body as words of purchase. The primary object of the direction is to prescribe the time at which the trustees are to denude themselves of the legal estate after the expiration of the period of maintenance, and I think that it must be construed in favour of the beneficiaries under the previous gift, and not as a fresh gift, notwithstanding any inaccuracy in the expression. It has already been decided in many cases, the authority of which cannot be questioned, that the addition of the words heirs and assigns after a gift to heirs of the body will not enable the court to give other than the legal meaning to the words heirs of the body, or preclude the application of the rule in *Shelley's case*. The gift over to the collateral relations, it is true, takes effect not by way of remainder, but as an executory limitation. It does not afford an argument in favour of an estate tail in Mary, but it is not inconsistent with it, and does not therefore afford any argument against the *prima facie* legal meaning of the words used. It is common ground that this executory devise did not take effect. Mary Hartley by name is made residuary devisee. She was the testator's sole heiress-at-law, and as the law stood at the date of the testator's death she, of course, took, not a remainder by devise, but the reversion in fee after her own estate tail by descent. She was, therefore, in my opinion, equitable tenant in tail with a legal reversion to herself in fee. Another construction has been suggested—namely, that Mary took an estate tail defeasible after her death in favour of the first heir of her body who attained twenty-one or married in fee. I think this construction too refined. It attaches a new meaning to the word "heirs," and, in my opinion, gives a wrong effect to the direction to the trustees to convey, which is not limited to an executory limitation or clause of defeasance, but I think is intended only to give legal effect to the previous equitable devise, and to clothe the beneficiaries under it with the legal estate as soon as the active duties of the trustees had expired. Such a construction, however, would not make any difference in the result if a valid disentailing assurance were executed.

The present respondents, plaintiffs in the

action, claimed, by their statement of claim, as heirs of William Harris, the testator, treating him as the last purchaser. According to the view of the Court of Appeal, Mary was the last purchaser; but, as it is admitted that the respondents are the heirs of Mary as well as the testator, I do not think that the judgment should be set aside on that ground only. It is, however, suggested, though not proved, that Mary made a will which excluded the respondents altogether; and if that had been proved at the trial the judgment should have been for the appellant, although he may derive no title under the will. The question turns, in the first instance, on the validity of the disentailing assurance of the 28th of February, 1835. Williams, J., held that it was proved that Mary was a lunatic at the date of this deed. This point was not left to the jury, but (I suppose by agreement) was decided by the learned judge after the trial. The only evidence against the deed was an inquisition taken in 1843, by which Mary was found to be of unsound mind; and it was also found that she had been in the same state of unsoundness of mind from the 31st of October, 1834. On the other hand, the appellant did not offer any evidence (except the disentailing deed itself and the certificate of the commissioners for taking acknowledgment, of deeds by married women). The certificate is in the form required by section 84 of the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), and was, I presume, accompanied by the affidavit required by the rules then in force, which required the deponent to state (amongst other things) that the married woman was, at the time of making the acknowledgment, "of competent understanding." It was certainly *primâ facie* evidence of Mary's soundness of mind on the date when she executed the deed, and I think that when the deed was produced which proved itself, and the certificate was put in, the burden of proof was thrown on the respondents to rebut it, and I do not think that they did so merely by production of the inquisition. It is not pretended that the inquisition was an estoppel, and it appears to me not to be in itself evidence of a very cogent character as to the date on which the lunacy commenced. It is not inconsistent even with Mary Hartley having sufficient possession of her faculties during a lucid interval to enable her to execute the deed. But the disentailing deed will not defeat the respondents unless it be proved that Mary executed a will or disposition which excluded them under the power thereby reserved to her. It has not been argued that she had any other testamentary power at that date, and as her husband did not die until 1847 she could not dispose by will except under a power, even of that reversion in fee which she took by descent. The appellant now alleges that Mary Hartley made a will, but he did not put it in evidence at the trial, as he might have done. The Court of Appeal has held that it is too late for him to do so. In strictness, I do not think that the appellant, although he might have put it in, was bound to do so. The respondents, by their statement of claim, claim solely as the heirs of the testator, treating him as the last purchaser. In order to defeat that claim it was, strictly speaking, only necessary to prove that the testator was not the last purchaser, and it was not necessary to do more than show that Mary had acquired a title by purchase. On the evidence before them, the Court of Appeal have held that Mary was a purchaser, but it is admitted that the same evidence which proves the respondents' title as heirs of the testator will also prove them to be heirs of Mary. Strictly speaking, the respondents should amend their pleadings by stating, at any rate, an alternative claim as heirs of Mary, and I think they ought to be allowed to do so. But if so, it for the first time becomes necessary for the appellant to show that Mary dealt with the estate in such a way as to exclude the respondents' title as her heirs. I think, therefore, the respondents should be at liberty to amend their statement of claim as they may be advised, and there should be a new trial, but on such a new trial the appellant should be put on terms to admit the respondents' pedigree, and that they are heirs both of the testator and of Mary. I think either of the parties should, however, be at liberty to put in any further evidence to show Mary's competence or incompetence of mind at the date of the deed. The costs of the former proceedings in the Court of Appeal should abide the result of the new trial.

New trial ordered. Cause remitted to the court below with directions. Costs to the court below to abide the result of the new trial. No costs of the appeal to this House.

Solicitors for the appellant, *Collyer-Bristow, Russell, Hill, & Co.*

Solicitors for the respondents, *Robbins, Billing, & Co.*, for *J. Clarke*, Preston.

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — April 30.

ATTORNEY-GENERAL v. BEECH AND ANOTHER. (*a*.)

Inland revenue—Estate duty—Property passing on death—Settlement—Tenant for life and remainderman—Surrender of life estate to remainderman—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (b).

Under a marriage settlement the wife was entitled to certain property for her life, with remainder to her son absolutely. More than twelve months before her death the wife surrendered her life interest in the property to the trustees of the settlement, to the end and intent that such life interest might merge in the interest in remainder of her son. Upon the death of the wife,

Held, that, as by the surrender her life interest had ceased to exist more than twelve months before she died, no property passed on her death within the meaning of section 2, *sub-section* 1 (b), *of the Finance Act*, 1894, *and estate duty was not payable.*

Judgment of the Queen's Bench Division, ante, *p.* 44, *reversed.*

Appeal by the defendants from the judgment of the Queen's Bench Division (Pollock, B., and Ridley, J.), upon an information by the Attorney-General claiming estate duty under the Finance Act, 1894: reported *ante*, p. 44, [1897] 2 Q. B. 535.

The facts are shortly stated in the judgment of A. L. Smith, L.J., and the effect of the various deeds is fully set out in the report below.

Cozens-Hardy, Q.C., and *Levett, Q.C.* (*W. M. Spence* and *Austen-Cartmell* with them), for the defendants.

Sir R. E. Webster, A.G., and *Sir R. T. Reid, Q.C.* (*Sir R. B. Finlay, Q.C.*, and *Vaughan Hawkins* with them), for the Crown.

Cur. adv. vult.

April 30.—A. L. SMITH, L.J., read the following judgment: The question in this appeal is whether,

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

when a tenant for life more than twelve months before his death absolutely and *bonâ fide* surrenders his life interest to the remainderman, this property is, nevertheless, upon the death of the tenant for life, liable to estate duty under the Finance Act, 1894. The facts giving rise to the question are extremely short. By deed bearing date 21st of December, 1886. Eliza Beech, who had a life interest in certain trust funds, over which she had a power of appointment, appointed the funds, subject to her life interest therein, to her son Howard Beech. In the year 1894 Eliza Beech was desirous of surrendering her life interest in the trust funds for the benefit of her son Howard Beech, and by deed bearing date the 18th of December, 1894, she surrendered her life interest in these funds "to the end and intent that such life interest might merge in the interest in remainder of her son Howard Beech, and that accordingly William Beech and Howard Beech as trustees might thenceforth hold the said trust funds in trust for the said Howard Beech, his heirs, executors, administrators, and assigns, to be disposed of as he or they should direct." Upon the surrender of this life interest to Howard Beech he became absolute owner of these funds. Eliza Beech died upon the 27th of August, 1896. These are the facts.

The real point in my judgment for determination is, When did the life interest of Eliza Beech pass? Did it pass to her son, the remainderman, at the date of the surrender—viz., upon the 18th of December, 1894—or did it pass to him at the death of Mrs. Beech upon the 27th of August, 1896—*i.e.*, twenty months after the surrender? Lengthened arguments have been addressed to us by the Attorney-General and Sir Robert Reid as to what was the intention of the Legislature when it passed the Act of 1894; but, as to this, I cannot do better than quote the words of the Lord Chancellor (Lord Halsbury) in the House of Lords when dealing with a similar argument addressed to the House upon a taxing Act in the case of *Tennant* v. *Smith*, [1892] A. C. 150, at p. 154. The Lord Chancellor said: "This is an income-tax Act, and what is intended to be taxed is income. And when I say 'what is intended to be taxed,' I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe that they may be all reduced to this—that, inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases, therefore, under the taxing Acts always resolve themselves to a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said in *In re Micklethwait*, 11 Exch. 452, at p. 456, 'It is a well-established rule that the subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words.'"

Now, what is it that the Finance Act, by the very words of the Act, levies a duty upon? The governing words of the Act are to be found clearly set out in sections 1 and 2. Section 1 enacts that "In the case of every person dying after the commencement of this part of this Act there shall . . . be levied and paid, upon the principal value . . . of all property, real or personal, settled or not settled, which passes on the death of such person, a duty called estate duty." And section 2, sub-section 1, follows up section 1, and enacts that "Property passing on the death of the deceased shall be deemed to include the property following." What this is I will deal with hereafter. This Act, for the first time, imposes a duty upon all real or personal property, settled or not settled, which passes or is deemed to pass upon death. The time at which by the Act the duty is imposed is the moment of death; the property upon which the duty is imposed is the property which passes or is deemed to pass upon death. If no property passes or is deemed to pass upon death, no estate duty is leviable. If it be leviable, then the duty imposed is a duty upon the principal value of the property which passes or is deemed to pass upon death. This is what we decided in *Earl Cowley's case*, *ante*, p. 222; [1898] 1 Q. B. 355, though in that case we held that, as the life estate of the second Earl Cowley had been kept alive until his death, and was then subsisting, it was property which was deemed to pass within section 2, sub-section 1 (*b*), of the Act upon the death of the second earl—a very different case from the present. I now come to section 2, sub-section 1. It enacts that "property passing on the death of the deceased shall be deemed to include—(*a*) property of which the deceased was at the time of his death competent to dispose; (*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest." The present case clearly does not fall within section 2, sub-section 1 (*a*), for the owner of the life interest at the time of her death was not competent to dispose of it, for the simple reason that she had absolutely disposed of it more than one year and eight months before her death. Nor does it fall within sub-section 1 (*b*), for the owner of the life interest had already disposed of it one year and eight months before her death, and had no interest ceasing on her death, nor had the remainderman any interest ceasing on her death, for at the date of the death of the owner of the life interest, the remainderman had been absolutely entitled to the property for more than twenty months. This life interest had been extinguished and annihilated long before the death of the owner of the life interest, upon which event it is that the estate duty attaches upon the property which then passes. To no extent whatever did any benefit accrue or arise by cesser of the life interest upon the death of the owner of that interest, either to her or to the remainderman, or to any other person. In the face, however, of the clear words of the Act divers arguments were addressed to us by learned counsel for the Crown. It was argued that, as the owner of the life interest had had at one time a life interest in the property, it came within sub-section 1 (*b*), but I would point out that this is not so; for the words are not "had had," as the Crown contends, but, on the contrary are "had an interest ceasing upon the death of the deceased," and are not "had had an interest which has ceased before death." Take, for instance, the case of a remainderman dying in the lifetime of the surrenderor after an absolute surrender to him of a life interest. What duty would have to be paid upon the property which passed upon his death—that is, upon the death of the surrenderor the remainderman? It is obvious to me that duty would have to be paid upon the principal value of the property which passed at the death of the remainderman. And yet, if the Crown be right, another duty would become payable upon the subsequent death of the owner of the life interest; for, upon the hypothesis which the Crown contends for, the life interest passes in such circumstances upon the death of the owner of the life interest. This appears to me wh

submission to be absurd. Another argument put forward by the Crown was that sub-section 1 (*b*) deals with settlements, and so it does, but where in this sub-section, or indeed in any other section, are to be found words showing that property which is non-existent passes or is deemed to pass upon death, and is subject to estate duty? Sections 5 and 7 were referred to, but, in my opinion, they show nothing of the kind. Again, the Crown argued that, if its contention were not correct, after the words "property in which the deceased or any other person" in sub-section 1 (*b*) must be added the words "other than the remainderman"; for if they are not inserted the words "other person" embrace the remainderman. Assume that they do. How does this show that the life interest which has become extinct by the surrender it liable to estate duty? My brother Chitty during the argument answered another suggestion made on behalf the Crown, which was that, if the Crown were not right in its contention, the case of a surrender of a life interest to a remainderman was the only case in which estate duty would not become payable upon the death of the owner of the life interest. My brother pointed out that this was not so, and he put the case of the cesser of a life interest with a gift over in fee upon the happening of an event which had happened, and the owner of the life interest not dying till years afterwards. Would estate duty become payable upon the death of the owner of the defunct life interest? I say not, but upon the death of the owner in fee the Crown would get the duty. The real truth of this case is that, after the surrender by the owner of the life interest to the remainderman, it having taken place more than twelve months before the death of such owner, her death, so far as estate duty in concerned, is a wholly immaterial matter, for her life estate had then ceased to exist, and nothing passed at her death: see *Radcliffe* v. *Bewes*, 40 W. R. 323, [1892] 1 Ch. 227. The Attorney-General, to use his own expression, stated that, if we decided against him, we should knock the bottom out of the Finance Act, for he argued that our judgment would permit any tenant for life upon his death-bed to surrender his life estate to the remainderman and thus defeat the duty. He argued that section 2, sub-section 1 (*c*), of the Finance Act, which relates to gifts *inter vivos* less than twelve months before death, and which incorporates and amends section 38 of 44 & 45 Vict. c. 12, and section 11 (1) of 52 & 53 Vict. c. 7, did not apply to the case. That section 2, sub-section 1 (*c*), is a very remarkable piece of legislation no one can deny, and if what the Attorney-General says is the effect of it the Legislature, by the circuitous route it has adopted, has obviously failed to carry out its object; but, if this be so, all I can say is, so much the worse for the Crown. The true construction of this composite section is wholly immaterial to the present case, and I give no opinion as to its true construction, though the argument upon it struck me as remarkable, coming as it did from learned counsel for the Crown. For the reasons above I think the Crown is wrong, and that Eliza Beech's property in the trust funds, which consisted of a life interest therein, and which came to an end twenty months before her death, is not liable to estate duty upon her death as contended for by the Crown, and that this appeal must therefore be allowed with costs.

CHITTY, L.J., read the following judgment: I am of the same opinion. Upon the execution of the deed of the 18th of December, 1894, the appellant, Howard Beech, became absolutely entitled in equity in possession to the trust property, upon the principal value whereof the estate duty is claimed by the information. The effect of the deed was to merge his mother's life interest in the immediate reversion then vested in him. The life interest was finally extinguished and ceased to exist. Thenceforth he was the sole owner of the entire beneficial interest in the property. He had all the rights of a beneficial owner. He could have sold or assigned the property or mortgaged it or otherwise disposed of it as he thought fit. He could have required his co-trustee to make it over to himself or his assigns. The merger of the life interest was as complete as it would have been if the property had been land and the estates legal. All these propositions are incontrovertible. They are the result of the simple application of an ordinary and well-established rule of equity to the facts of the case.

The ground being thus cleared, the question, as it appears to me, is narrowed down to this —Has the Finance Act, 1894, Part I. (the only part with which we have to deal), kept alive the life interest of Mrs. Beech for the purposes of the Act, so as to render the property liable to estate duty on her death, notwithstanding the merger? It is unquestionably within the competence of Parliament when imposing a tax to modify or abrogate for the purposes of the Act any rule of law or equity which otherwise would be applicable to the subject-matter. Whether it has done so or not must always be a question of the true construction of the particular statute under consideration. The right and, indeed, the only method of interpretation is to ascertain the intention of the Legislature from the language and provisions of the Act itself. In construing a statute regard must be had to the ordinary rules of law applicable to the subject-matter, and these rules must prevail except in so far as the statute shows that they are to be disregarded; and the burden of showing that they are to be disregarded rests upon those who seek to maintain that proposition. It is incumbent on the Crown when claiming the tax to make out affirmatively that the case falls within the statute. The principles applicable to the interpretation of a taxing Act are laid down by the Lord Chancellor in the passage already cited. You must see that the tax is expressly imposed; the subject is not to be taxed without clear words, and the Act, like every other Act, must be read according to the natural construction of the words.

In construing this particular Act I am unable to derive any assistance from the authorities or the *dicta* on the Succession Duty Act. The two Acts are framed on entirely different lines. The scheme of the Finance Act, Part I., is to be found in section 1, which is more fully developed and explained in the subsequent sections, the most important of which for the present purposes is section 2. The effect of these two sections is to impose the tax on property which passes or is deemed to pass on death. Stated simply, but with sufficient accuracy for the present purposes, section 1 runs thus: In the case of every person dying after the 1st of August, 1894, there shall be levied and paid upon the principal value of all property, real or personal, settled or not settled, which passes on the death of such person a duty called estate duty at the graduated rates after mentioned. For the duty to attach under this section it is essential that there be a passing of property on the death of the person so dying. In my judgment it is clear that this case does not fall within the section. No property passed on Mrs. Beech's death. Her life interest had passed more than a year before she died. The property remained unaffected by her death. If the appellant, Howard Beech, had died in her lifetime the property would have passed

on his death, and the duty would have been leviable. The fact that she was then alive would have been wholly immaterial. Her subsequent death would have been equally immaterial. Yet to be consistent on this section, it must be said for the Crown that a new or further duty would have been payable on her subsequent death. The claim for the duty is rested substantially on section 2. I pass over sub-section 1 (*a*), which has already been sufficiently dealt with by Smith, L.J., and go to sub-section 1 (*b*). The effect of it is as follows: Property passing on the death of the deceased shall be deemed to include property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest. Mrs. Beech had formerly a life interest in the property, but it had ceased more than a year before her death. The words are "ceasing on the death of the deceased." They import, according to their grammatical and natural meaning, that the interest ceases presently on the death. The argument for the Crown alters the words. It attempts to read the words as if they included the case of having previously had an interest which had ceased before the death. In my opinion the interest which ceases must be an interest which ceases on the death. I agree with what Rigby, L.J., said in *Earl Cowley's case*, *ante*, p. 222 at p. 227, [1898] 1 Q. B. 355, at p. 375. Where the interest is a life interest it need not be a life interest in the deceased; the deceased may have been merely a *cestui que vie*, the beneficial interest being vested in some other person. The sub-section is not confined to life interests, it would embrace any other case of an interest ceasing on the death. But, confining myself for the moment and for the sake of clearness to a life interest, it appears to me that the argument for the Crown requires the insertion of words to the effect that a life interest for the purpose of the sub-section shall be deemed to continue down to the death of the deceased notwithstanding it has been previously determined by merger. I cannot find any such words, nor words from which any such implication can be reasonably said to arise. Certainly there are no clear words to that effect. During the argument I put a case to the counsel for the Crown, on which I received no clear or satisfactory answer. Supposing a life interest is limited to a man for his life subject to a condition of cesser if he shall attempt to alien, and he does attempt to alien, whereby his life interest ceases on that attempt, or supposing property to be limited to a widow subject to a provision that if she marries again her interest will cease, and she does marry again, whereby her life interest ceases on her second marriage, do these cases fall within the sub-section? In my opinion they clearly would not. Much was said upon opening the door to evasion. Would these be cases of evasion? Certainly not. Indeed, the whole argument on evasion of the Act is fallacious. The case either falls within the Act or it does not. If it does not, there is no such thing as an evasion. If a tax is imposed on using a crest or coat of arms and a man who has previously used them ceases to use them in order to be free from the tax, there is no evasion of the Act in any sense of the term legitimately used. I now ask, What is the difference between the two hypothetical cases I have put and the case before us? I can see none. In the case before us the general law of merger whereby the life interest ceased was brought into operation by the lawful act of the parties. In the hypothetical cases the life interests cease by the acts of the parties bringing into operation a limitation of cesser to which the law gives effect. Turning back to the sub-section, I will deal briefly with the words "or any other person," on which great stress was laid in the argument for the Crown. They carry the case of the deceased being a mere *cestui que vie*. Restricting myself again to the case of a life interest, but merely for the sake of clearness, they include a life interest originally vested in the deceased, which has been assigned or transferred to some other person, and is still subsisting at the death. They would include other like cases, but they do not apply where the interest has ceased before the death. The words remaining to be considered are "to the extent to which a benefit accrues or arises on the death of the deceased." They were dealt with by the court in *Cowley's case*, and more particularly by Rigby, L.J. I agree with what he said in his judgment, *ante*, p. 228, [1898] 1 Q. B., at pp. 376, 377. He said that the words did not involve any departure from the principle that the Act takes no notice of successions, and that they "only limit the operation of the word 'ceasing' by confining it to cases where something passes and to the extent to which anything does pass." And again, "they are there used . . . as a measure of the extent to which the property in which the interest ceases is to be deemed to pass, and section 7, sub-section 7, only shows the way of applying that measure." He afterwards dealt with section 7. I think it unnecessary to add anything on that section.

In support of their main contention counsel for the appellants referred to sub-section 1 (*c*), and contended that, if the merger had taken place within a year before Mrs. Beech's death, the gift of her life interest would have brought the case within the Act. In my opinion their main contention did not require this support. For the Crown, however, it was contended that a gift of the life interest would not have fallen within the reach of the statutes mentioned in this complicated section. Legislation by reference to other statutes which are at the same time altered by the enacting statute is a risky method, and sometimes fails in accomplishing the object in view. I will assume that counsel for the Crown are right in their contention, but without expressing any opinion one way or the other on the point. On this assumption the result is simply this: The Legislature contemplated that recourse would be had to methods of attempting to escape from the tax, and closed the door against some of these attempts, but left it open where there was a gift of a life interest in the deceased made more than twelve months before the death. In other words, the Legislature (whether intentionally or not it is beyond our province to inquire) has failed or omitted to hit this particular case. I have dealt only with the main points argued for the Crown. There were some further points raised, but in my opinion they do not affect the real question, and with all due respect to the counsel who raised them I think it unnecessary to notice them in detail. In the judgments delivered in the Divisional Court some observations were made on conveyancers and the rules of conveyancing. I am unable to see the bearing of those observations. Conveyancers did not invent the rules of merger either at law or in equity, nor are they responsible for them. Their function is to understand the doctrine of merger and to apply it practically where it is applicable.

COLLINS, L.J., concurred.

Appeal allowed.

Solicitors for the defendants, *W. Carpenter & Son.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

High Court of Justice.

Chan. Div. Stirling, J. March 31.

In re ATKINSON (DECEASED).
WALLER *v.* ATKINSON. (*a.*)

Married woman — Testamentary capacity — Assent by husband to will — Practice of Probate Division.

A married woman, who died in 1892, and who had no power of disposition by will, except with the assent of her husband, bequeathed all her property to her husband, subject to the payment of a legacy of £10,000, and appointed him sole executor. The husband proved the will generally in accordance with the ordinary practice of the Probate Division.

Held, that, as probate of a married woman's will is now granted only in general terms, the husband had not estopped himself from saying that he had not assented to the dispositions therein contained.

This was an originating summons issued by the plaintiffs against the defendant James Beaumont Atkinson, as the executor of the will of the above-named Amelia Atkinson asking for payment to the plaintiffs of the legacy of £10,000 bequeathed by the will of the said testatrix to the next-of-kin of Lavina Waller according to the statutes for the distribution of the personal estate of intestates living at the death of the testatrix and for consequential relief.

The facts are fully stated in the judgment of Stirling, J.

Methold (*Butcher, Q.C.*, with him), for the applicants.—We ask for payment of this legacy on the footing that the husband has assented to the will: *Ex parte Fane*, 16 Sim. 406. The decision in *In the Goods of Price*, 35 W. R. 596, 12 P. D. 137, and the Probate rules of the 29th of March, 1887, do not alter any rule of law, but merely a rule of practice in that court. The husband has not in any way denied that the will was made with his assent, and we submit that, having proved it generally he cannot now be heard to say that he has not assented: *Smart v. Tranter*, 38 W. R. 530, 43 Ch. D. 587.

Jenkins, Q.C., and *Stewart Smith*, for the respondent.—We admit that under the old law a husband who had proved generally could not afterwards say that he had not assented, but this was so because he could by taking administration *cœterorum* have avoided recognizing the will in any way. Now, however, a husband has no alternative, but if he administers at all must prove generally. He ought not, therefore, now to be deemed to have assented merely because he has proved generally.

[STIRLING, J., referred to *In re E. A. Homfray*, 12 P. D. p. 138, n.] No inference can now be drawn from the husband proving his wife's will.

Methold replied.

STIRLING, J.—The question which I have to consider on this summons, which in form is simply for the payment of a legacy of £10,000 bequeathed by the will of a lady, is whether the husband of that lady who survived her has, by proving her will and taking certain other steps, assented to the will as a disposition of property of which his wife had no power to dispose.

The will bears date the 6th of May, 1880, and hereby the testatrix gave all the personal estate of which, by virtue of any power or authority, or of any separate right of property, or otherwise howsoever, she was competent to dispose (including her portion or fortune and other interest (if any) under the will of her late father, James Shaw Taylor) unto her husband, Joseph Beaumont Atkinson, for his own absolute use and benefit, subject nevertheless to the payment thereout of the pecuniary legacy thereinafter bequeathed by that her will, and also of any legacies bequeathed by her by any codicil to that her will, together with the expenses (but not including legacy duty) incident to the discharge of such legacies. And she thereby bequeathed to Lavina Waller the sum of £10,000 in manner therein mentioned; but, if the said Lavina Waller should die in the testatrix's lifetime, she gave the same legacy or sum of £10,000 to such person or persons as, at the time of her (the testatrix's) decease, would be her (Lavina Waller's) next-of-kin, and entitled to her personal estate under the statutes for the distribution of the personal estate of intestates, if she had died immediately after her (the testatrix's) decease. And the said testatrix thereby appointed her said husband sole executor of that her will. The testatrix died in February, 1892, and the will was proved in accordance with the then practice of the Probate Court in the May following.

At the time of the death of the lady there was pending a litigation in the State of New York with reference to the estate of John Shaw Taylor mentioned in the will. J. S. Taylor was an Englishman, but he had considerable property in the United States. One of his executors was resident in New York, and he had instituted a suit there for the purpose of having the estate within the control of the New York court administered by that court. To that litigation the next-of-kin of Lavina Waller mentioned in the said will, and who had died in the lifetime of the testatrix, were parties, and to it Mr. Atkinson, the husband, became a party, and in the course of that litigation he put in an answer which is relied upon as showing his assent to the disposition made by the will. After an adverse decision in the court of first instance, it was held on appeal that Mrs. Atkinson had no power of disposition over the property which came to her from J. S. Taylor, and that it could not be disposed of by will without the assent of her husband. The question is, Has Mr. Atkinson assented to the disposition contained in the will so as to bind himself against the legatees?

Under the practice which formerly prevailed in the Probate Court with reference to the wills of married women it was necessary that two grants should be made: first of all, to the executor named in the will probate was granted, limited, not only "to such property as the testatrix had a right to dispose" of, but also "to such property as she has disposed of by her will"; and, secondly, a grant of administration *cœterorum* was made to the husband. After the passing of the Married Women's Property Act, 1882, this practice was found to be inconvenient, and accordingly in the year 1887 a change was made in the practice, first of all by a decision of Butt, J., in the case *In the Goods of Price*, 35 W. R. 596, 12 P. D. 137, and subsequently by a rule passed on the 29th of March, 1887, which runs as follows: [His lordship read this rule.] In a note to the report of *In re Price*, in 12 P. D. at p. 138, it is stated that on the 17th of May, 1887, in *In the Goods of Elizabeth Ann Homfray*, a married woman who died before the passing of the Married Women's Property Act, 1882, on the 9th of May, 1880, leaving a will and two codicils executed under a power but disposing of property not included in the power, Searle moved for a grant limited in the old form to the personal estate which she had a right to dispose of by will; but the court held that

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

under the new rules the grant could no longer be limited, but must be in a general form.

I have made inquiries as to what the practice of the Court of Probate is and I am informed that that decision is considered binding on the court, and that the court requires the executor to take administration in the general form. The question then is, Does the probate of this will by the husband operate as an assent by him? Under the old law it was, I think, settled that it did so operate. *Ex parte Fane* is an authority to that effect, and it is, I think, reasonably clear that that case was well decided because there the husband, having the choice either of having the will proved so far as it was an effectual disposition of his wife's property, or of taking a grant *cœterorum*, chose to prove the will generally, and it might very well be that that was an assent to the will generally.

It has been held by the Court of Appeal in *Smart* v. *Tranter* that the new rule does not affect the rights of parties to property, but that it is a mere matter of machinery.

Under the present practice the husband, being obliged to take out probate in this form or else renounce it altogether, ought he to be deemed to have assented merely by reason of his having so taken it? I think the husband ought not to be so bound; to hold so would in many cases work great hardship. In the present case it would be peculiarly hard, because the legatees were taking up an entirely hostile position against the husband.

It seems to me, therefore, that this probate ought not to be deemed to be an assent by the husband to the disposition by the wife of property which she had no power to dispose of.

But reliance is also placed on what was done by the husband in the American litigation. [His lordship then dealt with the evidence as to this point, and came to the conclusion that nothing the husband had done in the American proceedings amounted to such an assent, and continued:] I come therefore to the conclusion that Mr. Atkinson has not assented to this disposition, and the application must be dismissed.

Solicitors, *Learoyd, James, & Mellor*, for *Learoyd & Co.*, Huddersfield; *Busk, Mellor, & Morris*, for *Sale, Seddon, & Co.*, Manchester.

Chan. Div.
Kekewich, J. } April 2.

In re SERLE.
GREGORY *v.* SERLE. (*a.*)

Landlord and tenant—Breaches of covenant—Sufficiency of notice to repair—Re-entry—Continuing breach—Damages—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14 (1).

A notice given by a lessor to a lessee in respect of breaches of covenant, "that you have not kept the said premises well and sufficiently repaired, and the party and other walls thereof," is not sufficiently definite; and even assuming that other parts of the notice sufficiently specify other breaches, the notice is invalidated by that part of it which is insufficient, and a claim to enforce a right of re-entry will therefore fail.

A notice requiring a lessee to repair "within one month, or a reasonable time thereafter," when the lease itself allows three months, is good within the Conveyancing Act, 1881, *s.* 14 (1).

A breach of covenant is not the less a continuing breach because the premises have been demolished, and, apart from the question of notice, will entitle a lessor to damages up to the time of demolition.

By an indenture of lease dated the 31st of October, 1876, Mary Ann Kenies Harding demised to Thomas John Serle certain premises at 10, Wellclose-square, in the county of Middlesex, for the term of forty-one years from the 29th of September, 1876, at a yearly rent of £19 15s. 8d.

The lease contained the following covenant to repair by Thomas John Serle, his heirs, executors, administrators, and assigns: "And shall and will at all times during the said term well and sufficiently repair, uphold, sustain, support, &c., and keep the said messuages, &c., and all improvements and additions thereto, and all and every party and other walls, posts, &c., and other appurtenances, &c., with all needful and necessary reparations, &c., where, when, and so often as occasion shall require. And the said messuage, with the appurtenances, &c., hereby demised with all improvements thereto in all respects so well and so sufficiently repaired, maintained, &c., and kept, shall and will at the expiration or other sooner determination of the said term hereby demised, leave, surrender, and yield up to the said M. A. K. Harding, her heirs or assigns, together with all the several stoves, &c., and other fixtures, &c., fastened to the said demised premises, reasonable wear and tear to the said fixtures excepted. And also shall and will in every third year of the said term, &c., paint or cause to be painted all the outside wood and ironwork belonging to the said premises with two coats of good paint, &c., and also shall and will within the first seven years of the said term, and also within every subsequent seven years thereof paint in like manner and whiten and colour all the internal parts of the said premises where usually painted, whitened, and coloured with proper oil colours and other materials."

The lease contained a power for the lessor at reasonable times to enter upon the premises and examine their state, and give or leave notice to the lessee to repair within three calendar months, and the lessee covenanted to repair accordingly.

The lease also contained a proviso that if the yearly rent or any part thereof should be in arrear for twenty-eight days, or in case Serle should fail to perform any of the covenants and agreements therein, it should be lawful for the lessor, her heirs and assigns to re-enter the premises.

On the 11th of August, 1893, the solicitors of Frances Louisa Itter, in whom the reversion of the premises expectant on the lease was vested, served upon the executors or administrators of Thomas John Serle, deceased, the following notice: "We hereby give you notice that you have committed breaches of the covenants contained in the said lease—first, that you have not kept the said premises well and sufficiently repaired, and the party and other walls thereof; secondly, that you have not painted the outside wood and iron work in every third year of the said term; thirdly, that you have not within each seven years of such term painted and whitened all the internal parts of the said premises where usually painted and whitewashed. Now we do hereby require you to remedy the said breaches of covenant, and to make fair and reasonable compensation for the said breaches of covenant. And we hereby give you notice that unless within one month or a reasonable time thereafter you remedy the said breaches and make reasonable compensation in money for the said breaches to her satisfaction the said Frances Louisa Itter will commence an action. . . ."

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

This notice was served in pursuance of section 14 (1) of the Conveyancing Act, 1881, which provides that "a right of re-entry or forfeiture under any proviso or stipulation in a lease shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach and the lessee fails, within a reasonable time thereafter to remedy the breach if it is capable of remedy and to make reasonable compensation in money to the satisfaction of the lessor for the breach."

Frances Itter received rent for the premises after the date of the above notice, which was not however complied with, and in October, 1893, the whole of the buildings comprised in the lease were condemned by the London County Council under the Metropolitan Building Acts and completely demolished. It appeared that at the time of the granting of the lease the premises were more than 200 years old and very dilapidated.

This was a summons in an action for the administration of the estate of the lessee, Thomas John Serle, deceased, taken out by Frances Louisa Itter, asking for liberty to establish her claim in respect of damages for dilapidations and breach of covenant to repair contained in the above-mentioned lease upon the estate of the deceased and for possession of the premises on forfeiture for breach of covenant.

Warrington, Q.C., and *H. G. Turrill*, for the applicant Louisa Frances Itter.—The measure of the damages to which we are entitled is the cost of repairing the premises as required by the covenant: *Payne* v. *Haine*, 16 M. & W. 541; *Proudfoot* v. *Hart*, 38 W. R. 730, 25 Q. B. D. 42; *Yates* v. *Dunster*, 11 Exch. 15, 4 W. R. Dig. 178; *Joyner* v. *Weeks*, 39 W. R. 583, [1891] 2 Q. B. 31; *Penton* v. *Barnett*, *ante*, p. 33, [1898] 1 Q. B. 276. The case of *Lister* v. *Lane*, 41 W. R. 626, [1893] 2 Q. B. 212, is distinguishable, as there the construction of the house was faulty. The notice is sufficient, at all events, so far as the second and third parts of it. One month is a "reasonable time" to give within which to repair according to the Conveyancing Act, 1881, s. 14 (1).

Renshaw, Q.C., and *W. L. Richards*, for the administrators of the lessee.—The notice is too general and is therefore bad. The covenant in the lease allowed three months in which to repair, whereas the notice requires the repairs to be done in one. Section 14 (1) of the Conveyancing Act must be strictly construed and in favour of the lessee: *Fletcher* v. *Nokes*, 45 W. R. 471, [1897] 1 Ch. 271. The applicant cannot maintain an action on the covenant, and is not therefore entitled to possession. The damages are merely nominal. This was an old house when demised, and was pulled down within seventeen years afterwards. Its structural condition when demised must have been wretched. The covenant does not cover structural repairs. The receipt of rent was a waiver, for this cannot be said to be a case of continuing breach since the premises have been demolished: *Lister* v. *Lane*.

KEKEWICH, J.—The point arising on the notice is no doubt one of considerable importance. I have the assistance in determining it of the decision of North, J., in the case of *Fletcher* v. *Nokes*. The notice by the lessor to the lessee commences as follows, "We hereby give you notice that you have committed breaches of the covenants contained in the said lease; first, that you have not kept the said premises well and sufficiently repaired, and the party and other walls thereof." That is by far the most important part of the notice. "Secondly" and "thirdly." [His lordship read those parts of the notice above set out, and continued:] Those second and third parts of the notice seem to me at any rate on the face of them to be sufficiently specific as at present advised, and the decision of North, J., in *Fletcher* v. *Nokes* points in the same direction. It is not necessary to say that the notice should specify any particular part of the outside or inside, or that it should point out any particular wall. There might be some question as to "in every third year," and "in every subsequent seven years"—namely, whether after a lease has been running for some time a particular period of three or seven years ought to be specified. I am not quite satisfied, on the authority of *Fletcher* v. *Nokes*, that that is sufficiently definite; but for the present purpose I will assume that it is. I have, besides the decision of North, J., some useful observations of Collins, L.J., in the case of *Penton* v. *Barnett*, where he says: "I think, however, that we ought to construe the words 'particular breach' in the section according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. The expression 'breach' means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease. The common sense of the matter is that the tenant is to have full notice of what he is required to do." That is entirely in accordance with the principle laid down by North, J., in the case of *Fletcher* v. *Nokes*, where he says: "I do not mean that the landlord need go through every room in a house and point out every defect. But the notice ought to be so distinct as to direct the attention of the tenant to the particular things of which the landlord complains." Then he gives the reason: "So that the tenant may have an opportunity of remedying them before an action to enforce a forfeiture of the lease is brought against him."

The first part of this notice offends against the rule laid down by Collins, L.J., and North, J. Then Mr. Warrington says, "I have given two other notices and those are good. They specify distinct breaches." It may be that the breaches there are sufficiently specified, but having regard to the decisions of Collins, L.J., and North, J., the tenant has not had an opportunity given him of considering all that he has to do to avoid forfeiture. I do not think it is enough for the landlord in effect to say to the tenant "at all events you must do this." That is not sufficient information. The tenant is entitled to look at the matter in this way, "suppose I do some painting and whitewashing, yet I still have the other breaches, that I have not kept the premises well and sufficiently repaired, which are much more serious. After doing the painting I shall still have the lease forfeited because the first part of the notice has not been complied with." I do not think I can save the notice in its entirety because part is good. A further objection is taken to the notice, that it requires the breaches to be made good within a month or a reasonable time thereafter instead of allowing three calendar months according to the terms of the lease. But the words of section 14, sub-section 1, are, "and the lessee fails within a reasonable time thereafter." Here the notice requires the lessee to remedy the breaches within one month or a reasonable time thereafter, and the fact that the lease gives him three months does not seem to be a good ground of objection to the notice. The bargain between the lessor and lessee is that the lessor may enter at various times to inspect, and that the lessee is to have three months

to remedy the breaches complained of. That does not affect the statutory right of the lessee to have a reasonable time; though if the notice were otherwise good, a month, to my mind, for the purpose would be sufficient. But I hold upon the decisions to which I have referred that the notice is bad, and the claim of the lessor to possession must therefore fail.

Then comes the important question of the neglect to repair giving a right to damages. This is an administration action, and a claim is carried in for damages. Mr. Renshaw says there are no damages, and the claim cannot be sustained. A right of action is maintainable, but a claim in an administration for nominal damages is not maintainable. No judge would allow such a claim. Mr. Renshaw says there are no damages. Why? It is not pretended that the notice was complied with, but it is said that there is no evidence that the premises could have been put into repair. Nothing that the lessee could have done would have put the house in repair at the end of forty-one years. The house at the beginning of the tenancy was in a state of dilapidation. That is not a sufficient answer. The lessee was bound to keep the premises in proper repair, and the court cannot consider whether the repairs would be useful or not afterwards. Then it is argued that rent has been accepted. The case of *Penton* v. *Barnett* is the answer to that contention; there can be no waiver of a continuing breach. But it is said that there was no continuing breach, because the house was pulled down by the London County Council. I think there was no less a continuing breach because the house was pulled down. The lessee committed the breach: subsequently the house was pulled down by the local authority, but the lessee cannot take advantage of that accident. The breach is still continuing although the house has been pulled down, and it was not waived by receipt of rent. This claim for damages is therefore maintainable independently of the validity of the notice. The case of *Penton* v. *Barnett* applies, and the lessee is liable in damages. The matter must be referred to chambers to settle what the lessee ought to have done under the covenant, and did not do.

The lessor must be allowed to prove for the damage caused by the breaches of covenant up to October, 1893, when the premises were pulled down.

I refuse so much of the summons as asks for possession with costs, so far as the costs of the claim were increased by the claim for possession.

Solicitors, *E. A. J. Breed; Anning & Co.*

Chan. Div. }
Kekewich, J. } March 26.

In re BROOKE AND FREMLIN'S CONTRACT. (*a.*)

Vendor and purchaser—Mortgagee—Married woman—Conveyance to purchaser—Concurrence of husband—Acknowledgment—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1—*Fines and Recoveries Act,* 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 77.

A married woman who is a mortgagee of real estate can convey the same without the concurrence of her husband or acknowledgment of the deed of conveyance by her.

In re Harkness and Allsopp's Contract, 44 *W. R.* 683, [1896] 2 *Ch.* 358, *distinguished.*

Summons under the Vendor and Purchaser Act, 1874, by Charles Edward Brooke as vendor of certain freehold premises against Walter Thomas Fremlin the purchaser, asking for a declaration that the vendor with the concurrence of Sarah Elizabeth Theobald, a married woman to whom the premises had been conveyed in fee simple by way of mortgage, could make a good title to convey the same to the purchaser without the concurrence of the husband of Mrs. Theobald and without her acknowledgment of the deed under the Fines and Recoveries Act, 1833.

By a deed of August, 1893, the freehold property in question situated at Hollingbourne, Kent, was conveyed to Charles Edward Brooke in fee simple.

By a mortgage dated the 28th of November, 1895, C. E. Brooke mortgaged the same premises in fee to Mrs. Theobald to secure the payment of £150 and interest as therein mentioned.

The money advanced belonged to Mrs. Theobald absolutely, and formed part of her separate estate. She was a married woman residing with her husband.

By a contract dated the 14th of January, 1898, the vendor agreed to sell the property in question to the purchaser for £550.

The purchaser, by his requisitions on title, required that the deed of conveyance should be acknowledged by Mrs. Theobald under the Fines and Recoveries Act, 1833, and that her husband should concur in the deed, notwithstanding the provisions of the Married Women's Property Act, 1882.

The case of *In re Harkness and Allsopp's Contract,* 44 W. R. 683, [1896] 2 Ch. 358 was relied on by the purchaser in support of his contention.

The vendor replied that Mrs. Theobald was not a trustee.

The purchaser insisted on his objection, and in consequence this summons was issued on the 23rd of February, 1898.

Warrington, Q.C., and *H. Greenwood,* for the vendor.—The purchaser relies on the case of *In re Harkness and Allsopp's Contract,* but that case is distinguishable from the present, as there the married woman was a trustee for other persons. The money was not, as here, her own separate property. A mortgagee is not a trustee for the mortgagor until after repayment of the mortgage money, and pending the reconveyance. The estate of the mortgagee is her own separate property within the meaning of the Married Women's Property Act, 1882, s. 1, sub-section 1. If the married woman is a trustee in any sense she can only be a bare trustee, and can convey as such under section 16 of the Trustee Act, 1893, without the concurrence of her husband: Wolstenholme on the Conveyancing and Settled Land Acts, &c., 7 ed., pp. 212 and 11. In exercising his power of sale a mortgagee is not a trustee for the mortgagor: *Warner* v. *Jacob,* 30 W. R. 731, 20 Ch. D. 220.

Ashton Cross, for the purchaser.—The principle of the judgment of North, J., in *In re Harkness and Allsopp's Contract* governs this case also. Wherever a married woman is in any sense a trustee of the estate she cannot convey except by a deed acknowledged. In the present case an element of trust still remains, for the money has not yet been paid to Mrs. Theobald, so some duties still remain to be performed by her. If the point is doubtful, surely the concurrence of the husband is not unreasonably asked.

Warrington, Q.C., in reply.—The married woman could transfer the mortgage, and if she did it would be as mortgagee and not as trustee. The mortgagee does not become a trustee in the proper sense except as regards the surplus proceeds of sale: *Locking* v. *Parker,* 21 W. R. 113, L. R. 8 Ch. App. 30.

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

KEKEWICH, J.—The object of the Married Women's Property Act, 1882, was not only to amend and alter, but also to simplify the law of married women in connection with property. Under the earlier Act of 1870, in the case of *Howard* v. *The Bank of England*, 23 W. R. 303, L. R. 19 Eq. 295, there was a long discussion by Sir George Jessel of extreme interest and importance at that time, but now, I suppose, entitled to be forgotten except so far as it explains the provisions of the Act of 1882.

There now comes before me a case which has not occurred before, and counsel have not been able to refer to any case nearer to the point than that of *In re Harkness and Allsopp's Contract*, recently decided by Mr. Justice North. That was the case of a married woman trustee, and the decision seems to go entirely on the fact that the property which she had was property of which she was a trustee—not a bare trustee—and therefore on that ground, and on that ground only, she was not a married woman entitled to separate property to whom the provisions of the Act of 1882 applied. That is how I understand the decision. From the first part of his judgment in which the learned judge calls attention to the title of the Act, to the last word of it, he seems to me to go entirely on this—viz., that the property of which a married woman is a trustee is not a married woman's property. I, of course, loyally accept that decision. It would be extremely wrong of me to try and criticize the judgment—a judgment which has been reported for some two years and which no doubt has been accepted by the conveyancing branch of the profession and certainly ought not to be lightly criticized. I may, however, venture to say that the Act might conveniently have been interpreted otherwise, but North, J., did not see his way to do so. But it is only a decision upon that state of things, and, in order to apply it to any other case, one has to consider whether a married woman is a trustee. If once you get a married woman who is merely a bare trustee, then, under section 16 of the Trustee Act, 1893, which re-enacted the provisions of the Vendor and Purchaser Act, 1874, s. 6, she can convey and surrender as if she were a *feme sole*. There is no doubt that on receiving payment of principal, interest, and costs due in respect of a mortgage granted to her as part of her separate estate, she would become a bare trustee. There would be no difficulty, therefore, when such a state of things occurred—namely, when the married woman was a bare trustee.

But then, in the present case she is not a bare trustee, for the money has not been paid to her, and so she has not been denuded of all her beneficial interest. Can she then as mortgagee, and notwithstanding the decision in *In re Harkness and Allsopp's Contract*, reconvey without the concurrence of her husband? Is she a trustee within the meaning of that decision? Now, it is elementary law that in order to create a trust you must have three things—the person who is the trustee, the person or class of persons who form the *cestuis que trustent*, and the property which the trustee holds on behalf of the *cestuis que trustent*. There is no difficulty in a case of this kind in finding a possible trustee or a possible *cestui que trust*—namely, the mortgagor and the mortgagee; but what does the mortgagee hold in trust for the mortgagor? That question does not seem to me to admit of an answer favourable to the purchaser. The mortgagee is not a trustee of the property for the mortgagor—that is, not until the principal, interest, and costs due under the mortgage have been satisfied. When they have been paid, the mortgagee's beneficial interest in the property determines, and he holds the property to some extent in a fiduciary character towards the mortgagee; he cannot, for instance, exercise the powers given to him by statute, or mortgage or otherwise deal with the property without having due regard to the mortgagor's interest. He cannot convey it away so as in any way to prejudice the equity of redemption. There are many obligations laid upon him as a mortgagee, but he is not a trustee, strictly speaking, of the property for the mortgagor.

Until the principal, interest, and costs have been paid the property belongs to the mortgagee subject to the equity of redemption, but he holds it as mortgagee and not as trustee for the mortgagor. The relation between them is that of mortgagor and mortgagee, not that of trustee and *cestui que trust*. The mortgage is a security for the principal money and interest. The land conveyed is only part of the transaction. There is an advance of money to be secured on the land, with interest. To whom does the money belong? To the mortgagee. The mortgagee holds the security for himself; as regards that, he has absolutely no fiduciary relation to the mortgagor, the fiduciary character does not come in for a moment. The security is granted to the mortgagee for his own benefit in order to provide for the particular sum advanced, and interest according to the contract, and the mortgagee's costs. It seems to me that, looking at it from this point of view, it is not right to say that the mortgagee is a trustee, and that is what I have to conclude in order to distinguish this case from the case of *In re Harkness and Allsopp's Contract*. If my argument is sound this lady is not a trustee at all, because you have not found the person for whom she is a trustee, the only possible person being the mortgagor, and he is not in the position of a *cestui que trust*. The result is that in my opinion the property comprised in this mortgage, which was made after the Act of 1882, vested in this lady as a married woman, and she can deal with the security, including the legal estate in the land, as if she were a *feme sole*, and the purchaser will get a complete title without the concurrence of her husband or the acknowledgment of the deed of conveyance by her.

Solicitors for the vendor, *E. C. Rawlings & Butt.*

Solicitors for the purchaser, *William Webb & Co.*

Q. B. Div. (Wright and Darling, JJ.) March 17.

SPENCER v. LANCASHIRE AND YORKSHIRE RAILWAY CO. (a.)

Railway—Traffic—Weights and measures—Inspector of—Police-constable—Constable travelling on railway as inspector—Right to travel at reduced fare—Cheap Trains Act, 1883 (46 & 47 *Vict. c.* 34), *s.* 6.

A railway company is not bound, under section 6 *of the Cheap Trains Act*, 1883, *to give a ticket at a reduced fare to an inspector of weights and measures who is travelling on the railway in the performance of his duties as such inspector, although he be at the time a police-constable.*

Appeal by the plaintiff from a judgment of his Honour Judge Parry, judge of the Manchester County Court.

The plaintiff was, and had been for many years, a police-constable of the county police force, and in 1891 he was appointed by the Standing Joint Committee an inspector of weights and measures for the

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

county council under the Weights and Measures Acts, 1878 and 1889.

The plaintiff stated that he was under the control of the chief constable, who could put him on any police duty, and that he was under the superintendent of his division; that when on duty inspecting weights and measures he does and has on several occasions acted as constable and assisted the police as constable, and that he has made arrests as a constable when away on such duties; that he sometimes travels in uniform, but generally in plain clothes, and that the bulk of his work is for weights and measures, and that any fees he gets he hands to his superintendent.

The plaintiff is paid out of the county fund, and not out of the police rate.

On the occasion now in question the plaintiff was travelling as an inspector of weights and measures, and on business as such inspector. He produced to the railway company (the defendants) a "route" duly signed by a police officer within the meaning of section 6 of the Cheap Trains Act, 1883, and claimed a ticket at three-fourths of the ordinary fare, according to the provisions of that section.

The railway company refused to carry him at the reduced fare, and demanded the ordinary fare, and the plaintiff paid the full ordinary fare under protest, and now sued in the county court to recover the difference—namely, 2d.

The question was whether the plaintiff, being a police-constable and an inspector of weights and measures, was entitled to be carried at the reduced rate when travelling on his duties as inspector of weights and measures.

The Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), provides: Section 6—"For the purpose of moving by railway on any occasion of the public service, (*a*) any of the officers or men in or belonging to Her Majesty's navy, or royal naval volunteers, and other officers or men under the command or government of the Admiralty; and (*b*) any of the officers or soldiers in Her Majesty's regular reserve or auxiliary forces . . . for the time being subject to military law; and (*c*) any officers or men of any police force (all and any of which officers, soldiers, and men are in this Act called 'the forces'); every railway company shall, on the production of a route duly signed for the conveyance of the forces, provide conveyance for them and their personal luggage, and also for any public baggage, stores, arms, ammunition, and other necessaries and things, whether actually accompanying the forces or not, at all usual times at which passengers are conveyed by the company, on such terms as may be agreed on between the railway company and the Secretary of State, Admiralty, or police authority, and subject to or in default of agreement on the following terms: (ii.) The fares shall not exceed the following proportions of the fares charged to private passengers for the single journey by ordinary train in the respective classes of carriages specified in the route—that is to say, if the number of persons conveyed is less than 150, three-fourths; and if the number is 150 or more, then for the first 150, three-fourths, . . . and for the numbers in excess of the said 150, one-half."

For the plaintiff it was contended before the county court judge that the plaintiff had fulfilled all the conditions necessary under the section to entitle him to the reduced fare; that he had produced a "route duly signed by a police authority," that he was a policeman and was therefore within the class of men specified in sub-section (*c*), and that while travelling on his duties as inspector of weights and measures he was travelling by railway on "an occasion of the public service."

For the defendants (the railway company) it was admitted that the plaintiff had produced a "route duly signed," but it was contended that he was not travelling on any occasion of the public service, and that he was not travelling as a policeman but as an inspector of weights and measures.

The learned judge held that the plaintiff was in fact a constable, and that he therefore fulfilled the second condition, but he held that he was not travelling on any occasion of the public service, and he gave judgment for the defendants with costs, with leave to appeal.

The plaintiff appealed.

Pickford, Q.C. (*E. W. Jordan* with him), for the plaintiff.—The three conditions to be fulfilled to bring the plaintiff within the section are, that he should produce a "route" duly signed; that he should come within one of the classes specified in section 6, and that he should be travelling on any occasion of the public service. It is admitted that he produced a route duly signed. In the second place, he was a police-constable; he was not in any way separated from the police force, although his salary was paid, not out of the police fund, but out of the county fund. He in fact held the rank of inspector and he assisted as a constable in various ways. He therefore came within the class of persons specified in sub-section (*c*). Thirdly, he was, on the occasion in question, travelling on the public service; he was travelling as an inspector of weights and measures, and an inspector of weights and measures is on the public service, as he is travelling in the performance of duties imposed by the public statute, and for the due performance of these public duties he has to enter into a recognizance to the Crown under section 43 of the Weights and Measures Act, 1878, the section under which inspectors are appointed. He therefore fulfilled all the conditions, and was entitled to a cheap ticket under the section.

C. A. Russell, Q.C., and *T. F. Byrne*, for the defendants, were not called upon.

WRIGHT, J.—It is enough to say in this case that, in our opinion, the Cheap Trains Act does not extend to inspectors of weights and measures when travelling on their duties as such inspectors.

DARLING, J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Ridsdale & Son*, for *F. C. Hulton*, Preston.

Solicitors for the defendants, *Woodcock, Ryland, & Parker*, for *C. Moorhouse*, Manchester.

Prob. Div. & Adm. Div. Probate. } Nov. 22.

In the Goods of STILES. (*a*.)

Probate—Executor renouncing—Application to retract—Court of Probate Act, 1857 (20 & 21 *Vict.* c. 77), *s.* 79.

One of several executors, who has renounced, will, under proper circumstances — e.g., *where, as in the present case, the other executor had absconded, and where administration has not been granted—be allowed to retract his renunciation and carry on the executorship.*

Section 79 *of the Probate Act of* 1857 *has not altered the practice in this respect.*

(*a*.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Motion on behalf of Henry Tournay Stiles for leave to retract his renunciation as executor of the will of Maria Stiles, deceased, and for a grant of probate of the will to him as executor.

Maria Stiles died in 1880, having duly executed her will in 1877, and by it, in exercise of a power of appointment contained in her marriage settlement made in 1834, she appointed, subject to her husband's life interest, a sum of £1,000 to be paid to Henry Tournay Stiles and Edmund Cammach upon certain trusts, and she appointed them her executors. The will was proved by Edmund Cammach, who was a solicitor, Henry Tournay Stiles having renounced probate on the representation that as his co-executor was a solicitor it would simplify winding up the estate. Thomas Stiles died in 1894. Edmund Cammack absconded in 1895 and £800, part of the £1,000, remained unadministered on deposit in a bank in the names of the trustees of the marriage settlement. Probate was sought in order to deal with this sum under the will.

Barnard, in support of the application.—Williams on Executors, 9th ed., vol. 1, p. 233, shows this is in accordance with the old practice, which is not altered by section 79 of the Court of Probate Act, 1857: see *In the Goods of Badenach*, 3 Sw. & Tr. 465, 12 W. R. P. Dig. 6; *In the Goods of Whitham*, 15 W. R. 560, L. R. 1 P. & D. 303; *In the Goods of Gill*, L. R. 3 P. & D. 113, 22 W. R. Dig. 195; *In the Goods of Morant*, 22 W. R. 267, L. R. 3 P. & D. 151.

JEUNE, P.—I think I ought to decide this point in favour of the applicant. There is no reason why in a proper case where circumstances have altered one of several executors should not be allowed to retract his renunciation and carry on the executorship. Under the old law, where all the executors of a will renounced and administration had been granted, the renunciation could not be retracted for the obvious reason that the representation had been suffered to go into another channel and the executors could not be allowed to come in and alter the state of things to which their conduct had given rise. But where some executors proved and others renounced, those who had renounced were allowed to retract as they could then be let in, without altering the devolution of the representation, seeing that they would only occupy the position which they might have originally assumed.

Section 79 of the Probate Act, 1857, provides that when an executor renounces probate his rights "shall wholly cease" and the representation and administration shall go, &c., as if he had not been appointed. I think the words "shall wholly cease" are to be read in conjunction with those which follow, and the effect is merely that it is not necessary to cite the executor who has renounced. This seems to have been the view of Lord Penzance in 1864, in *In the Goods of Badenach*, when he said, in answer to an argument by counsel: "There is nothing in the clause" (section 79) "to prevent the courts from allowing a retractation according to the old practice in a case fit for it." And again in 1866, in *In the Goods of Whitham*, which was a peculiar case, in which an executor who had renounced before the passing of the Act of 1857 retracted that renunciation for the purpose of renouncing again after the passing of the Act to bring himself under it. Lord Penzance said, "It is true that the ecclesiastical courts did prevent a man who had renounced to retract his renunciation, but it was for the purpose of taking a grant, and was in fact part of the application for a grant. Except for that purpose I think that it is not possible for an executor to retract his renunciation." I think this passage shows that Lord Penzance adhered to his former view. Lord Hannen, in the cases which have been cited, can hardly be said to have expressed any definite view. I think, therefore, in a proper case, one of several executors may be allowed to retract his renunciation. This is essentially a proper case; the executor who took probate has absconded and I think the executor who renounced should be allowed to retract his renunciation and take probate.

Motion allowed.

Solicitors for the applicant, *Robbins, Billing, & Co.* for *W. J. Stiles*, Spalding.

Prob. Div. & Adm. Div. Probate. } Nov. 1.

In the Goods of BUTLER. (*a*.)

Probate—Insolvency—Trust estate—Limited administration—Annexing will.

The court, in granting administration, limited to certain leaseholds of which the deceased, who died insolvent, was trustee, directed his will to be annexed to the grant.

Motion for a grant of administration of an insolvent's estate limited to certain leasehold estate (two leases) which the deceased had in 1871 covenanted to stand possessed of in trust for the applicant, Thomas Leman, a trustee under a deed of assignment executed by the deceased in favour of creditors.

The deceased had, in 1896, made a will appointing executors and giving his wife a life estate with remainder to his children. The executors renounced and the wife and children had been cited to take general administration but had not entered an appearance.

Hextall, in support of the motion.—The practice of the court is to grant limited administration in a case of this kind without annexing the will: see Tristram & Coote, 12th ed., p. 160.

JEUNE, P.—I think the grant ought be limited to the subject-matter in which you are interested, and that the will ought to be annexed to the grant. It is safer and can do no harm.

Motion allowed.

Solicitor for the applicant, *Kinch*, for *Eking & Wyles*, Nottingham.

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) } Feb. 24, 25; March 23.

In re HAWKES.

ACKERMAN *v.* LOCKHART. (*b*.)

Solicitor and client—Solicitor's lien—Administration action—Lien acquired before action—Order for production of documents for purposes of action.

The existence of a solicitor's lien does not give the solicitor any greater right to refuse production of the documents subject thereto than his client would have.

(*a*.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

(*b*.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

Where, therefore, in an action to which the client is a party, production of documents subject to a lien is necessary for the purpose of doing justice to parties other than the client, production will be ordered.

A solicitor had acquired a lien on papers of a client who afterwards died; the solicitor was employed by the client's executors to bring an action for administration of the client's estate; the conduct of the action was subsequently given to a creditor, but the executors still remained parties and still retained the solicitor.

Held, upon an interlocutory application made by the creditor, that the solicitor was bound to produce papers covered by the lien, their production being material for the conduct of the administration proceedings.

Appeal from Kekewich, J.

The appellant, John F. S. Cridland, a solicitor, had acted professionally for a person named Hawkes, and had acquired a lien upon certain documents belonging to his client. Hawkes died in August, 1895, and his estate was not sufficient to pay his debts, which included a bill of costs due to Cridland.

In May, 1896, the executors of the deceased employed Cridland to bring an action for the administration of the estate; and the usual administration order was obtained. In May, 1897, on the ground that the action was not being prosecuted with due diligence, an order was made giving the conduct of it to a creditor; but the executors remained parties to the action, and Cridland continued to act for them.

Afterwards a question arose whether any steps should be taken to get in a debt supposed to be due to the estate. To determine this question it was necessary to lay a case before counsel for his opinion, and such a case could not be prepared without the use of some of the documents subject to Cridland's said lien.

On the 7th of February, 1898, Kekewich, J., on the application of the creditor having the conduct of the action, made an order that Cridland should at his office produce to the solicitors of that creditor the documents so required.

Cridland appealed.

P. Rose Innes, for the appeal, cited *In re Faithfull*, L. R. 6 Eq. 325, 16 W. R. Ch. Dig. 123; *In re Capital Fire Insurance Association*, 32 W. R. 260, 24 Ch. D. 408; *Boden* v. *Hensby*, 40 W. R. 205, [1892] 1 Ch. 101; *Boughton* v. *Boughton*, 31 W. R. 517, 23 Ch. D. 169; *In re Austin, Ex parte Yalden*, 25 W. R. 134, 4 Ch. D. 129.

LINDLEY, M.R., referred to *Bennett* v. *Baxter*, 10 Sim. 417.

Stewart Smith, for the respondents.—Among the authorities cited there is no case of an administration action. Even where documents cannot be ordered to be handed over an order for production will be made. Here the solicitor by proving his debt has given the court jurisdiction to order production.

He cited *Hope* v. *Liddell*, 3 W. R. 581, 7 De G. M. & G. 331; *Ex parte Bramble, In re Toleman & England*, 28 W. R. 676, 13 Ch. D. 885; *Pratt* v. *Pratt*, 30 W. R. 837; *Lockett* v. *Cary*, 10 Jur. N. S. 144, 12 W. R. Ch. Dig. 30; *Simmonds* v. *Great Eastern Railway Co.*, 16 W. R. 1100, L. R. 3 Ch. App. 797; *Belaney* v. *Ffrench*, 22 W. R. 177, L. R. 8 Ch. App. 918; *Warburton* v. *Edge* 9 Sim. 508; and *Robins* v. *Goldingham*, 20 W. R. 277, L. R. 13 Eq. 440, 442.

LINDLEY, M.R., referred to *Ross* v. *Laughton*, 1 V. & B. 349, and to *Baker* v. *Henderson*, 4 Sim. 27.

VAUGHAN WILLIAMS, L.J., referred to *Bell* v. *Taylor*, 8 Sim. 216.

P. Rose Innes replied.

Cur. adv. vult.

March 23.—The following written judgments were delivered.

LINDLEY, M.R., stated the facts and proceeded: Cridland has appealed against this order, the ground of his appeal being that the documents ordered to be produced came into his possession not from the executors for the purposes of the action, but from the deceased in his lifetime, and that he, Cridland, had a lien on them before and at the time of his original client's death, and before any retainer by his executors.

A great number of authorities were referred to by counsel, but none of them were exactly in point, and it is necessary to consider the question for decision on principle.

A solicitor's lien is simply a right to retain his client's documents as against the client and persons representing him. As between the solicitor and third parties the solicitor has no greater right to refuse production of documents on which he has a lien than his client would have if he had the documents in his own possession. This principle is as applicable at law as it is in equity. Accordingly it has been long settled that if a solicitor is required by his client to produce documents under a *subpœna duces tecum* the solicitor can refuse to do so if he has a lien on them; but that the lien is no answer to a demand for their production by a third party: see *Hope* v. *Liddell* and *Hunter* v. *Leathley*, 10 B. & C. 858. This doctrine is not confined to production under the exigency of a *subpœna duces tecum*. The same principle applies to other applications for production by solicitors who are acting for their clients in litigation: s-e. at law, *Ley* v. *Barlow*, 1 Ex. Ch. 800; and in equity, *Furlong* v. *Howard*, 2 Sch. & Lef. 115. Nothing can be clearer than Lord Redesdale's judgment in this last case: "Though a solicitor may have a lien on a deed for his costs, yet if his client is bound to produce it for the benefit of a third person, so also must the solicitor. I know this is not so understood in general, but the common opinion, that the solicitor may withhold it from all parties in such a case, is erroneous. The right is only as between his client and him."

It is on this principle that courts of equity order solicitors acting for clients who are parties to actions to produce documents on which the solicitors have a lien, if their production is necessary for the purpose of doing justice to other persons beside their respective clients. Administration actions are the most familiar instances of such actions. But the principle is not confined to them. As, however, we are dealing with an administration action, I will refer only to such actions.

It must not be forgotten that before the Judicature Acts a creditor could be restrained from enforcing his debt at law after a decree for the administration of his debtor's estate, and a court of equity never allowed the creditors to be defeated by allowing the proceeding under the decree to be embarrassed by the liens of the solicitors of the parties. The solicitors of the parties to the proceedings are not deprived of their liens and treated as if they had none; but they are not allowed to render the proceedings abortive by refusing to produce documents in their possession which are wanted by other persons than their own clients, and which such other persons have a right to see.

But even as between solicitor and client, where the client is a party to an action, his solicitor may be bound to produce, for the purposes of the action, any documents of the client which are wanted for the purposes of the action, and which have come into the solicitor's possession in the course thereof for the purpose of conducting the same; see *Rose* v. *Laughton*

and other cases collected in 2 Daniel's Chancery Practice 1717, 5th ed. This rule, however, does not cover the point to be decided in the present case.

To return, however, to administration actions. If a creditor sued his debtor or his executor, at law, and required the defendant's solicitor by a *subpœna duces tecum* to produce a document belonging to the defendant, but in the possession of the solicitor, who had a lien upon it, I take it to be plain that the lien would not justify the solicitor in refusing to produce the document, and *Ley* v. *Barlow* shows that an order for its production might be made, even before trial, without a *subpœna*. If these are the principles on which the court acts in an administration action—if the production is ordered in order to prevent the legal rights of creditors from being defeated—it cannot matter whether the documents which are wanted came into the hands of the solicitors of the parties before or after the death of the deceased, or before or after the commencement of the action for administration, nor can it matter whether the executors are plaintiffs or are defendants, nor who has the conduct of the action. Having regard to the rights of the creditors, if Hawkes's executors now had the conduct of the action, their solicitor could not, in my opinion, effectually rely on their lien on the documents of the deceased to prevent their production for the purpose of enabling the executors to get in the assets of the deceased. The rights of the creditors under the administration judgment, and their inability to sue at law, explain the apparent anomaly that the executors should be entitled to obtain production from their own solicitor of documents on which he has a lien as against them. The fact that they have been deprived of the conduct of the action does not improve the solicitor's position, so long, at all events, as his clients remain parties to the action and have not discharged him: see on this point *Bennett* v. *Baxter* and *Simmonds* v. *Great Eastern Railway*. Mr. Cridland's clients are still parties, and he acts for them. It is unnecessary, therefore, to consider what his right might be under other circumstances.

The general rule of the court, founded on the principles above referred to, is very emphatically stated in *Belaney* v. *Ffrench*. That was an administration suit, and it was the case of a solicitor who had acted for several of the parties to it, and had been discharged by them, and who refused to produce documents belonging to them, but on which he had a lien. The receiver who had been appointed in the action wanted to see the documents. James, L.J., said: "A solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the court, and cannot use that means of obtaining payment." *Boughton* v. *Boughton* is another recent decision to the same effect, and Fry, J., there points out the importance of the rights of creditors. It is, however, true that the documents which were in question in these cases came into the solicitor's hands from the clients who discharged them. The point, therefore, made before us by the appellant's counsel had not to be considered.

I proceed now to examine the authorities more particularly relied upon by the appellant in support of his contention.

The first and most important is *Warburton* v. *Edge*. The facts of that case are not very clearly stated; but as I understand them there was an administratrix abroad; she had a solicitor here, who had acted for her in a suit for the administration of her deceased's estate, but who had been instructed by her to act for her no longer. A receiver had been appointed. The solicitor had some documents which came into his hands after the death of the deceased, and on which he claimed a lien, not only for the costs of the suit, but for other costs due to him from the administratrix before the commencement of the suit. The plaintiffs were creditors of the deceased, and they petitioned for an order of a very unusual nature. They prayed for an order on the solicitor to deliver to the receiver, or to deposit with the master, all deeds, &c., in his custody relating to the personal estate of the deceased, subject to any lien the solicitor might have, and for an inquiry into the existence of any lien which the solicitor might claim, and as to the amount due to him in respect of it; and if necessary for a taxation of his bill of costs, to the intent that it might be paid out of the estate of the deceased. Shadwell, V.C., refused to make any order on this petition. He said the plaintiffs had no right to the production of the documents, as some of them had come into the solicitor's hands before the suit commenced, and he had a lien on them for costs incurred in other business besides the conduct of the suit. The Vice-Chancellor also said the plaintiffs had no right to tax the solicitor's bill. The petition being really a petition by a creditor for the taxation of the solicitor's costs and for payment of them by the administratrix, the order of the Vice-Chancellor seems to have been right. But, if he meant to say that the creditors had no right to have the documents produced for the purposes of the action because of the lien, the Vice-Chancellor, in my opinion, went too far. Having regard to what he said in *Baker* v. *Henderson* he may have meant to go this length. That case presents no difficulty, although the first few words of the judgment were relied upon by counsel for the appellant. In *In re Capital Fire Insurance Association* an order was made to wind up a company. The company had employed a solicitor, who, when the petition for a winding-up order was presented, had a lien on some documents which the liquidator wanted. Chitty, J., made an order directing the solicitor to deliver these documents to the liquidator, but subject to the solicitor's lien. On appeal this order was discharged as to some of the documents—viz., those referred to in the second order, on which the solicitor had a lien before the petition was presented. The ground of this decision, as I understand it, was that the solicitor never was the solicitor of the liquidator in the winding-up proceedings, and was not acting for the company in those proceedings (see per Cotton, L.J., at p. 417), the liquidator having employed another solicitor. The court, moreover, pointed out that as to these documents the liquidator could obtain production of them under the winding-up sections of the Companies Acts, 1862, as decided in *In re South Essex Estuary and Reclamation Co., Ex parte Paine and Layton*, L. R. 4 Ch. App. 215, 17 W. R. Ch. Dig. 87 (see per Cotton, L.J., 24 Ch. D. 420). No doubt Cotton, L.J., said (see p. 420) that *Boughton* v. *Boughton* did not apply to "such a case." By this expression I understand was meant the case of documents in the hands of a solicitor before an administration suit commenced, the solicitor not being employed in that suit by the client against whom the lien could be asserted. In such a case the solicitor would be a stranger to the litigation, and could not be compelled to produce documents, except as a witness by *subpœna duces tecum*. That was the sort of case which Cotton, L.J., had to consider. I do not understand the observation to apply to the case of a solicitor who is employed in an administration suit by a party to the suit, and who could be made by the other parties, or by creditors, to produce the documents other than by *subpœna*.

Boden v. *Hensby* was a partition action. The plaintiff had changed his solicitor, and it was held that the solicitor could not be compelled to produce documents on which he had a lien before the action was commenced, although he could not withhold

those which came into his possession afterwards. North, J., who decided this case, acted on the authority of *In re Capital Fire Insurance Association*. If third parties were entitled to have the documents produced, *Boden* v. *Hensby* went too far in favour of the solicitor.

These were the principal authorities referred to, and the only ones which it is necessary to notice. None of them appear to me to compel the court to reverse the order appealed from. That order seems to me right in principle, and the appeal therefore ought to be dismissed.

RIGBY, L.J.—In this case the applicant was a creditor of the deceased person whose estate is being administered, and the conduct of the cause has been transferred to him. Mr. Cridland has acted for the plaintiffs from the commencement of the action, and does so now, so that there can be no question as to his having been discharged, if that be material. The order made is for production only, that being apparently sufficient for the purpose of ascertaining what information useful for the statements in the case to be laid before counsel the documents contain.

But for the fact that the lien arose before the action was commenced, there could, I think, be no question, on the decided cases, that the order appealed from is correct. The question will turn out to be, in my judgment, one of procedure only. There can be no doubt of the right of the creditor to production, and the only question which can arise is whether that right should be enforced against the solicitor as a witness, or whether a summary order in the action is, according to the course of practice, permissible. As to documents which the solicitor has obtained in or for the purposes of the action, it is clear that a summary order in the action may be made. The only possible doubt is as to those on which he had a lien before the action. Whether the lien was acquired from the testator or his executors seems to me to be immaterial. At law the very case seems to me to have been decided in *Ley* v. *Barlow*, where inspection before trial was ordered of documents which were in the possession of the attorney of a party to the action, notwithstanding that he had possession of and a lien upon them before action. This case has not, to my knowledge, ever been questioned. It was, however, apparently decided on the authority of *Hunter* v. *Leathley*, which had reference to a witness required by a *subpœna duces tecum* to produce the document under consideration, and more especially of *Steadman* v. *Arden*, 15 M. & W. 587, where it is not clear that the lien was insisted upon. It may be possible, therefore, to suggest that the distinction was not so clearly brought before the court as to make the case a conclusive authority.

Although, therefore, I am of opinion, as will hereafter appear, that the case was well decided, and that the doctrine is the same in equity as at law, yet, having regard to the numerous cases cited before us in the arguments, and to a certain amount of confusion and apparent conflict between them, I think it better to discuss the present case on principle, supported by some authorities which cannot be questioned.

The clear statement of the limit to the right of a solicitor to refuse production of documents on which he has a lien enunciated by Lord Redesdale in the case of *Furlong* v. *Howard* may be, and has been, rested on the very general rule that no one can give greater rights to another than he has himself. The owner of a document who would himself be obliged to produce it for the purposes of justice cannot give to his solicitor a right to refuse production. Lord Redesdale's statement of the law in *Furlong* v. *Howard* is only one of many statements to the like effect to be found in the books, though it is a very clear and important instance.

The principle itself is so obviously just that I do not think it requires any further support on authority, and I only go into the authorities for the purpose of showing that it has down to the present time been recognized, in order to get rid of any argument that might be set up that the law has been changed.

In addition to the cases already mentioned of *Hunter* v. *Leathley* (where the lien was a broker's lien on a policy of insurance, but the principle is the same) and *Ley* v. *Barlow*, I may refer to the following cases: In *Commerell* v. *Poynton*, 1 Swans. 1, Lord Eldon said (p. 2): "A solicitor cannot by virtue of his lien prevent the king's subject from obtaining justice." The same principle is to be found enunciated throughout the whole of the carefully-considered judgment of Sir Edward Sugden in *Blunden* v. *Desart*, 2 Dr. & War. 405. In *Brassington* v. *Brassington*, 1 Sim. & St. 455 (treated as undoubted law in *Hope* v. *Liddell*), Sir John Leach says (p. 457): "It would be very extraordinary if a deed by which property is conveyed were to be of no effect because the party who executed the deed did not choose to pay his solicitor's bill. It may be very reasonable that the husband" (the document was a marriage settlement), "calling for the the deed for his own purposes, should not have access to it until the solicitor's claim was satisfied, but to refuse to produce it as a witness for the other party cannot be justified." In *Hope* v. *Liddell*, above referred to, Knight Bruce, L.J., says (p. 336): "If Benjamin Norton and Edward Spencer Norton" (the persons against whom the lien was claimed) "were now alive, and either of them had actual possession of the deed, he would be compellable certainly to produce it for the purpose of evidence at the instance of these defendants. Why, then, . . . should not Mr. Clipperton" (the solicitor claiming a lien) "not do so? I think he ought." And Turner, L.J., says that he had long thought the question settled by *Brassington* v. *Brassington*. In *In re South Essex Estuary and Reclamation Co.*, L. R. 4 Ch. App. 215, Lord Hatherley made, under section 115 of the Companies Act, 1862, an order for production against a solicitor claiming a lien on documents belonging to a company in liquidation. The Lord Chancellor, after referring to the case of a client asking for production without having paid his solicitor's bill, says: "It is equally beyond doubt that a solicitor would have been ordered to produce on a *subpœna duces tecum* obtained by a creditor or third party." He then decides the case on the ground that under the Companies Act the official liquidator represented the creditors as well as the company. This is an express decision of the Lord Chancellor that a creditor is not a person who claims through or under the client so as to be in the same position with him, but is a person claiming hostilely to him so as to be entitled to the full benefit of Lord Redesdale's statement of the law in *Furlong* v. *Howard*. In *Belaney* v. *Ffrench* James, L.J., says: "But a solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the court, and use that means of obtaining payment." It may be, as suggested by Cotton, L.J., in *In re Capital Fire Insurance Association*, that in *Belaney* v. *Ffrench* only papers in the cause, were being dealt with, but I do not think that the generality of the language used by James, L.J., ought to be limited, though the case itself would, if Cotton, L.J., is right as to the facts, be no authority as to the way in which production of deeds on which a lien attached prior to suit is to be procured against a solicitor who had

been discharged. Cotton, L.J., in *In re Capital Fire Insurance Association*, at p. 418, says that a solicitor can claim no greater lien than the person who puts the documents into his hands is capable of creating.

Many of the cases dealt with by me involve the same principle, and there are decisions which might, if necessary, be cited to the same effect—see, for instance, Fry, J., in *Boughton* v. *Boughton*.

These authorities make it clear that the principle enunciated by Lord Redesdale in *Furlong* v. *Howard* has never been modified, and any *dicta*, or even any decisions, if there be any, which are contrary to that principle must be wrong.

I now go to the consideration of the remedies against a solicitor to enforce production or delivery notwithstanding his lien: (1) Of course delivery of the documents may be enforced by way of redemption as in *Christian* v. *Field*, 2 Hare 177, where the plaintiff in a creditor's suit (*Christian* v. *Chambers*), who had in that suit obtained a decree for sale of real estate of a testator for the payment of his debts, was held entitled to maintain a suit (*Christian* v. *Field*) to redeem title deeds held by a solicitor of the testator, claiming a lien upon them, but an entire stranger to the creditor's suit. In that case redemption was the only effectual remedy, since the deeds were wanted for the purpose of delivering them to a purchaser.

(2) Where there is no litigation in which the solicitor acts or has acted for one of the parties, the usual course is to summon him as a witness on a *subpœna duces tecum*, and to require him to produce the documents on which he claims a lien. Several of the cases above referred to, including *Brassington* v. *Brassington* and *Hope* v. *Liddell*, are of this nature, and there are many other cases both at law and in equity which might be cited. There is no case, so far as I know, where production has not been enforced against a solicitor notwithstanding the lien, if the person demanding production could have enforced production against the client. Consistently with Lord Redesdale's statement in *Furlong* v. *Howard* there could be no such case.

(3) There are innumerable instances in which a solicitor has been ordered summarily to produce or deliver without prejudice to his lien, where he is or has been solicitor to a party, plaintiff or defendant. Perhaps the most common case is that now before us—viz., an administration action, though the practice is not confined to administration actions. Wherever the court has taken upon itself the administration of or dealing with an estate for the benefit of persons other than those against whom the lien authorizes a refusal to produce, it has been the practice to enforce production in a summary way by order in the action against the solicitor of any party. *Ley* v. *Barlow* has been already indicated as a case of this kind at law. So no case has been produced which shows that any difference is to be made so long as the solicitor continues to act as solicitor in the action with reference to a lien existing before suit and one arising during the pending action. Nor can there be any such difference in principle. A solicitor who engages to act for a party to an action impliedly agrees that he will not use his lien or any document required for the purposes of the action so as to embarrass the prosecution of it. This conclusion would be sufficient for the purposes of this appeal; but many cases of the exercise of the summary jurisdiction have been cited, and it may be desirable to see whether any of them are adverse to the proposition laid down.

The first cases of this kind that I need mention are *Ross* v. *Laughton* and *Commerell* v. *Poynton*, both decisions of Lord Eldon. In the first, on the application of assignees of a bankrupt defendant to an administration action in which a decree had been made, Lord Eldon made an order for production against the defendant's solicitor, notwithstanding his lien.

In the second, Lord Eldon, on the application of a defendant against his solicitor, who had refused to proceed in the action, ordered the solicitor to permit inspection by the defendant for the purposes of the action, and directed production by the solicitor before the master for the purposes of the action. I mention these cases particularly because Lord Eldon has been supposed to have withdrawn somewhat from the doctrine involved in them by what fell from him in *Lord* v. *Wormleighton*, Jac. 580 [1822]. Lord Eldon's decision in the last-mentioned case has been referred to as more favourable to the solicitor's lien than the earlier cases. The case itself has frequently been misunderstood. It has been argued that Lord Eldon there laid down something inconsistent with the former decisions in *Ross* v. *Laughton* and *Commerell* v. *Poynton*, and his subsequent decision in *Colegrave* v. *Manley*, Turn. & Russ. 400 [1823]. Lord Cottenham, however, in *Heslop* v. *Metcalfe*, 3 My. & Cr. 183, treats the case as quite consistent with *Colegrave* v. *Manley*, pp. 187, 188, and with *Commerell* v. *Poynton*, p. 190. In like manner Wood and Selwyn, L.JJ., in *Simmonds* v. *Great Eastern Railway Co.*, expressly decided that *Ross* v. *Laughton* was not overruled by it. In *Belaney* v. *Ffrench* Bacon, V.C., said, referring to *Lord* v. *Wormleighton*: "Lord Eldon's words were greatly misunderstood if they were understood to say that a solicitor might, by detaining papers, embarrass the proper and rational progress of an administration suit." The opinion of James, L.J., in the same case has already been cited, and both were expressly approved by Fry, J., in *Boughton* v. *Boughton*. Having regard to all these explanations of *Lord* v. *Wormleighton*, it is impossible, I think, to treat it as introducing any substantial change into the law as to solicitors' lien. It is in my judgment only a decision against the exercise of summary jurisdiction in the case where a solicitor has not discharged himself, but been in effect discharged, and his former client moves against him. *Colegrave* v. *Manley*, above referred to, is a very leading and important case on the subject of the summary jurisdiction. There Lord Eldon, in the case of a solicitor who had discharged himself, made an order that he, the late solicitor, should deliver to the new solicitor of his former client all the proceedings in the cause, and all such deeds, evidences, papers, and writings whatsoever, as had come into the possession or custody of the late solicitor, belonging to the plaintiff, and which related to the cause, subject to the lien of the late solicitor for the amount of what should be found due to him on the taxation of his bills of costs. The terms of this order are sufficiently wide to include papers and costs which respectively came into the solicitor's hands, and were incurred, before the commencement of the suit, though it does not clearly appear that there were any such. In *Baker* v. *Henderson* Shadwell, V.C., making an order on the plaintiff's solicitor for the production of documents in his possession for the purposes of the suit, takes notice that the solicitor had no lien on the documents anterior to the suit. This, however, only means that he had not to decide a question as to such an antecedent lien. In *Heslop* v. *Metcalfe* the same learned judge, on the authority of *Colegrave* v. *Manley*, ordered delivery up by a solicitor, held to have discharged himself, of papers in a suit, to his client's new solicitor. This decision was affirmed on appeal by Lord Cottenham. Lord Cottenham there also relies upon *Colegrave* v. *Manley*, and especially upon

a paragraph at p. 402 of the report in these terms: "So far as the use of papers is concerned the suitor, when his solicitor discharges himself, must have his business conducted with as much ease and celerity and as little expense as if the connection of solicitor and client had not been dissolved."

It does appear from the report of *Heslop* v. *Metcalfe* that the papers were only papers in the cause, though the late solicitor claimed a lien thereon for his general costs outside the suit; but this fact was only relied upon as evidence of the solicitor having discharged himself, and there is not a word in the carefully considered judgment of Lord Cottenham to show that he would have excluded from the order papers received before the commencement of the suit and subject to a lien for general costs, if in fact they were necessary for the proper prosecution of the suit. The nature of the suit is not shown from the report.

Warburton v. *Edge* is a case which has been much discussed, and is not easy to understand. I think that the true view of that case is that the petition presented by the plaintiffs, creditors of the deceased person whose estate was being administered, was an informal application for redemption of the documents referred to in it on terms which the plaintiff had no right to impose, and that it was dismissed partly on that ground and partly on the ground that the plaintiffs had no *locus standi*. One main reason for the order, given in the judgment at p. 514, is that, because the solicitor had a lien on the documents prior to the right of the administratrix to take them out of his hands, the lien was consequently prior to the right of the plaintiffs, who were merely general creditors of the deceased's estate, and could only take the estate as they found it. This seems to me to be in direct opposition to the string of authorities above cited, commencing with *Furlong* v. *Howard*, and deprives the case of any weight as an authority.

The next case which I think it worth while to deal with is that of *Bennett* v. *Baxter*. It decided that the fact of the conduct of an administration suit being taken from the plaintiff and given to another creditor did not entitle the plaintiff's solicitor to treat himself as discharged, or in a better position than if he had discharged himself, and gave the creditor having the conduct the right to inspect and take copies of all papers in the cause. On the authority of *Colegrave* v. *Manley* an order for delivery, if asked for, might, I think, have been made.

The constant recurrence of a distinction between the position of a solicitor discharging himself and that of one who has been discharged will be observed, and I think that there has been a good deal of misapprehension as to the meaning of those cases. In fact, they only apply to the exercise of summary jurisdiction to make an order in the suit. If a solicitor having a lien does not act, and never has acted, in the suit for a client party thereto, the course of procedure against him cannot in general be by way of application in the suit to which he is in every way a stranger. If he begins to act for a party he must, of course, be taken to be ready to do everything necessary for carrying on the suit effectually. He certainly cannot set up a lien acquired during the progress of the suit so as to embarrass the proceedings in it, and no case that I have heard of has laid it down that he can, whilst acting in the suit, use in such a manner a previously-acquired lien. If his client discharges him it is obvious that such discharge cannot in substance affect the right to production of any third party. The utmost effect, if any, of the class of cases now being dealt with has been to place him, in the circumstances of the particular case, in the same position as if he had never been a party to the litigation—that is to say, to relieve him from the summary jurisdiction. Even as to this I have not observed a case in which the summary jurisdiction has been cut down except where the client himself, or his representative, has been the applicant, though I should hesitate to say that there are no cases to that effect. If, on the other hand, the solicitor discharges himself, he has always been held to be in the same position as though he continued to act—that is to say, to be subject to the summary jurisdiction. The case of *In re Capital Fire Insurance Association*, already referred to, has been supposed to indicate that this summary jurisdiction cannot extend to the case of a lien acquired before the commencement of the litigation. I do not think that to be the meaning of the case. Cotton, L.J., there guarded himself carefully against appearing to lay down any such conclusion. At p. 417 of the report he says, with reference to the documents which the solicitors had possession of before the 18th of September, 1882—that is, the commencement of the liquidation—"They came to the hands of the solicitor before the presentation of the petition, and I see nothing to affect his lien." He cannot by these words have meant that the right of any person to insist upon the production on *subpœna* was taken away. When the three authorities relied upon by Chitty, J., in the court below were referred to, he says, "None of them seem to me to govern the case. A solicitor employed in a suit is in a very different position." This can, I think, only mean, having regard to what has been before said, that in a suit a solicitor may be subject to the summary jurisdiction as to documents on which he acquired a lien before suit. It is remarkable that in no case in which a solicitor has been held to be subject to the summary jurisdiction has there been any attempt to limit the summary jurisdiction by saying that it could not apply to a lien acquired before suit. It seems to me that it is more in accordance with common sense that the summary jurisdiction should, if it applies at all, be extended to all cases, than that an order under it should be confined to papers acquired in or for the purposes of the action, whilst as to those acquired before the action the procedure to compel production by the solicitor as a witness should necessarily be resorted to.

My conclusion is that *Ley* v. *Barlow* should be maintained, and this appeal dismissed.

VAUGHAN WILLIAMS, L.J.—I agree in the result; but, having been favoured with an opportunity of reading the judgments of the Master of the Rolls and Rigby, L.J., I prefer to give my own reasons, which differ considerably from theirs.

Now, I agree that it would seem to be an unsatisfactory state of the law if in a case where the conduct of an administration suit is taken from the plaintiff executor and given to a creditor, the solicitor for the plaintiff executor should be able to embarrass the progress of the suit by refusing to produce documents on which he has a lien, even though he acquired such a lien in respect of documents received from the testator in respect of work done for him. But if production by the solicitor of such documents is to be ordered, it is important to ascertain the principle on which the order is made. A precisely similar order was made in *Bennett* v. *Baxter*; but Shadwell, V.C., in that case based his order on the misconduct of the solicitor in delaying the suit, which misconduct led to the conduct of the suit being given to the creditor. No misconduct is, however, imputed to the solicitor in the present case, and it therefore becomes necessary to consider on what principle an order on the solicitor for production can be made in this case.

There can be no doubt but that the lien of the

licitor would not be a ground for refusal to produce he documents at the trial of an action, if the solicitor ere served with a *subpœna* issued at the instance of ny person other than the person against whom the m came into existence, or someone claiming through im. *Hope* v. *Liddell* is a clear authority for this, also are *Furlong* v. *Howard* and *Brassington* v. *rassington*. This, however, would not justify the rder to produce in this case, unless either it is right make an order to produce before trial in every case which production would be compelled at the trial a person served with a *subpœna duces tecum*, or less an executor in an administration action, or a editor having the conduct of it, is to be treated as person other than the testator or someone claiming der him. It is said that there is no difference tween the liability to produce at the trial and a bility to produce before the trial, and that whenr the one production can be compelled the other a also. I do not think that this is so. If it were , one would have expected to find instances of ders on mere strangers to an action to produce cuments which they had in their possession for pection by a party to the action before trial. I ow of no such cases. The report in *Furlong* v. *ward* is very short, and it is not at all clear from it at the order to produce was not an order to produce the trial, or that the document was not an instrumt in which the applicant who obtained the order d not an interest as a party thereto. In *Ley* v, *rlow* and in *Steadman* v. *Arden* and in *Hunter* v. *thley* the applicant who obtained the order for duction before trial had an interest as a conting party in the document ordered to be duced for inspection, and at law it was always practice, even before there was any statutory vision for discovery, to order the production such documents for the purpose of pleading, but, for this purpose, and in the case of such docuts, no order could be obtained to compel a third ty, a stranger to the action, to produce documents inspection in a cause: see *Cocks* v. *Nash*, 3 Moore & 164, where the whole subject is very fully discussed. reover, it is difficult to explain the refusal of the r for production and inspection in *Lord* v. *Wormhton*, or the necessity to rely, in *Bennett* v. *Baxter*, the default of the attorney, if there was any broad eral rule which could be invoked to the effect every witness must produce for inspection before any document which he would be compelled to duce at the trial on a *subpœna duces tecum*.

seems to me important in examining the authori- to notice the distinction between an order for very up of papers and an order for production of ers, and again, the distinction between an order the production of papers by a solicitor who by s or conduct has discharged himself, and an for production by a solicitor who has been disged, without misconduct on his part, by the t.

e granting or refusal of an order for delivery up pers by the acting solicitor, to the client does not ve the affirmation or negation of any obligation stranger to the action to produce a document he holds subject to his lien, nor does the order oduction by a solicitor who has discharged him- of documents received by him for the purposes e cause; but an order on a solicitor, discharged client, to produce before the trial for inspec- documents on which he has a lien might involve affirmation of such an obligation by a mere to produce before trial documents on which d a lien, for the solicitor in such a case would, ent any fault of his own, have become a stranger e action. But I do not think it does.

The case of *In re Faithfull* seems to me to lay down the rule that a discharged solicitor is under no obligation to deliver or even produce or allow inspection of papers on which he has a lien; and I am not aware that a solicitor thus discharged has any special rights or liabilities beyond those of other persons holding documents subject to a lien. But on the other hand, it is clear law that in administration and other representative actions, a discharged solicitor cannot resist production, at the instance of creditors, of documents received for the purposes of the action. Now, what is the reason of this apparent anomaly? The reason seems to me to be that a solicitor receiving from his client papers in the course of a cause, for the purpose of doing justice to his client, thereby undertakes to produce them if necessary in the cause, and is not relieved from this undertaking by being discharged by the client, in so far as relates to the obligations incurred by the client in that cause. Even if this does not explain the anomaly, the fact remains that administration and representative actions are, at all events, treated as a special class outside the general rule. The very fact that in cases of orders for production, as distinguished from delivery, a distinction is drawn between papers received for the purposes of the cause and papers not so received (see *Ross* v. *Laughton*, *Commerell* v. *Poynton*, and *Vale* v. *Oppert*, 23 W. R. 780, L. R. 10 Ch. App. 340), seems to point to the liability to produce for inspection being based, not on any general obligation, but on special obligations attaching to solicitors. The result of all these considerations seems to be to show that there is no liability on a mere stranger to produce documents on which he has a lien before the trial, or otherwise than at the trial in obedience to a *subpœna*.

This being my view, I will not trouble to consider how far the plaintiff in an administration action, as representing the creditors of the estate, can set up the rights of third persons to insist on the production under a *subpœna*; and I will now proceed to consider whether there is any special obligation on a solicitor, as such, to produce for inspection before trial documents in circumstances like those appearing in the present case. The remedy against a solicitor who wrongfully refuses to produce or deliver up papers is by summary order against him as officer of the court. The obligations of a solicitor claiming a lien on papers received by him professionally, and the extent of the remedy against him, are defined in a long series of cases, chiefly in courts of equity. These cases mostly turn on the difference in the obligation of a solicitor who has been discharged by the client and a solicitor who has discharged himself by refusing to continue to act. The present case differs from such cases in that the solicitor has not been discharged by the client or by his own refusal to act, but continues the solicitor in the cause.

So far as relates to the cases of solicitors discharged by the client, there is a long series of cases going to show that a solicitor discharged by the client is liable to produce for inspection or deliver up, subject to his lien, all papers received for the purpose of the cause in every case in which litigants other than his client are concerned, at the instance of such other parties, and creditors and others concerned in administration and other representative actions are treated for this purpose as parties to the litigation distinct from the client of the solicitor; but these cases all limit the obligation to papers received by the solicitor for the purpose of the cause, and seem to exclude from the obligation papers on which the solicitor has a lien acquired prior to and irrespective of the cause. *Ross* v. *Laughton*, *Belaney* v. *Ffrench*, *Boughton* v. *Boughton*, *In re Capital Fire Insurance*, and *Boden* v. *Hensby* are examples of this class of cases.

It is difficult to reconcile *Lord* v. *Wormleighton* and *Warburton* v. *Edge* with the obligation to produce or deliver up in these cases. The distinction between *Ross* v. *Laughton* and *Lord* v. *Wormleighton*, upon which the lords justices tried to reconcile them in *Simmonds* v. *Great Eastern Railway*, seems too narrow, as it would exclude administration actions from the scope of these cases. The obligation of the discharged solicitor to produce in the cause papers received for the purpose of the cause in administration or representative actions seems, however, well established.

Now, what is the obligation of a solicitor who has not been discharged in reference to the production of papers? I cannot doubt but that he is bound to produce all papers received in the action; but does his obligation go further? Is he bound to produce papers received before the action, on which he had already acquired a lien? I think he is. There is no direct authority, but the observations of Shadwell, V.C., in *Bennett* v. *Baxter*, and of the lords justices in *Simmonds* v. *Great Eastern Railway*, seem to show that he is, and that this is an obligation not towards persons other than his client, but to the client himself. The solicitor has a mere right of retainer, and the enforcement of that right seems to me inconsistent with the duty which he has undertaken to perform. He must, I think, be taken to have known when he accepted the retainer that it might be necessary to produce, under an order for discovery made on his client in the action, these papers upon which he had a lien, and to have waived by implication his lien so far as the production of the papers might prove necessary in the suit. This same obligation is the obligation which continues in its entirety if he voluntarily discharges himself. He must still continue to afford facilities for the prosecution of the suit. It is to be remarked, also, that there is no case reported in which a solicitor, while still the solicitor on the record, has ever successfully resisted, or indeed attempted to resist, this obligation on account of a lien acquired prior to the action, which is very remarkable, as the opportunity for making such a claim must have arisen again and again.

I wish to add that, even if I am wrong in assuming that this is an obligation of the solicitor towards the client, the obligation might yet be held to arise in the case of an administration action, or any action in which the rights of other persons are concerned; but I prefer to rest my judgment on the ground of obligation to the client.

I may add that I think that *In re Capital Fire Assurance Association* and *Boden* v. *Hensby*, in so far as these cases are authorities for limiting, in the case of a solicitor discharged by the client, the order whether for production or delivery up of papers, to papers received in the action, are in accordance with previous authorities, and I wish further to add that I think that if *Colegrave* v. *Manley* and *Heslop* v. *Metcalfe* are looked at there is nothing in them to show that the orders were intended to extend to papers received by the solicitors before the action, but, on the contrary, the observations by Lord Cottenham and the Vice-Chancellor point in the opposite direction. The order in *Bennett* v. *Baxter* is similarly limited to documents in the cause.

Appeal dismissed.

Solicitors, *Spencer Cridland, & Co.; Frame & Son.*

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — April 5.

PENDER v. TADDEI. (*a*.)

Practice—Pleading—Counter-claim—Parties—Claim by defendant and other person against plaintiff—Ord. 21, *r.* 11.

The defendant and a third person had a joint cause of action against the plaintiff arising out of the same circumstances as the plaintiff's cause of action. The defendant delivered a counter-claim in respect of such joint cause of action, making the third person a defendant to the counter-claim.

Held, that such counter-claim could not be set up in the action.

Appeal from an order of Grantham, J., striking out the defendant's counter-claim.

The plaintiffs were the executors of the late Sir John Pender, and they sued the defendant as acceptor of two bills of exchange for £5,000 each drawn by Sir John Pender on behalf of himself and J. S. Balfour and indorsed to Sir John Pender.

The bills of exchange were given in connection with a contract which had been entered into between the defendant and one Bellani of the one part, and Sir John Pender and J. S. Balfour of the other part, whereby the defendant and Bellani agreed to sell to Sir John Pender and J. S. Balfour a certain estate and water-rights in Italy.

The defendant's case was that there had been a breach of this contract by Sir John Pender, and he delivered a counter-claim intituled between himself as plaintiff, and the plaintiffs in the action and Bellani as defendants.

By the counter-claim it was alleged that the contract provided for an advance of £10,000 by the purchasers, that the purchasers accordingly advanced that sum to the defendant, and that the defendant gave the two bills of exchange now sued upon as security for the same. The defendant claimed as against the plaintiffs in the action £70,000 damages for breach of contract, and as against all the defendants to the counter-claim a declaration that so much of that sum as might be necessary to meet any claim which the plaintiffs in the action might have against the defendant in the action might be set off against it, and that the residue of such sum might be dealt with by the court and paid as to the court might appear just.

On the application of the plaintiffs Grantham, J., made an order striking out the defendant's counter-claim.

The defendant appealed.

C. C. Scott, for the defendant.—The counter-claim arises out of the same transaction as the claim, and is therefore properly set up in accordance with the rules and the practice. By it the defendant seeks to raise a question between himself and Bellani on the one hand and the plaintiffs on the other, which question is closely connected with the plaintiffs' claim. Bellani does not consent to become a party to the counter-claim, but the defendant is entitled to have him added under ord. 16, r. 11, which gives the court power to order that the names of any parties "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." The defendant cannot make Bellani a co-plaintiff in

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the counter-claim against his will; he therefore makes him a co-defendant in accordance with ord. 21, r. 11, and the old Chancery practice, under which all persons who were interested had to be before the court, whether as plaintiffs or defendants.

He cited *Luke* v. *South Kensington Hotel Co.*, 27 W. R. 514. 11 Ch. D. 121; and *Turner* v. *Hedneaford Gas Co.*, 26 W. R. 308, 3 Ex. D. 145.

G. S. Bower, for the plaintiffs.

A. L. SMITH, L.J.—The plaintiffs sue the defendant on two acceptances. The defendant says that he and Bellani have a counter-claim against the plaintiffs, Bellani being a joint contractor with the defendant in the transaction out of which the dispute between the parties arose. The defendant, however, does not make Bellani a plaintiff to the counter-claim, he seems to admit that ord. 21, r. 11, does not by its terms enable him to do that; but he makes him a defendant to the counter-claim. The question is whether by the rules and the practice he can do this. Ord. 21, r. 11, says that, "Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross-action." In my opinion, those words are not applicable to the present case. The defendant is not raising a question between himself and the plaintiffs along with another person, he is raising a question between himself along with another person and the plaintiffs; though instead of making that other person a plaintiff to the counter-claim he makes him a defendant. I do not think that what we are deciding is at all in conflict with what was said by the Lords Justices in *Turner* v. *Hedneaford Gas Co.* In my opinion the defendant cannot be allowed to do in an indirect way that which by this rule he cannot do directly. The appeal must, therefore, be dismissed.

CHITTY, L.J.—I agree. I think that the words "along with any other persons" in ord. 21, r. 11, apply solely to "the plaintiff," and that, as this rule does not permit the defendant directly to set up such a counter-claim as he has raised, we ought not to allow him to do so indirectly by reference to the general practice.

COLLINS, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Barlow & Barlow.*

Solicitors for the defendant, *Hogan & Hughes.*

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) March 21.

In re KENT COALFIELDS SYNDICATE (LIMITED) (IN LIQUIDATION). (*a.*)

Company — Winding up — Voluntary liquidation — Register of shareholders—Application to inspect— Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 32.

Section 32 *of the Companies Act*, 1862, *which gives a right to inspect the register of shareholders of a company, is no longer applicable where the company is being wound up, whether the winding up be compulsory, or under supervision, or merely voluntary.*

Appeal from an order of a judge at chambers.

The Kent Coalfields Syndicate (Limited), a company registered under the Companies Act, 1862, had ceased to carry on its business, and was being wound up voluntarily. After the commencement of the winding up a person who was neither a creditor nor a shareholder of the company applied to the company and the liquidator for inspection of the register of members, under section 32 of the Companies Act, 1862, at the same time tendering one shilling. Inspection being refused, Grantham, J., made an order directing the company and the liquidator to produce the register to the applicant for his inspection. The company and the liquidator appealed.

F. Evans, for the appellants.—There is no jurisdiction under section 32 of the Companies Act, 1862, to order inspection of the register, where the company is being wound up. That section occurs in Part II. of the Act, which deals with going companies. The object is to enable a person dealing with the company to ascertain how far he may trust the company: *Oakes* v. *Turquand*, L. R. 2 H. L. 325, at p. 366 (per Lord Cranworth), 16 W. R. H. L. Dig. 15. That section is not applicable when a company is in liquidation: *In re Yorkshire Fibre Co.*, 18 W. R. 541, L. R. 9 Eq. 650. After the winding up has commenced the register is under the control of the liquidator, *In re Capital Fire Insurance Association*, 32 W. R. 260, 24 Ch. D. 408, at p. 412; and yet, if section 32 applied, the company and its directors would incur a penalty for refusal to allow inspection. By section 133, sub-section 5, after a voluntary winding up all the powers of the directors are to cease. By section 156, coupled with section 138, where a company is being voluntarily wound up "the court" may give a contributory of the company inspection of the register; and, by section 32, sub-section 2, of the Companies (Winding-up) Act, 1890, "the court" means the court having jurisdiction under that Act to wind up a company.

Swinfen Eady, Q.C., and *J. R. Atkin*, for the respondent.—Section 32 does not come to an end with the voluntary winding up. By section 39 the company must keep a registered office, and that obligation does not cease upon a voluntary winding up though the penalty upon the company for not having a registered office is only applicable while the company is carrying on business. A writ may be served under section 62 on a company which is being voluntarily wound up. After the voluntary winding up the liquidator has power to manage the company (section 95), and therefore he can give inspection of the register under section 32, and can close it under section 33. Section 35, as to the rectification of the register, clearly applies after a winding up. All the reasons for granting inspection of the register exist, though not in the same degree, in the case of a voluntary winding up. There is no limit in terms in section 32 to a going company, and the court will not be astute so to limit it. Further, section 156, which is made applicable by section 138, in the case of a contributory in a voluntary winding up, deals with inspection of "books and papers." These words, which are very general, do not show an intention that the special provisions of section 32 as to the register should terminate on a winding up. They referred to *Nelson* v. *Anglo-American Land Mortgage Agency Co.*, 45 W. R. 171, [1897] 1 Ch. 130.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

A. L. SMITH, L.J.—The question we have to determine is whether or not an order can be made under section 32, when a company is in voluntary liquidation and not carrying on its business, for inspection of the register of shareholders. It is clear that section 138, coupled with section 156, cannot be relied upon in support of this order at chambers, because the applicant is not a contributory, and even if he were the proper tribunal to apply to for inspection would be the judge having jurisdiction under the Companies (Winding-up) Act, 1890, to wind up the company—that is, Wright, J. The question, therefore, is whether section 32 applies. That section begins by providing that the register of members shall be kept at the registered office of the company thereinafter mentioned. By section 39 every company must have a registered office; but whether that provision is applicable to a company in liquidation I do not decide. Section 32 then goes on to provide that except when closed as thereinafter mentioned—that refers to section 33, which seems to me to apply only to a company before it has gone into liquidation—the register shall during business hours be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one shilling for each inspection, and a penalty is imposed upon the company and its directors in case of a refusal to allow inspection. The penalty, therefore, is payable by the company in case of a refusal by it to allow inspection. It would be absurd to impose a penalty upon a company in liquidation when the register would not be under its control. It seems to me that it would be an unreasonable view of this section to read it as applying to a company in liquidation as well as to a going company. It seems to me to apply only to a going company, and sections 138 and 156 support this view. If authority were needed in support of this proposition, it is to be found in the decision of James, V.C., in *In re Yorkshire Fibre Co.* In my opinion, therefore, Grantham, J., had no jurisdiction to make the order for inspection.

CHITTY, L.J.—I am of the same opinion. Section 32 does not, in my opinion, apply to a company which is being wound up, whether by the court, or under a supervision order, or voluntarily. The section comes within a group of sections which, upon their face, refer to a company as a going concern, and though this may not be sufficient to settle the construction of section 32, it is an element to be taken into consideration. The exception in the section as to the closing of the register seems to me to be applicable only to a going company. That exception refers to section 33, which gives a company power to close the register for certain periods. Another provision in the section points in the same direction—namely, the provision as to the penalty. I am unable to say that a penalty which is imposed upon the company for refusal to allow inspection, is still so imposed when the powers of the directors have ceased, or is imposed upon the liquidator. It is clear that upon the winding up of a company the register passes into the control of the liquidator: *In re Capital Fire Insurance Association.* As regards section 156, which occurs in the winding up part of the Act, the contention put forward on behalf of the respondent upon that section is that though the word "books" may be large enough to include the register, yet that is not sufficient to show that the Legislature intended that the special provision as to the register in section 32 should terminate upon a winding up. In my opinion section 156 is an enactment by way of replacement of section 32, when a winding up occurs. Section 156, which, as has been pointed out, does not apply to a stranger, in terms only applies to a winding up by the court or under a supervision order, and section 138, which makes it applicable to a voluntary winding up, expressly limits it to a contributory or the liquidator. To my mind Lord Cranworth's observations in *Oakes v. Turquand* with reference to section 32 are very important as showing how necessary the right of inspection is for the protection of a person who is going to deal with a company. That necessity is not required after a voluntary winding up has commenced. It is quite true that the company continues in existence after a voluntary winding up, and the liquidator may carry on the business. But I should say that no liquidator would enter into a contract with a person after the winding up without at the same time telling him that the company was in voluntary liquidation. No stranger has any interest in the company after a winding up. Section 32 points to a company as a going concern, and then section 156 points to a company which is being wound up, and gives inspection in such a case. I think that the case of *In re Yorkshire Fibre Co.* has an important bearing upon this point. I do not say that the decision actually covers the point, but James, V.C., held that a particular article in the articles of association of the company, framed on similar lines to section 32, had no application after a winding up had commenced. That case is therefore analogous to this. For these reasons I think that it was not intended that after a winding up has commenced a stranger should have a right to inspect the register.

COLLINS, L.J.—I agree.

Appeal allowed.

Solicitors for the appellants, *Lake & Lake.*

Solicitor for the respondent, *N. Herbert Smith.*

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — March 18.

SUMPTER v. HEDGES. (a.)

Contract—Building—Contract abandoned by builder—Completion by building owner—Right to sue on quantum meruit—*Evidence from which new contract may be inferred.*

A builder who contracts to erect certain buildings for a lump sum, and who, after performing part of the contract, abandons it, thus necessitating the completion of the buildings by the building owner, cannot sue the latter on a quantum meruit *for the work done unless there is some evidence from which the inference can be drawn that there was a fresh contract to pay on that basis.*

Munro *v.* Butt, 8 *E. & Bl.* 738, 7 *W. R. C. L. R.* 19, *followed.*

This was an appeal by the plaintiff from a judgment of Bruce, J.

The action was brought on a building contract. By an agreement in writing dated the 3rd of October 1896, and made between the plaintiff and the defendant, the plaintiff agreed to erect for and on behalf of the defendant two houses and a stable for a sum of £565, £365 of which was to be paid in cash and £200 in horses of the value of that sum.

The work was to be completed by the 31st of December, 1896. By the 28th of November the plaintiff had completed work to the value of £[illegible]

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

and he had received £119 in cash and two horses valued at £100. The plaintiff at that time being in want of money was unable to continue the building. The defendant immediately took over the work and finished the building on his own account, and in doing so used certain loose building materials which the plaintiff had left upon the ground.

The plaintiff then brought an action claiming damages for breach of contract and £222 as balance due to him for work and labour done and materials supplied.

Bruce, J., held that the plaintiff had on the 28th of November abandoned the contract, and that he was in default, and that he was not entitled on a *quantum meruit*, but only for £34 in respect of the loose material left by him on the ground and which had been used by the defendant.

From this decision the plaintiff now appealed.

C. J. Peile (*G. T. Drury* with him), for the appellant.—The plaintiff was entitled to recover on a *quantum meruit*. This case is on all fours with *Lysaght* v. *Pearson* (*Times*, 3rd of March, 1879). If the decision in that case is good law, the plaintiff was entitled to succeed in his action. There the owner had entered into possession and had prevented the builder from completing, and the Court of Appeal held that the latter was entitled to succeed on a *quantum meruit*. *Munro* v. *Butt*, 8 E. & Bl. 738, 7 W. R. C. L. Dig. 19, is distinguishable from the present case, for in that case the defendant had done nothing from whicha new contract could be inferred.

The cases of *Appleby* v. *Myers*, L. R. 2 C. P. 651, and *Whitaker* v. *Dunn*, 3 Times L. R. 602, were also cited.

R. M. Bray, Q.C. (*E. Bray* with him), for the respondent, were not called upon.

A. L. SMITH, L.J.—In this case the plaintiff entered into a contract with the defendant to erect on the latter's own land two houses and a stable for a lump sum. This was an entire contract. When these buildings were partly completed the plaintiff informed the defendant that he had no more money left and was unable to continue the work. The learned judge in the court below found as a fact that the plaintiff thereby abandoned the contract. What is a building owner to do in such a case. He cannot let the buildings remain unfinished. He must therefore continue the work. Where there is a contract to do work for a lump sum you cannot divide the contract, and until the work is completed the builder cannot recover the price. The plaintiff here, therefore, cannot recover on his original contract. Now, was there a new contract? I can find no evidence of such, and therefore the plaintiff cannot recover, as it was argued he might, on a *quantam meruit*. To enable him to do so there must be evidence of a new contract to pay him for that work actually done. That is the law laid down in *Munro* v. *Butt*, and that decision is good law. *Lysaght* v. *Pearson*, cited on behalf of the appellant, is not in point here. There the builder, after completing one portion of the contract, refused to carry out the other part unless the building owner paid him for the portion he had already completed. The owner refused to do so and proceeded to complete the work himself. The Court of Appeal there held that there was evidence from which it might be inferred that there was a new contract to pay for work actually done. In *Whitaker* v. *Dunn* there was a special contract and the work was not carried out according to the contract, and it was held that *Munro* v. *Butt* applied, as there was no evidence of an implied agreement to waive the contract and pay according to value. I therefore think this appeal must be dismissed.

CHITTY, L.J.—I am of the same opinion. The plaintiff entered into a contract to erect certain buildings for a specified lump sum. This contract he failed to complete, and the learned judge in the court below has found as a fact that he abandoned the contract. The owner, then, had to complete the buildings himself. There is no evidence from which an inference can be drawn that the building owner entered into a new contract with the builder to pay on a *quantum meruit*. *Cutter* v. *Powell*, 6 T. R. 320, and a number of subsequent cases have decided that in such cases the builder cannot recover on a *quantum meruit* unless there is some evidence of a fresh contract enabling the builder so to recover. In *Pattinson* v. *Luckley*, 24 W. R. 224, L. R. 10 Ex. 330, it is pointed out that the mere fact that the building owner remains in possession of his land is not sufficient to found an inference of a fresh contract. I think the learned judge was quite right in the present case in holding that there was no evidence of a fresh contract.

COLLINS, L.J.—I agree. In this case the builder has not merely committed some breach of his contract; he has abandoned it. In some cases where the plaintiff has abandoned the contract it is possible for him to sue on a *quantum meruit*, but in order to enable him to do so there must be some evidence of a new contract to pay on that footing for work done, and for that purpose it must be shown that the defendant had an option of taking or not taking the benefit of the work done. It is only where that option exists that it can be inferred that there has been a fresh contract. I see no such circumstances here. The mere fact that the building owner remains in possession of his land is no evidence that the defendant had such an option given him. The owner is not bound to keep an unfinished building on his land; such a building would be a nuisance. Therefore I am of opinion that the appellant cannot succeed.

Appeal dismissed.

Solicitor for the appellant, *Sydney R. Letchford.*

Solicitor for respondent, *G. E. Philbrick.*

High Court of Justice.

Chan. Div. Stirling, J. — Dec. 18; Jan. 12; March 19.

In re STOCKPORT RAGGED, INDUSTRIAL, AND REFORMATORY SCHOOLS. (*a.*)

Charity — Mortgage of property of — Jurisdiction of Charity Commissioners — "Cathedral, collegiate, chapter, or other schools"—Words "ejusdem generis" —Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 62.

By section 62 *of the Charitable Trusts Act*, 1853, *it is enacted that that Act shall not extend to certain kinds of charitable institutions therein specifically mentioned, but the said section concludes with a proviso that "the said exemption shall not extend to cathedral, collegiate, chapter, or other schools."*

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

Held, that such proviso ought to be so construed as to apply only to schools ejusdem generis *with cathedral, collegiate, and chapter schools.*

This was a petition by the trustees of the above-mentioned charity asking the sanction of the court to a proposed mortgage of part of the property of the charity.

The only point calling for a report was as to the construction of section 62 of the Charitable Trusts Act.

The facts (as to which there was no dispute) are fully stated in the judgment.

Vaughan Hawkins, for the Charity Commissioners.—As to "exemptions" in the Charitable Trusts Act, 1853, see *Governors of Charity for Relief of Poor Widows, &c.* v. *Sutton*, 27 Beav. 651, 9 W. R. Dig. 13; *In re Clergy Orphan Corporation*, 43 W. R. 150, [1894] 3 Ch. 145; *In re St. John-street Wesleyan Methodist Chapel*, [1893] 2 Ch. 618, 42 W. R. Dig. 11. The word "exemption" in section 62 of the Charitable Trusts Act, 1853, must mean the whole exemption contained in that clause. The *ejusdem generis* doctrine is discussed in *Smelting Co. of Australia* v. *Commissioners of Inland Revenue*, 45 W. R. 203, [1897] 1 Q. B. 175. Where that doctrine has been applied it has always been subject to the general scope of the enactment: see also *Fenwick* v. *Schmalz*, 16 W. R. 481, L. R. 3 C. P. 313. If the exemption in favour of particular charities is not to include schools in the one case, why does it not exclude them in the other? The words are inserted to show that the exemption goes back to the beginning of the clause, and is not confined to the latter part.

Ingle Joyce, for the Attorney-General.

Grosvenor Woods, Q.C., and *Henry Johnston*, for the charity.—The *ejusdem generis* rule applies here. If Parliament had intended to exclude all schools they could have said so, and the use of the words "cathedral, collegiate, chapter" is intended to limit the general word "schools": *Gunnestad* v. *Price*, 23 W. R. 470, L. R. 10 Ex. 65, at p. 70; *Davidson* v. *Burnand*, 17 W. R. 121, L. R. 4 C. P. 117; *Reg.* v. *Portugal* (*sub nom. Re de Portugal*), 34 W. R. 42, 16 Q. B. D. 487, at p. 491; *Withington Local Board* v. *Manchester Corporation*, 41 W. R. 306, [1893] 2 Ch. 19; *Sun Fire Office* v. *Hart*, 37 W. R. 561, 14 App. Cas. 98, at p. 103. (*Sandiman* v. *Breach*, 7 B. & C. 96, and *Reg.* v. *Cleworth*, 12 W. R. 375, 4 B. & S. 927, were also referred to.) The case of the *Smelting Co. of Australia* v. *Commissioners of Inland Revenue*, is quite different: *Powell* v. *Kempton Park Racecourse Co.*, *ante*, p. 8, [1897] 2 Q. B. 242. Here it is for the other side to show that there can be no other kind of schools analogous to cathedral, collegiate, and chapter schools; and *Fenwick* v. *Schmalz* shows that unless the specific words exhaust the genus, the general words only apply to other species of the same genus. Prebendal schools such as the grammar school at Chichester would come within the general words. If the word "schools" is so wide the exemption of Roman Catholic institutions would not apply to Roman Catholic schools. It seems impossible to suppose that at the time of the passing of the Endowed Schools Act, 1869, the Charity Commissioners had jurisdiction over all schools: Tudor on Charities, p. 507; *In re Wilson's Will*, 19 Beav. 594, 4 W. R. Dig. 14; *Sir Robert Peel's School at Tamworth*, 16 W. R. 773, L. R. 3 Ch. App. 543; *Finnis & Young to Forbes & Pochin*, 32 W. R. 55, 24 Ch. D. 591. It is clear both on principle and authority that this is the first time it has been contended that all schools throughout the country are subject to the jurisdiction of the commissioners. If this were so one would have expected the contention to have been put forward in the cases just cited. What is asked here is to raise money by mortgage, the school being wholly supported by voluntary contributions.

H. Greenwood.—This point is covered by authority: *Shrewsbury School*, 1 Mac. & G. 324; *Bradford School*, W. N. [1893] p. 60.

Vaughan Hawkins replied.

STIRLING, J.—This is a petition by the trustees of the Stockport Ragged, Industrial, and Reformatory Schools presented under Sir S. Romilly's Act (52 Geo. 3, c. 101), asking the sanction of the court to a proposed mortgage of part of the property vested in the trustees.

The sanction of the Charity Commissioners has not been obtained either to the mortgage or to the application, the petitioners maintaining that the charity is exempted from the jurisdiction of the Charity Commissioners by section 62 of the Charitable Trusts Act, 1853.

The Charity Commissioners dispute this, and having been served with the petition at the request of the Attorney-General appear and oppose the petition in order that the question, which is one of some importance, may be judicially determined. In 1888 the trustees obtained a leasehold piece of land at a rent of £20 per annum, and erected thereon a girls' school out of subscriptions and funds derived from legacies and voluntary contributions.

The income of the charity is derived from a Government grant and contributions from school boards, boards of guardians, and other public bodies, subscriptions from residents in the neighbourhood, and the earnings of the school children in their industrial occupations.

The evidence is that all donations or bequests made to the school were or are applicable by the committee of management in aid of the voluntary contributions, which constitutes their main support, and that every donation or legacy has been so applied.

The proposed mortgage was a mortgage of this girls' school.

By section 66 of the Charitable Trusts Act, 1853, the expression "endowment" means and includes (amongst other things) "all lands and real estate whatsoever of any tenure . . . and all . . . personal estate whatsoever which shall for the time being belong to or be held upon trust for charity or all or any of the purposes thereof."

In *In re The Clergy Orphan Corporation* it was decided by the Court of Appeal that these words must receive their natural meaning, and that all property of every description belonging to or held in trust for a charity, whether held upon trusts or conditions which render it lawful to apply the capital to the maintenance of the charity or upon trusts which confine the charitable application to income, is an endowment within the meaning of the Acts.

Section 62 of the Act contains, however, certain exemptions from the jurisdiction, and amongst others the following: "Where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only to the exclusion of voluntary subscriptions and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, or which may legally be applied by the governing or managing body in aid of the voluntary subscriptions, shall be

subject to the jurisdiction of the said board or the powers or provisions of the said Act."

It was held in the same case that in the case of a charity partly maintained by voluntary subscriptions and partly by the income of any endowment bequests and donations for the general purposes of a charity which may be lawfully applied as income consistently with the terms of the gift are exempt, and that such gifts and the income thereof are not brought within the jurisdiction by being invested by the governing body.

This decision would govern the present case were it not that section 62 concludes with the following proviso: "Provided always that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools." It is contended on behalf of the Charity Commissioners that this proviso excludes all schools from the exemption found in section 62. The contention on the part of the trustees is that only cathedral and chapter schools and other schools of a similar kind are so excluded. I have come to the conclusion that the narrow construction ought to prevail. The charities enumerated in section 62 are of an extremely miscellaneous kind:

1. Universities of Oxford, Cambridge, London, and Durham, and colleges or halls in universities of Oxford, Cambridge, and Durham.
2. Cathedral or collegiate churches.
3. Buildings registered as places of meeting for religious worship.
4. Roman Catholic charities.
5. Queen Anne's Bounty; the British Museum; any friendly or benefit society.
6. Any institution, establishment, or society for religious or other purposes, or auxiliary or branch associations connected therewith, maintained by voluntary subscriptions, &c.
7. Mixed charities.
8. Funds of missionary societies not within the limits of England and Wales.

If the intention was that all such charities should be excluded from the exemption so far as they consisted of schools, it would have been easy and more natural to express it by saying simply: "Provided that the said exemption shall not extend to any school whatever." The draftsman, however, does enumerate certain kinds of schools, and begins with cathedral schools, passing by, at least for the moment, schools connected with the universities or colleges therein. I am not aware that any of the universities has a school connected with it, but it is well known that there is a school connected with Magdalen College, Oxford. He next mentions "collegiate" and "chapter" schools. The word "collegiate" is found in the earlier part of the section, "cathedral and collegiate church"; the word "chapter" does not occur here at all. "Cathedral" and "chapter" both relate to ecclesiastical foundations; and "collegiate" may have a like signification. A "collegiate" school may mean a school connected with a collegiate church, such a school as is referred to in section 13, sub-section 2, of the Endowed Schools Act, 1869, which speaks of schools "wholly or partially maintained out of the endowment of any cathedral or collegiate church or forming part of the foundation of any cathedral or collegiate church." Of such a church and school a conspicuous example is to be found in the Abbey and St. Peter's College at Westminster.

Standing as it does between the words "cathedral" and "chapter" it seems to me more natural that it should be used in this sense than as designating a school connected with a college in one of the universities. Then, as the draftsman proceeded to refer to chapter schools, chapters not having been spoken of before, he naturally introduced the word "other" to sweep in any schools connected with ecclesiastical foundations not designated as cathedral, collegiate, or chapter schools.

I may add that if the argument on behalf of the Charity Commissioners be well founded Roman Catholic schools must, down to the passing of the Roman Catholic Charities Act in 1860, have been subject to the jurisdiction of the commissioners, a result which does not seem in accordance with the legislation on the subject of those charities.

Solicitors, *Andrew Wood & Purves*, for *John W. Johnston*, Stockport; *Clabon*.

Chan. Div. } Kekewich, J. } March 31.

In re CALCOTT AND ELVIN'S CONTRACT. (*a*.)

Bankruptcy — Registration — Priority — Vesting under order of court—Deed or conveyance—Title of official receiver—Middlesex Registration Act (7 *Anne c.* 20), *s.* 1—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 20 (1); *s.* 54 (1) (4); *s.* 121.

An order of the court adjudging a debtor bankrupt and directing the summary administration of his estate, made under the Bankruptcy Act, 1883, *ss.* 20 *and* 121, *under which the official receiver becomes the debtor's trustee in bankruptcy, is "a conveyance" capable of registration within the meaning of the Middlesex Registration Act, s.* 1. *The title of the official receiver to land in Middlesex belonging to the debtor at the date of his bankruptcy, if it is not registered, will therefore be postponed to a subsequent mortgagee who has duly registered his mortgage without notice of the bankruptcy.*

By an indenture of the 7th of February, 1881, certain leasehold premises in Maida-vale, London, were leased to Michael Death for forty-one years.

By two indentures of mortgage dated respectively the 4th of September and the 25th of December, 1894. Michael Death mortgaged the premises to G. L. B. Calcott to secure moneys advanced to him by Calcott. Memorials of these mortgagees were duly registered in the Middlesex Land Registry on the 10th of October and the 29th of December, 1894.

Michael Death having made default, Calcott entered into possession and in exercise of his power of sale as mortgagee on the 16th of November, 1897, contracted to sell the premises to T. G. Elvin. Just before completion the purchaser, Elvin, discovered that Death was an undischarged bankrupt, and that an order dated the 28th of January, 1887, had been made under the Bankruptcy Act, 1883, s. 20, adjudicating him a bankrupt, and an order dated the next day had been made for the summary administration of his estate under section 121 of that Act. Section 20 (1) provides that "When a receiving order is made against a debtor . . . the court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee." And section 121 provides that in the case of small debtors "the court may make an order that the debtor's estate be administered in a summary way," and thereupon "if the debtor is abjudged bankrupt the official receiver shall be the trustee in bankruptcy," and "may do, with the permission of the Board of Trade, all things which may be done by the trustee with the permission of the committee of inspection." Under these orders the official receiver became

(*a*.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Death's trustee in bankruptcy. The official receiver was unaware of the existence of this property and registered no memorial of his title. The purchaser refused to complete. But the vendor alleged that the official receiver's title was void for want of registration in accordance with the terms of the Middlesex Registration Act (7 Anne c. 20), s. 1, and took out this summons under the Vendor and Purchaser Act, 1874, asking *inter alia* for a declaration (paragraph 2) that notwithstanding that Michael Death became bankrupt in 1887 the vendor, as mortgagee, had a good title to the premises, and (paragraph 3) that a good title to the premises had been shown in accordance with the particulars and conditions of sale.

The Middlesex Registration Act, s. 1, enacts that a memorial of all deeds and conveyances and of all wills and devises of or concerning or whereby any houses, lands, &c., in the county of Middlesex may be in any way affected in law or equity may be registered as therein mentioned, and that every such deed and conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration unless such memorial thereof shall be registered as by the Act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim.

Warrington, Q.C., and *Muir Mackenzie*, for the vendor.—The order of the court made under section 20 of the Bankruptcy Act, 1883, vested the bankrupt's property in a trustee [until a trustee is appointed the official receiver is the trustee under section 54 (1)]. That order together with the order made under section 121 operated as a conveyance of the debtor's property which was capable of registration as a "conveyance" under the Middlesex Registration Act. It was not registered, and is therefore void as against the vendor who has registered his subsequent title. In the ordinary case of the appointment of a trustee his certificate of appointment can be registered as "a conveyance" under section 54 (4) of the Act, which provides that "the certificate of appointment of a trustee shall for all purposes of any law in force . . . requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly." The reason of that provision is that the certificate is not itself a conveyance. What passes the property is the appointment of the trustee. In this case the order of the court is itself the conveyance which vests the property. There is no magical meaning in the word "conveyance": *Credland* v. *Potter*, 23 W. R. 36, L. R. 10 Ch. App. 8. On the evidence the vendor had no knowledge of Death's bankruptcy until after the contract for sale and he had no constructive notice.

They also referred to *Battersby* v. *Rochfort*, 2 Jones & La Touche 431; *Palmer* v. *Locke*, 30 W. R. 419, 18 Ch. D. 381; *In re Jakeman's Trusts*, 23 Ch. D. 344, 31 W. R. Dig. 87; *In re Stone's Will*, 37 SOLICITORS' JOURNAL 354, [1893] W. N. 50; and the Trustee Act, 1893, s. 32, as to the effect of a vesting order.

Rowden and *Carrington*, for the purchaser.—There is no certificate of appointment of a trustee which can be registered under section 54 (4). The order of the court is not a "deed or conveyance," a memorial of which can be registered. The vendor has therefore no title. But if it be held he has by registration, still that registration would not give him priority unless he took without notice of the official receiver's title. The vendor had constructive notice. At any rate the vendor's title is so doubtful that the court will not force it on the purchaser: *In re New Land Development Association and Gray or Fagence*, 40 W. R. 551, [1892] 2 Ch. 138; *In re Clayton and Barclay's Contract*, 43 W. R. 549, [1895] 2 Ch. 212; *In re Poppleton and Jones's Contract*, 74 L. T. Rep. 582, 44 W. R. Dig. 168; *Le Neve* v. *Le Neve*, 1 Ambler 436.

KEKEWICH, J.—Mr. Rowden's first point is this: The vendor claims under a mortgage to him by an undischarged bankrupt, and at the date of the mortgage the bankrupt's estate was already vested in the official receiver, his trustee in bankruptcy; the vendor, he says, has therefore nothing to convey because he has no title. That would plainly be the case if there were nothing else to be taken into consideration. But the Registration Act (7 Anne c. 20), s. 1, comes in, and it is to be observed that, according to that Act, if a tenant in fee first conveys property to a person who does not register his title and subsequently conveys the same property to a subsequent purchaser who, without notice of the prior sale, registers his title, the title of that subsequent purchaser is to be preferred to the title of the first purchaser. If that is the law in the case of two ordinary purchasers, why should any new rule displacing that law be introduced merely because in this case the property was vested in the first instance by bankruptcy? The next point taken is that the order of the court is not properly a "conveyance" within the words of the Registration Act. In answer to that, to my mind it is sufficient to quote one sentence from the case of *Credland* v. *Potter*, where Lord Cairns says: "There is no magical meaning in the word conveyance." Under the Registration Acts all kinds of documents have been held to be "conveyances," including, of course, orders of the court such as those made under the Trustee Act, 1893, vesting the estate of one person in another. Mr. Rowden suggested that there was some provision in the Trustee Act, 1893, such as that contained in section 54 (4) of the Bankruptcy Act, 1883, that an order should be deemed to be a conveyance or assignment of property, but there is no such provision in that Act or in the earlier Trustee Acts. An order made under the Trustee Act, 1893, of itself operates as a conveyance. There is no doubt that vesting orders do operate as conveyances and form links of title which ought to be drawn with scrupulous care and with due reference to the law of real property.

Then I observe that the Trustee Act, 1893, provides in a convenient manner for the making of vesting orders in two forms. You may vest the estate of A. in A. and B., or you may appoint some person to convey the estate of A. to A. and B.—that is, you may vest the estate directly in the persons or you may appoint someone to convey it to them, and it is impossible to say that if an order is made on a person to convey and he does convey that the conveyance made by him is not within the Registration Acts, and that, to my mind, shows that a vesting order which is only the equivalent of the conveyance in such a case is itself a conveyance within the meaning of the Registration Act. Then it is urged that you have this provision in s. 54 (4) of the Bankruptcy Act, 1883, that the certificate of appointment of a trustee shall be deemed to be a conveyance, whereas section 121 of that Act, empowering the court to make an order for summary administration of a debtor's estate, contains no such provision. But Mr. Warrington, I think, interpreted that correctly by showing that the certificate is not itself a conveyance and does not itself vest the property, and that therefore it was necessary. Where the vesting of property is not

effected by the certificate, but follows from the appointment of the trustee, it is necessary that it should be provided that the certificate of his appointment shall be deemed to be equivalent to a conveyance for purposes of registration. So far, therefore, I am in favour of the vendor on all the points of law.

Then comes the question of notice. Registration would not give the vendor any priority unless he took without notice of the official receiver's title. On the evidence Calcott clearly had no knowledge of the official receiver's title. But it is said he had "constructive," or to use, as I think, a better phrase, "imputed" notice. [His lordship then considered the evidence on this point, and held that the vendor had not constructive or imputed notice of the official receiver's title, and continued:] Then Mr. Rowden raises another point, he says the vendor's title is so doubtful a one that it ought not to be forced on the purchaser. I think, however, that it would be better to be silent on that point on a vendor and purchaser summons which should be limited to points of law raised by the abstract of title and the requisitions. Mr. Rowden refers to the case of *In re New Land Development Association and Gray*. There, the Court of Appeal, approving Chitty, J., declined to force a doubtful title on a purchaser. I did not know the Court of Appeal had gone so far as they did in that case. That, however, compels me to decide whether I can on the present materials before me force this title on the purchaser. I say advisedly on the present materials. I do not prejudice the purchaser as regards the future at all. On these materials I think I must say that the title of the vendor is good by virtue of his registration, and is prior to that of the official receiver's as he has not registered his title.

Solicitors, *G. L. B. Calcott; Percy C. Ray.*

Chan. Div. } April 19, 20, 21.
Romer, J. }

In re BATT'S TRADE-MARKS. (*a.*)

*Trade-mark—Registration—*Bonâ fide *intention of user, necessity for—Non-user—Rectification.*

If persons register new trade-marks which they say they intend to use, they must at the date of registration have a bonâ fide *intention of using these trade-marks in respect of the goods for which they register them.*

On motion to expunge two marks from the register, the court, finding as facts that there had been no real user before registration, and no real user since registration in respect of the articles in the class in which the applicants sought registration of an identical mark, and that at the date of the registration there was no bonâ fide *intention to use these marks for any of the goods in that class,*

Held, that the registration of the marks was wrong, and must be expunged.

Motion.

This was an application on behalf of Messrs. Carter & Co., seed merchants, for an order that the register of trade-marks might be rectified by removing therefrom the trade-marks next referred to, being figures of butterflies.

The mark No. 27,850 was registered by the respondents, Messrs. Batt & Co., on the 13th of March, 1882, in several classes of goods, including the whole of class 42. The mark No. 72,790 was registered by them on the 16th of February, 1888, in class 42. Class 42 comprises substances used as food, or ingredients in food.

In 1897 Messrs. Carter & Co. applied to register certain butterfly marks in class 42 for oats, but the Comptroller, being of opinion that, in accordance with section 72 of the Patents, &c., Act, 1883, as amended by section 14 of the Act of 1888, Messrs. Carter & Co.'s marks were incapable of registration, their application could not be proceeded with.

Section 72 of the Act of 1883, as amended, is as follows: "Except when the court has decided that two or more persons are entitled to be registered as proprietors of the same trade-mark, the Comptroller shall not register in respect of the same goods or description of goods a trade-mark identical with one already on the register with respect to such goods or description of goods."

Notice of the above motion to expunge was then given by Messrs. Carter & Co. and also notice of motion for an order on the Comptroller to proceed with Messrs. Carter & Co's application to register, the applicants alleging that the respondents had never used the two marks in question for oats or any goods in class 42, and never had any *bonâ fide* intention of so using them, and it was asked that either the respondent's marks should be expunged or their registration limited so as not to cover oats.

Neville, Q.C., and *Austen-Cartmell*, for the applicants.—A mark which was not, *bonâ fide*, intended to be used for the whole class ought not to have been registered for the whole class, and non-user is a good ground for expunging or at least limiting the mark to the articles for which it is used. The register is for the protection of trade, and obstruction by a dog-in-the-manger proceeding like keeping a mark on the register for articles for which it is not used is beyond the scope of the Acts. User by the respondent in connection with the goods in question is essential to his case both in applications to expunge and to restrain infringement, except that on a motion to expunge it is sufficient to show that a trade-mark has been put on the register *bonâ fide* with the intention of user. By section 18 of the Act of 1888 (substituted for section 75 of the Act of 1883) application for registration is to be deemed equivalent to public use, but that does not do away with the need for user; see *Pinto* v. *Badman*, 8 Rep. Pat. Cas. 181; *Edwards* v. *Dennis*, 30 Ch. D. 454, 34 W. R. Dig. 197; *Hargreave* v. *Freeman*, [1891] 3 Ch. 39, 40 W. R. Dig. 266; and *Apollinaris Co.* v. *Snook*, 7 Rep. Pat. Cas. 474, 8 *Ib.* 166) (which were cases of infringement), and *In re Apollinaris Co.'s Trade-Marks*, [1891] 2 Ch. 186, at p. 234, 39 W. R. Dig. 237.

Levett, Q.C., and *Sebastian*, for the respondents.—The classification of goods adopted by the Acts shows that a mark is not necessarily confined to an article or the articles actually traded in. There is no jurisdiction to remove a mark properly registered. The old rule about user is gone, and the jurisdiction to expunge under section 90 of the Act of 1883 does not depend upon user. The only condition precedent to the exercise of that jurisdiction is that the entry upon the register must have been "made without sufficient cause." The Act says you cannot assign a trade-mark without the goodwill: see section 70; and *Edwards* v. *Dennis* says the same, 30 Ch. D., at p. 474. *In re Hudson's Trade-mark*, 34 W. R. 616, 32 Ch. D. 311, 319, shows that there may be registration of a mark before user. They also referred to sections 65, 72, and 76 of the Act of 1883.

Ingle Joyce, for the Comptroller, cited *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 34 W. R. 345, 31 Ch.

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

D. 454; *In re Lysaght*, Sebastian's Digest, Case No. 623; *In re Harrison's Trade-mark*, 42 Ch. D. 691, 38 W. R. Dig. 198 (in which cases the mark was old), and two unreported cases cited as the *Pheasant case* and the *Helm case*, before Stirling, J., where the mark was new.

Neville replied.

ROMER, J.—I take it to be clear that if persons register new trade-marks which they say they intend to use, they must, at the date of registration, have a *bonâ fide* intention of using these trade-marks in respect of the goods for which they register them: see *Edwards* v. *Dennis*, 30 Ch. D. 454, per Cotton, L.J., p. 474. One can not help seeing the evils which might result from allowing trade-marks to be registered broadcast, there being no real intention of using them, or only an intention possibly of using them in respect of a few articles. The cost and inconvenience of such a practice would be very great, and it would lead in some cases to absolute oppression, for persons would be enabled to use the position they had got as registered owners of trade-marks, which were not really *bonâ fide* trade-marks, for the purpose of trafficking in them and using them as weapons to obtain money from subsequent persons who might want to use *bonâ fide* trade-marks in respect of some classes of goods for which they found the bogus trade-marks registered. I am sorry to say that it appears from the evidence given before me by several experts that such a system of traffic is, in fact, carried on. I do not refer in these observations to the respondents. But they registered over forty trade-marks in the year 1882. When I look at the variety of these trade-marks and the variety of goods in respect of which they were registered it is at least difficult to suppose that there can have been a *bonâ fide* intention on their part to use all these trade-marks in all the classes in respect of which they were registered. [His lordship then commented on certain evidence, and continued:] With regard to the two marks in question I come to the conclusions of fact that there was no real user at any time before registration; that there has been no real user since registration in respect of the articles in class 42, and that at the date of registration there was no *bonâ fide* intention to use these trade-marks for any of the goods in that class. I therefore hold that the registration was wrong, and ought to be expunged, and I so order, and the respondents must pay costs of the motion to rectify. With regard to the other motion I order the registrar to proceed with the application to register, and that the applicants pay the Comptroller's costs on that motion.

Judgment for the applicants.

Solicitors for the applicants, *Mann & Taylor*.

Solicitors for the respondents, *Shepheards*.

Solicitor for the Comptroller, *Solicitor to the Board of Trade*.

Chan. Div.
Romer, J. } Feb. 24.

In re AVERILL.
SALSBURY *v.* BUCKLE. (*a.*)

Will – Contingent remainders — Infants—Intermediate rents—Equitable limitation.

A. by his will, dated in 1876, *devised certain real property to the use of trustees in fee simple upon trust for B. for life, and after her death, in the events which had happened, for her children who should attain twenty-one, or, if daughters, should marry, as tenants in common. A. died in* 1881. *B. died in* 1885, *leaving six children, infants and unmarried. The eldest child, E., attained twenty-one in March,* 1897; *none of the other children had attained twenty-one or married,*

Held, that E. was entitled, on attaining twenty-one, to the entirety of the rents until the next child attained a vested interest, and so on.

Adjourned summons.

The testator, William Averill, by his will dated the 21st of June, 1876, devised and bequeathed all his freehold, copyhold, and leasehold hereditaments to trustees therein named upon trusts to pay the rents and profits to his wife Susan Averill for life, and after her decease as to all his freehold real estate situate at Inkberrow and Dormstone upon trust to pay the rents and profits to Annie Buckle for life for her separate use without power of anticipation, and after her decease the testator declared that the trustees should stand possessed of the last-mentioned real estate (in the events which happened) in trust for the children of Annie Buckle, who, being sons, should attain the age of twenty-one, or who, being daughters, should attain that age or marry under that age, as might be living at her decease, and the issue of such of them as should have then died leaving issue him or her surviving, to be divided between them if more than one as tenants in common.

The testator died on the 9th of January, 1881; Susan Averill died on the 9th of December, 1885; Annie Buckle died on the 22nd of February, 1885. Annie Emma Buckle, on whose behalf the present summons was taken out, was the eldest of the six children of Annie Buckle, and attained twenty-one on the 13th of March, 1897.

By an order in *In re Averill, Buckle* v. *Coombe*, it had been declared that the legal estate in the Inkberrow and Dormstone estates was vested in the then trustee of the will, and that the interests of the children of Annie Buckle of and in the said real estates vested contingently on their severally attaining twenty-one, or, being females, marrying under that age, and that in the meantime the property vested in the testator's heir-at-law.

The question in the present summons was whether Annie Emma Buckle was entitled as from the 13th of March, 1897, when she attained her majority, to the entirety of the rents and profits of the said estates until one of her brothers or sisters attained twenty-one, or, if a sister, married.

Church, for the trustees and the children of Annie Buckle other than Annie Emma.

Ball, for Annie Emma Buckle.—As in legal limitations the estate should vest in the first member of the class who fulfils the conditions of the will, equity follows the law: *In re Burton's Will*, [1892] 2 Ch. 38, 40 W. R. Dig. 97; *Genery* v. *Fitzgerald*, (1822) Jac. 468; *Furneaux* v. *Rucker*, W. N. (1879) 135.

ROMER, J., referred to *In re Holford*, 42 W. R. 563, [1894] 3 Ch. 30, and *In re Jeffery*, 39 W. R. 234, [1891] 1 Ch. 671.

Church, in reply.

ROMER, J.—This is a case of real estate, and, in my opinion, had the limitations in this will with regard to the real estate been legal instead of equitable, it is clear that on the eldest child attaining twenty-one that child would have been entitled to the whole of the income until the next child attained twenty-one, when that child would have to share, and so on as the other children attained twenty-one.

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

That being the case with regard to legal limitations, does it make any difference that the estates here are equitable—that there are trustees? I think not. Usually equity follows the law; and where, if the estate had been legal, certain rights would accrue to the beneficiaries, corresponding rights also accrue, and only corresponding rights in the case of equitable trust estates. In this case I see no sufficient reason for departing from the rule. I therefore hold that the eldest child on attaining twenty-one became entitled to the whole income until the younger children severally acquire vested estates.

Solicitor for all parties, *Kenard Ball*, for *A. R. Hudson*, Pershore.

Chan. Div. } Byrne, J. } Nov. 16-19; Feb. 3.

LYONS & SONS *v.* WILKINS AND OTHERS. (*a.*)

Trade union — Strike — "Watching and besetting" — Conspiracy and Protection to Property Act, 1875 (38 & 39 *Vict. c.* 86), *s.* 71—*Registered society—Conspiracy—Trade union funds.*

Watching or besetting the works or place of business of an employer, for the purpose of persuading or otherwise preventing persons from working for him, or for any purpose except merely to obtain or communicate information, is illegal within the meaning of section 7 of the Conspiracy and Protection to Property Act, 1875, *and will be restrained by injunction.*

A trade union, although registered under the Trade Union Act, 1871, *cannot be made a party to an action for an injunction against "watching and besetting."*

The trustees of a registered trade union, made defendants in their capacity as trustees to an action against themselves and others for "watching and besetting" the premises of the plaintiff, will not be restrained from allowing the funds of the union to be employed for the furtherance of the wrongful acts against which an injunction is obtained.

Action.

The plaintiffs were leather bag manufacturers in Red Cross-street, London, E.C.

The defendant Wilkins was the secretary, and the defendants Thompson, Laverick, and Goodall were the trustees of a trade union called the Amalgamated Society of Leather Workers, registered under the Trade Union Act, 1871; the defendant Clarke was a member of the executive committee of the same society.

In February, 1896, the executive committee of the union, in order to compel the plaintiffs to raise their wages and alter the system of employment of their workpeople, ordered a strike against them, and in consequence their workpeople refused to continue to work for the plaintiffs after the expiration of their current engagements; and the plaintiffs' premises were picketed by the direction of the executive committee.

The pickets were given cards headed "Amalgamated Society of Fancy Leather Workers."

A strike was also ordered against a bagmaker named Schoenthal, who employed his own workmen, but who was frequently employed by the plaintiffs to make goods for them, for the purpose of compelling him to give up working for the plaintiffs; and his premises were also picketed.

The defendants also published circulars and statements of a damaging nature to the plaintiffs, which the plaintiffs alleged were false.

The plaintiffs asked for an injunction to restrain the defendants from maliciously inducing, or conspiring to induce, persons not to enter into contracts with the plaintiffs, and from watching and besetting the plaintiffs' works or place of business, and the approaches thereto, for the purpose of persuading or otherwise preventing persons working for the plaintiffs, and from preventing Schoenthal and other persons from working for the plaintiffs by withdrawing his or their workmen or workwomen from their employment. Damages were also asked for in respect of the alleged libels.

In February, 1896, an *interim* injunction was granted by North, J., which was affirmed by the Court of Appeal (*Lyons & Sons* v. *Wilkins*, 45 W. R. 19, [1896] 1 Ch. 811).

After the hearing of the action in November, 1897, his lordship reserved judgment until after judgment should have been given by the House of Lords in the case of *Allen* v. *Flood*, *ante*, p. 258, [1898] A. C. 1.

During the proceedings the pleadings were amended by adding the Amalgamated Society as defendants, but at the hearing the society were ordered to be struck out as not being capable of being sued.

The defendants Thompson, Laverick, and Goodall were, by amendment at the hearing, stated to be sued in their capacity as such trustees, and an injunction was asked for, to restrain them from applying the funds of the society in furtherance of the acts complained of.

Eve, Q.C., and *Ward Coldridge*, for the plaintiffs.

Jenkins, Q.C., and *W. H. Cozens-Hardy*, for the defendants.

Feb. 3.—BYRNE, J.—In this case the plaintiffs, who are a firm of bag and portmanteau makers, have obtained an injunction until judgment to restrain the defendants Wilkins and Clarke, their servants or agents, from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them or for any purpose except merely to obtain or communicate information, and also from preventing Adolph Schoenthal or other persons from working for the plaintiffs by withdrawing his or their workmen or workwomen from their employment respectively. By a slip the order as drawn up has been made more extensive, but the terms I have mentioned are the true terms of the order pronounced by the Court of Appeal, as appears by the judgment of Kay, L.J. In substance, at the trial, the plaintiffs have clearly proved the case made on the motion as to watching and besetting the plaintiffs' premises illegally, and I am of opinion that they are entitled to have the injunction made perpetual, so far as the first part of the injunction is concerned, for the reasons given by the Court of Appeal on disposing of the motion; and I do not consider it necessary to add anything upon the law bearing upon this part of the case. I consider that it is clearly proved that the defendants Wilkins, Clarke, and Thompson watched and beset the plaintiffs' works or place of business and the approaches thereto for the purpose of persuading or otherwise preventing persons from working for the plaintiffs, and for purposes other than that of merely obtaining or communicating information.

In reference to the second part of the injunction, I think the case made upon the motion is fully proved, and I think also that it has been clearly shown that the same defendants illegally watched

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

and beset the premises of Schoenthal for the purpose of preventing him from working for the plaintiffs, but I think it probable that the Court of Appeal would have framed the second part of the injunction granted in a different manner had the case of *Allen* v. *Flood* then been decided by the House of Lords. At any rate, the point has not been specifically argued before me whether or not, apart from the question of malice, it was unlawful to call out the workmen of Schoenthal in order to prevent him from working for the plaintiffs. Had the matter been one of importance in the present case I should probably have required further argument; but the strike is long since over, and I have assumed that the parties would prefer not being put to the trouble and expense of a re-argument on this point. I propose, therefore, to grant a perpetual injunction following the terms of the first part of the order of the Court of Appeal, but to frame the latter part of the injunction, "And also from watching or besetting the premises of Adolph Schoenthal for the purpose of persuading or otherwise preventing him from working for the plaintiffs, or for any purpose except merely to obtain or communicate information." The injunction must extend to the defendant Thompson, who was a participator in the wrongful acts committed, the acts in question being unlawful. The other defendants, if they conspired to induce the commission of such acts, are equally liable to an injunction, and by their amended defence all the defendants make common cause, and accept common responsibility in respect of the matters I have referred to, as well as in respect of the alleged libels, which still remain to be dealt with; and indeed it is difficult to see how, as officers of the society under an obligation to attend the meetings of the executive council, under whose directions the defendant Wilkins acted, and with power to express their opinions, they could well do otherwise whatever the domestic constitution of society they belong to may provide as to their voting power.

The plaintiffs further asked for an injunction to restrain the defendants from maliciously inducing, or conspiring to induce, persons not to enter into contracts with the plaintiffs, and I postponed judgment at the request of both parties until after the decision of the House of Lords in the case of *Allen* v. *Flood* should be given. The effect of that decision which has now been delivered is, in my opinion, to show that the plaintiffs are not entitled to their injunction. It was conceded by the plaintiffs that they could not succeed unless they could show malice, and it is the law as finally determined by the House of Lords that the existence of a malicious motive cannot in such a case as this render unlawful an act or acts otherwise lawful. Another injunction was asked for by an amendment made by leave at the trial against the defendants Thompson, Laverick, and Goodall, as the trustees of the society, from applying the funds of the society in furtherance of the wrongful acts complained of. I am of opinion that there is no legal ground for such an injunction, and I refuse it, and disallow the plaintiffs the cost of the amendment made in pursuance of such leave. I do not think that the defendants have been put to any extra costs by reason of the amendment, or I should have ordered the plaintiffs to pay them.

His lordship then dealt with the alleged libels, and no injunction being asked for at the hearing, awarded £5 as damages.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Warburton & De Paula.*

Solicitors for the defendants, *Shaen, Roscoe, Massey, & Co.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Mathew, J.) — March 28.

REG. v. ROBINSON AND OTHERS. (*a.*)

Bastardy order—Summons—Simultaneous applications to three magistrates—One summons dismissed—Fresh summons—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 3.

On the 21*st of October*, 1896, *the complainant applied to three magistrates separately for summonses against C. in respect of a bastard child born on the* 9*th of September*, 1896. *On the* 28*th of July*, 1897, *one of the magistrates issued a summons, which was heard on the* 3*rd of November*, 1897, *and dismissed, on the ground that there was not sufficient corroboration of the complainant's evidence. On the* 17*th of November*, 1897, *another of the three magistrates issued a summons which recited that it was based on the application to this magistrate on the* 21*st of October*, 1896. *On this summons a bastardy order was made.*

Held, that the three applications of the 21*st of October*, 1896, *must be treated as one application only, and that that application was exhausted by the issue and dismissal of the summons of the* 28*th of July*, 1897; *and that, consequently, the summons of the* 17*th of November*, 1897, *was not based upon an application made within twelve months of the birth of the child, and must be quashed.*

Rule *nisi* calling upon the justices of Staffordshire to show cause why an order of the justices dated the 29th of December, 1897, by which H. Corbishley was adjudged to be the putative father of the illegitimate child of Annie Kirkham, and was ordered to pay 3s. per week towards the maintenance of the child should not be quashed.

The facts were as follows: The child was born on the 9th of September, 1896. On the 10th of October, 1896, the mother made an application to a magistrate for a summons for a bastardy order against Corbishley. The summons was issued and came on for hearing on the 21st of October, when, there being no proof of service, no order was made. On the same day further applications for summonses were made to three separate magistrates, Brealey, Phillips, and Robinson, but, owing to the difficulty of effecting service, no summonses were at the time issued. This course was adopted because the application for a summons has to be made within twelve months of the birth of the child, and therefore in the event of the complainant being unable to effect service within that period, she would be without any remedy if the magistrate to whom the application had been made happened to die in the meantime. In such a case it would be too late to make another application to another magistrate, and no summons could issue in respect of the application which had been made to the magistrate who had since died.

On the 28th of July, 1897, a summons was issued by the magistrate Brealey based on one of the applications of the 21st of October, 1896. This summons was served on the respondent, and the hearing took place on the 3rd of November, 1897, when the justices disagreed as to whether there was any corroboration of the complainant's evidence. The chairman then informed the complainant that the summons was not dismissed on its merits, and that if she could bring further evidence she might apply again.

On the 17th of November, 1897, a summons was issued by the magistrate Robinson which recited that

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

it was based on the application of the 21st of October, 1896. This summons was heard on the 29th of December, 1897, when the order now sought to be quashed was made.

The Bastardy Laws Amendment Act, 1872, s. 3, enacts that "Any single woman who may be . . delivered of a bastard child after the passing of this Act may . . . at any time within twelve months from the birth of such child . . . make application to any one justice of the peace . . . for a summons to be served on the man alleged by her to be the father of the child, . . . and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear, &c."

Hume Williams, for the complainant, showed cause against the rule.—The order of the 29th of December, can be supported. Any number of applications for summonses can be made within twelve months of the birth of the child (*Reg* v. *Gaunt*, 15 W. R. 1172, L. R. 2 Q. B. 466), and if the application is made within the twelve months the summons need not be issued within that period, but can be issued and heard at any time (*Potts* v. *Cumbridge*, 6 W. R. 214, 27 L. J. M. C. 62; *Reg.* v. *Chugg*, 34 J. P. 469; *Staples* v. *Staples*, 41 L. T. Rep. 347, 28 W. R. Dig. 22). The order in question may be treated either as having been made on the summons of the 17th of November, which was based on one of the applications of the 21st of October, 1896, or, if it be said that the issue of a summons on the 28th of July exhausted the three applications of the 21st of October, the hearing of the 29th of December should be regarded as a continuation of the hearing of the 3rd of November. The justices did not really adjudicate upon the summons on that day; they in effect adjourned it for want of evidence (see *Reg.* v. *Justices of Lancashire*, 22 W. R. 329).

Montague Lush, in support of the rule.—If the argument for the complainant is right, the time limit in the statute is completely done away with. The complainant might make any number of applications to different magistrates and proceed with them for an indefinite period. I admit that where an application has been made and a summons issued but not heard on the merits owing to a defect of form, then the original application is not exhausted or spent and a fresh summons may issue based on the original application. That was the case in *Reg* v. *Justices of Lancashire*, where the birth of the child was incorrectly stated on the summons; but the present case is different. On the 3rd of November the summons of the 28th of July was heard and dismissed, not on account of any formal defect, but for lack of corroborative evidence. Under these circumstances no fresh summons can issue based on that application (see *Reg.* v. *Thomas*, 8 L. T. Rep. 460, 11 W. R. C. L. Dig. 20). Then complainant relies on another of the applications of the 21st of October as a sufficient basis for the summons of the 17th of November. Those three applications cannot be regarded otherwise than as being duplicates of the same application, and when one is exhausted the others are gone. *Staples* v. *Staples* is in my favour.

Lord RUSSELL OF KILLOWEN, C.J.—In this case two contentions have been put forward on behalf of the complainant. In the first place it is said that what took place on the 3rd of November, 1897, was not a hearing or determination of the case at all, but that there was merely an intimation by the chairman of the justices that there was not sufficient corroborative evidence and that the complainant might come before them again. It is said that under these circumstances the case comes within the case of *Reg.* v. *Justices of Lancashire*. With regard to the question of the complainant coming again, that is not a matter which depended on the will of the magistrates, for she had the right to do so if she made her application for the summons within twelve months of the birth of the child. In my opinion this case is governed by *Reg.* v. *Thomas* and *Staples* v. *Staples*, and I am bound to give effect to those decisions, in which a distinction is drawn between a case in which there has been a hearing of the facts of the case, and a case which has been dismissed without any hearing on the preliminary ground that the summons was bad in form. I can see no difference between the circumstances of this case and those of *Staples* v. *Staples*, and I cannot treat this case as one within the principles of *Reg.* v. *Justices of Lancashire*. Therefore I must regard the summons of the 17th of November not as being a continuation of the July summons, but as an entirely new summons, and one, therefore, which must be founded on an application for a summons made within the statutory period. A complainant has an undoubted right to apply for a second summons. What was done in this case was that the woman made three separate applications to three separate magistrates, all on the same day. Ultimately, on the basis of the application to one of these magistrates, Robinson, she obtained a summons on which the order in question was made on the 29th of December. I should add that previously, on the 28th of July, a summons had been issued based on the application to the magistrate Brealey, so that if the three applications of the 21st of October were to be regarded as being in fact only one application, then that application had been exhausted by the issue and determination of the summons by Brealey.

The question, therefore, is, Can these three applications of the 21st of October be treated as three separate and distinct applications, or are they in reality one and the same application? In my judgment they must be treated as one application, except for one purpose only—that is to say, if one of the magistrates applied to were unable owing to death or other causes to issue a summons, the complainant was entitled to obtain a summons from one of the other magistrates to whom application had been made; but for all other purposes the applications must be regarded as being in duplicate, and if a summons was issued based on one of them, then the others were exhausted and at an end. Therefore, in the present case, after the summons on the 28th of July had been issued, there did not remain any application made within the twelve months on which a fresh summons could issue.

For these reasons I am of opinion that the order of the 29th of December must be quashed. I regret having to come to this decision, but it would be a straining of the law to come to any other.

MATHEW, J.—I am of the same opinion. I had hoped that the terms of the justice's dismissal of the summons of the 28th of July would have justified us in saying that the matter was not *res judicata*, but when we come to examine the terms of the order, it is clear that the summons was not intended to be adjourned, but it was dismissed on the understanding that a fresh summons should issue. I hope that in future cases of this description the justices will take the precaution merely to adjourn and not to dismiss the summons.

Rule absolute.

Solicitors for the applicant, *Chester & Co.*

Solicitors for the complainant, *Everett & Hodgkinson.*

Prob. Div. & Adm. Div. } Jan. 24.
Admiralty. }

"THE RUBY." (a.)

County court—Admiralty jurisdiction — Ship — Sale of ship by bailiff of county court in action in rem—*Admiralty title—County Court Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 12, 23—*County Court Rules*, 1892, *ord.* 39B, *rr.* 40-42 (105-107)—*County Court Rules*, 1889, *Form* 331.

The purchaser of a ship sold by the high bailiff of a county court under the decree of a county court having admiralty jurisdiction made in an action in rem, *takes the ship free from all antecedent liens, mortgages, and liabilities.*

This was a motion on behalf of the high bailiff of the Bow County Court for directions as to how the sale of the vessel *Ruby*—condemned in an action of collision tried in the City of London Court and transferred to this division, and in respect of which a warrant of execution in the form given by the County Court Rules (see County Court Rules, 1889, Form 331) for the sale of the defendant's goods and chattels, including *The Ruby*, had issued—should be proceeded with.

Butler Aspinall, for the motion.—The registrar of the port where *The Ruby* is registered had refused, though required by the purchaser to register a bill of sale executed by the high bailiff of the Bow County Court under the 42nd rule of order 39B of the County Court Rules, 1892, which provides that "on the completion of the purchase the high bailiff shall deliver up the property to the purchaser, and if required so to do he shall execute a bill of sale to him" in such a way as to give priority to the purchaser over interests in the ship already on the register. The agreement with the purchaser was for a sale of the ship "free from incumbrances," and this agreement cannot be carried out if a mortgage of *The Ruby* now entered on the register is deemed to have priority over the interest the purchaser has purchased. The bailiff in selling the ship has acted for the bailiff of the City of London Court under the 23rd section of the County Court Admiralty Jurisdiction Act, 1868; that section providing that the process of any county court having admiralty jurisdiction may be executed by any officer of any county court; and by the provisions of the section he has had conferred on him the same power that the bailiff of the City of London Court would have had in giving what is called "an admiralty title" to the purchaser, that being a portion of the jurisdiction and powers given to county courts having admiralty jurisdiction (The Admiralty County Court Act, 1868, s. 3).

F. Laing, for the registered mortgagee of *The Ruby*, who had intervened in the county court suit before its transfer to this court.—A county court having admiralty jurisdiction has no power to sell a ship in an action *in rem* so as to confer a title on the purchaser good against all the world, but can only sell the interest of the plaintiff in the ship to which the suit relates. [He referred to the County Courts Admiralty Jurisdiction Act, 1868, ss. 12, 32; The Judicature Act, 1873, s. 89; County Court Rules, 1889, Form 331; County Court Rules, 1892, Ord. 39B., rr. 40-42.] Where a sale analogous to a sale in the Admiralty Division in an action *in rem* commenced in a county court is desirable, the proceedings for sale can be transferred to and conducted in this court—the County Courts Admiralty Jurisdiction Act, 1868, s. 12—and this course ought to have been followed here. Considering the order "for sale" to be what it really is, a common law warrant of execution, the mortgagee of *The Ruby* has clearly priority over the purchaser from the high bailiff: *Metcalf* v. *Scholey*, 2 N. R. 461. The mortgagee tendered the amount of the judgment with costs to the plaintiff but the tender was not accepted.

Lauriston Batten, for the plaintiff.

Muir Mackenzie, for the trustee in bankruptcy of the mortgagee of *The Ruby*.

JEUNE, P.—I can easily understand the question before me being raised because I am afraid that what has happened has been that the sale under the decree of the City of London Court has taken place for what may be supposed to be less than the real value of the ship, and I am afraid also that it took place without a sufficient notice having been given to the mortgagee. But it appears to me impossible to limit in the way suggested the jurisdiction of a county court having admiralty jurisdiction, because that would be to take from it a branch of jurisdiction which it was intended that it should possess.

There is no doubt that an action *in rem* can be maintained on the admiralty side of a county court. There is no doubt that a judgment *in rem* can be given on the admiralty side of a county court; but it has been contended that although there is power for the court to entertain an action *in rem*, and give a judgment *in rem*, that still you cannot in the county court issue execution with the full effect of carrying out the terms of that judgment; that either the judgment must be executed as a judgment of a court of common law would be executed, or the High Court must be applied to and the judgment *in rem* be carried out through the aid given by that court. I should require very clear language indeed in the County Courts Admiralty Jurisdiction Act, 1868, to convince me that a jurisdiction so peculiar as that in an action *in rem* was not intended to carry with it its well-known legal results. When the Act of 1868 is looked at, so far from finding any limitation of that kind, the words seem sufficiently ample to carry the whole of the jurisdiction which it appears to me it was intended to give. Section 3 of the Act gives all powers and authorities necessary to determine certain matters, among these being salvage, wages, and damage by collision, all of which carry with them a maritime lien. The section, I agree, is limited to trying and determining, and I do not say that the words of the section alone would necessarily carry with them the power to execute a judgment given under the powers of the section. But by section 12 of the Act the power is given by these words: "The decree of the county court in an admiralty cause shall be enforced against the person or persons summoned as the defendant or defendants in the same manner as the decrees of the court are enforced in ordinary civil causes, save and except as in this Act otherwise provided." Now, who are the persons summoned in an action *in rem*. Why, all the owners, all the persons having an interest. Then section 22 provides that there shall be no arrest or detention of the vessel in an admiralty cause in a county court otherwise than in execution, so that it is clear that the vessel can be taken in execution in an admiralty cause. Then section 23 provides that for the execution of any decree or order of the county court in an admiralty cause the court may order, and any officer of any county court may execute, process according to the general orders provided. If it is desired a transfer to the High Court may be obtained. That contemplates a sale in the High Court. It is therefore clear that you can have a sale in the county court in an action *in rem* just as in the High Court. The general order seems to me to carry that out.

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Rule 42 of ord. 39B of the County Court Rules, 1892, provides that, on the completion of the purchase, the high bailiff shall deliver up the property to the purchaser, and give a bill of sale to the purchaser. All that is the complete machinery for a sale under a decree in an action *in rem*. What is there to show that the warrant of execution is limited, and that it does not entail such an execution as ought to follow a decree in an action *in rem*? I do not think there is anything. The only difficulty which presents itself to my mind is that, when you come to look at the warrant of execution, the form is not strictly appropriate to an action *in rem*. I think a form of that kind ought to have been moulded so as to follow the judgment *in rem* more accurately. But are the words of the warrant of execution in Form 331 of the County Court Rules of 1889 enough. I think they are. They recite that the plaintiff has obtained judgment in the court against the defendant for a certain sum. Then there is an order made to levy distress on the goods and chattels, including the ship *Ruby*, of the defendant; so that there is an order for sale of the goods of the defendant, including this particular ship. It appears to me that that is enough to make a good sale in this case.

It may be that the term defendants, if limited to owners, having regard to the provisions of the Merchant Shipping Act, 1894, might not include mortgagees, but an action *in rem* is brought against all the owners and parties interested. When you afterwards speak of the defendants in any of the subsequent proceedings in the court, I think it must be intended to cover all those parties who are interested. The rights of any of such parties who are not summoned are protected by the express power given to them to intervene. It may be, as it has been argued, and I daresay correctly argued, that the county court has not power to deal with mortgages; but the mortgagee has the power to intervene and the action may be transferred to the High Court. It is also to be observed that probably in the majority of cases there would not be a mortgagee to intervene.

I think the judgment of the county court has all the effects of a judgment *in rem* in the High Court as regards the power of sale, but the question arises what, under these circumstances, has to be done? It is pointed out that there are no express words declaring that the property is to be vested in any person to give a title, but the answer appears to me to be that neither is there, where the proceedings are in the High Court. I think it must be taken that when the court is empowered to give and gives authority to one of its officers to sell a ship, that property is sufficiently vested in him to enable him to ask the registrar of shipping to act upon the authority which he has received. There is only one point left, and and that is as to the objection that has been taken that it was the high bailiff of the county court of Bow who executed the sale. I think that objection is met by the 23rd section of the Act of 1868, which gives express power to any officer of any county court to execute such an order. In my opinion, therefore, all the points made against the sale by the high bailiff in this case fail, and I think that the sale is good, and the ship must be registered in the name of the purchaser. The proceeds of the sale will be brought into court, and out of them the high bailiff must have his costs.

Solicitor for the high bailiff, *Tijou*.
Solicitors for the plaintiff, *Farnfield & Co.*
Solicitor for the intervener, *T. B. Williams*.
Solicitors for the trustee in bankruptcy, *Trinder & Capron*.

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) March 24; April 1.

In re MAYFAIR PROPERTY CO. (LIMITED).
BARTLETT *v.* MAYFAIR PROPERTY CO. (LIMITED). (*a*.)

Company—Mortgage of uncalled capital—Debenture-holders—Unsecured creditors—Winding up—Priority—Companies Act, 1879 (42 & 43 *Vict. c.* 76), *s.* 5.

The M. Co. had power under its memorandum and articles of association to borrow money and issue debentures charged on (inter alia) *its uncalled capital. Before this power was exercised the company, by special resolution, declared that a portion of the uncalled capital should "not be capable of being called up except in the event of and for the purpose of the company being wound up in accordance with the provisions of the Companies Act,* 1879." *The directors afterwards created and issued debentures charged on the company's undertaking and property, "including its uncalled capital for the time being." The company having gone into liquidation, and a winding-up order having been made, the liquidator called on the contributories for payment of that portion of the capital (the reserve capital) to be called up only in the event of a winding up.*

The assets of the company, including the reserve capital, not being sufficient to pay the costs of the winding up and the creditors of the company, the debenture-holders claimed to have a valid first charge on the reserve capital, and to be entitled to be paid in priority to the other creditors and to the costs of the winding up.

Held (affirming Wright, J.), *that the company had no power to create any charge on that portion of its capital which could only be called up in the event of and for the purpose of the company being wound up.*

In re Pyle Works, 38 *W. R.* 674, 44 *Ch. D.* 534, *distinguished.*

Appeal of a debenture-holder in the above-named company from Wright, J.

The point at issue turned upon the true construction of section 5 of the Companies Act, 1879, which provides as follows: "An unlimited company may, by the resolution passed by the members when assenting to registration as a limited company under the Companies Acts, 1862 to 1879, and for the purpose of such registration or otherwise, increase the nominal amount of its capital by increasing the nominal amount of each of its shares. Provided always, that no part of such increased capital shall be capable of being called up, except in the event of and for the purposes of the company being wound up. And, in cases where no such increase of nominal capital may be resolved upon, an unlimited company may, by such resolution as aforesaid, provide that a portion of its uncalled capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up. A limited company may by a special resolution declare that any portion of its capital which has not already been called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up."

The facts as stated by Lindley, M.R., were as follows: The company was formed and registered

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

as a limited company on the 16th of August, 1892, with a nominal capital of £50,000 divided into 5,000 shares of £10 each. The memorandum of association stated that one of its objects was to borrow money and issue debentures charged on "the property and rights of the company, both present and future, including its uncalled capital." By the articles of association full power was given to the directors to issue debentures charging all the assets of the company, including its uncalled capital. Before this power was exercised—viz., on the 12th of October, 1892—a special resolution was passed, and it was thereby declared "that such portion of the company's capital as consists of £5 per share remaining uncalled upon all the ordinary shares of the company shall not be capable of being called up, except in the event of and for the purpose of the company being wound up in accordance with the provisions of the Companies Act, 1879." In June, 1894, it was resolved by the directors to create and issue debentures for £50,000, bearing interest at 6 per cent., and 160 debentures for £100 each bearing interest at 6 per cent. were created and issued accordingly under the seal of the company. By these debentures the company bound itself to pay the principal moneys and interest secured by them, and the company as beneficial owner charged with such payments "its undertaking and its property whatsoever and wheresover, both present and future, including its uncalled capital for the time being." At the time these debentures were issued £4 5s. per share had been called up. There remained to be called up £5 15s. per share, of which, however, £5 could only be called up on the winding up of the company.

On the 8th of August, 1896, an action was brought against the company by a debenture-holder, suing on behalf of himself and all other debenture-holders, and on the 12th of August he obtained judgment in the form usual in such actions, and a receiver was appointed. On the same date the company was ordered to be wound up and a liquidator was appointed. By this time 15s. of the £5 15s. before referred to as uncalled up when the debentures were issued had been called up by the directors; so that on the 12th of August, 1896, when the winding-up order was made, £5 per share had been called up by the directors, and £5 more—*i.e.*, the reserve capital—only remained to be called up for the purposes of the company being wound up. The liquidator had called on the contributories for payment of this £5 per share. The assets of the company, including the reserve capital called up by the liquidator, would not be sufficient to pay the costs of the winding-up and the creditors of the company. The question therefore arose whether the debentures created a valid first charge on the reserve capital so as to entitle the holders of them to payment out of that fund in priority to the other creditors and to the costs of the winding-up.

In November, 1897, the plaintiff in the debenture-holders' action applied by summons that this question might be determined, and Wright, J., determined it against the plaintiff, holding that the company had no power to create any charge on that portion of its capital which, by the Companies Act, 1879, could only be called up "in the event of and for the purposes of the company being wound up."

The plaintiff appealed.

Swinfen Eady, Q.C., and *R. F. Norton*, for the appellant, argued that the company was in process of being wound up and that the call was required for the winding up.

They referred to *In re Pyle Works*, 38 W. R. 674, 44 Ch. D. 534; *In re Phœnix Bessemer Steel Co.*, 24 W. R. 19; *Newton* v. *Debenture-holders, &c., of Anglo-Australian Investment Co.*, 43 W. R. 401, [1895] A. C. 244.

[LINDLEY, M.R.—Cotton, L.J., said that capital did include capital called up after the winding up.]

Farwell, Q.C., and *George Henderson*, for the respondent, the official receiver and liquidator, referred to *In re David Lloyd & Co., Lloyd* v. *David Lloyd & Co.*, 25 W. R. 872, 6 Ch. D. 339; *In re Henry Pound, Son, & Hutchins*, 38 W. R. 18, 42 Ch. D. 402.

Eady, Q.C., in reply.—Directors may validly create a charge on capital which they have no power to call up. There is nothing in the Companies Act to say that this reserve capital cannot be charged.

He referred to *Welton* v. *Saffery*, 45 W. R. 508, [1897] A. C. 299; *In re Portsmouth Tramways Co.*, 40 W. R. 553, [1892] 2 Ch. 362; *Moor* v. *Anglo-Italian Bank*, 27 W. R. 652, 10 Ch. D. 681; and *Lock* v. *Queensland Investment and Land Mortgage Co. (Limited)*, 45 W. R 65, [1896] A. C. 461.

Cur. adv. vult.

April 1.—LINDLEY, M.R., stated the facts as above set out, and continued: The contention on the part of the appellant is that a limited company can validly charge its uncalled capital if authorized so to do by its memorandum of association or by its articles; and that the capital or money which, under the Act of 1879, can only be called up in the event of and for the purposes of the company being wound up is part of the capital of the company in the full and proper sense of that word; and that, there being no prohibition against creating charges upon it, the power to create such charges necessarily follows. This argument is based on *In re Pyle Works*, 38 W. R. 674, 44 Ch. D. 534, which finally settled that uncalled capital of a limited company governed by the Companies Act, 1862, could be validly charged in favour of particular persons. It is further contended that the payment of the secured debts of a company is as much a purpose of the company as the payment of its other debts; that there is no necessary implication requiring the court to hold reserve capital to be incapable of being charged with the payment of particular debts; and that it may be ruinous to a company to prevent it from obtaining relief from perhaps temporary pressure by raising money on the security of its most valuable asset. Cogent as this argument is, I am convinced that it is unsound, and that to yield to it would defeat and not carry out the purpose with which the Act of 1879 was passed. When *In re Pyle Works* was decided, I foresaw that the decision might be pressed further than I was prepared to go, and I pointed out that, in my opinion, it did not authorize mortgages of reserve capital formed under the Act of 1879. I adhere to that view now that I have carefully reconsidered it.

In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's case*, 3 Co. 7, to consider how the law stood when the statute to be construed was passed; what the mischief was, for which the old law did not provide; and the remedy provided by the statute to cure that mischief. The Companies Act, 1879, was passed in order to remedy some defects in the law relating to unlimited companies, and which defects, although long known to lawyers, startled the public when the City of Glasgow Bank stopped payment in 1878. The members of unlimited companies were in this position. First, they were liable to calls on their shares to their nominal amounts. This was the only liability which could be enforced

by the company or by its directors whilst the company was carrying on business. This liability, but no liability beyond, was an asset of the company with which the company could deal. But, secondly, in addition to this limited liability the members were under an unlimited liability to the creditors of the company; and this unlimited liability could be enforced by creditors, although it was not an asset of the company which the company or its directors could charge, alien, or dispose of, in any way whatever to the prejudice of any creditor. What was wanted was power to form a company with a reserve capital which should be limited in amount, which should be available for creditors in the event of a winding up, and which should not be under the control of the directors any more than the funds were which the creditors could obtain, but the directors could not, under the old law. This amendment in the law was made by the Act of 1879. It appears to me plain that section 5 was framed with a double object—viz., first, to preserve for the general creditors of the company the funds which the members were liable to pay, but which the directors could not call up; and, secondly, to enable the members to limit the amount of their liability on a winding up to pay the creditors more than the amount preserved for them.

Now, if the appellant's contention is right the first of these objects will be entirely defeated, although there is not a sign of any intention on the part of the Legislature to effect so great a change in the law, and although such change a would or might be ruinous to the great body of a company's creditors and be destructive of the credit which the preservation intact of reserve capital gives to those companies which avail themselves of the Act of 1879. To effect such a change in the law applicable to unlimited companies which avail themselves of the Act of 1879 some provision is wanted to confer on companies carrying on business power to deal with what the members are only liable to pay when the winding up takes place. Such a power would be a complete novelty, and cannot be inferred from the absence of any words prohibiting it.

I have dwelt on the effect of the Act of 1879 on unlimited companies, which take the benefit of it because the effect on them and the effect on limited companies are to be gathered from the use of exactly similar language. It was obviously desirable to enable companies originally formed and registered as limited companies to have reserve capitals and not to confine that advantage to unlimited companies registering themselves as limited companies. The object of the last part of the section is exactly the same as the object of the first part. Both classes of companies are put on the same footing so far as reserve capital is concerned. The prohibition against calling up the reserve capital in the case of limited companies is inserted for precisely the same purpose as in the case of unlimited companies—viz., to preserve such capital for the general purposes of the company when wound up. To interpret the section so as to enable a company to defeat this object by pledging or otherwise disposing of its reserve capital is, in my opinion, entirely to miss the real meaning of the Legislature as expressed in the language it has used. Neither the Act of 1879 nor the other Companies Acts give a company power to dispose of assets which cannot come into existence until it is wound up. To hand over the reserve capital or any part of it when called up to a prior assignee, or to a mortgagee who has no claim against the assets until he has realized or given up his security, is not to apply the reserve capital for the purposes of the company being wound up within the true meaning of that expression as used in section 5, but to prevent such application. This was the view of Wright, J., and it is mine also. With respect to the case of *Newton* v. *Debenture-holders, &c., of Anglo-Australian Investment Co.*, 43 W. R. 401, [1895] A. C. 244, on which counsel for the appellant so much relied, I need only observe that it was not a decision on the Act of 1879, but a decision on an article of association, so worded as not to preserve, nor indeed to show any intention to preserve, the reserve capital for the benefit of the general creditors in the event of liquidation. I cannot regard that case as an authority against the view which I take of the Act of 1879. The appeal must be dismissed with costs.

RIGBY, L.J.—I am of the same opinion and for the same reasons, and do not add anything.

VAUGHAN WILLIAMS, L.J.—I agree, but I prefer to express my own reasons. The question in this case is whether capital rendered incapable by the Act of 1879 of being called up except in the event and for the purposes of a winding up can be mortgaged by the directors. It is not an essential characteristic of capital of companies formed under the Companies Act, 1862, that it should be capable of being mortgaged by the company. All that was decided in *In re Pyle Works* was that there being in the articles of that company a power of mortgage wide enough to include uncalled capital there was nothing in the nature of uncalled capital as constituted by the Companies Act, 1862, to prohibit, either by express words or by necessary implication, the mortgaging of such capital, and that the article therefore was operative, and not *ultra vires*. The question therefore in this case is not whether capital rendered incapable of being called up by the Act of 1879 is capital within the meaning of the Companies Act, 1862, but whether, being such capital, there is anything in the Act of 1879 which expressly, or by necessary implication, renders such capital incapable of being mortgaged. This question depends on the true construction of the words of the Act. [His lordship read section 4 of the Act of 1879, and continued:] It will be observed that this section, excepting in so far as it provides that the registration of an unlimited company as a limited company in pursuance of this Act shall not affect or prejudice any debts or liabilities incurred prior to registration, does not impose any condition of registration. [His lordship read section 5, and continued:] The first three paragraphs of this section relate solely to unlimited companies registering as limited companies. The first paragraph provides that the unlimited company may by the resolution assenting to registration increase the nominal amount of its capital by increasing the nominal amount of each of its shares; and the second paragraph provides that no part of such increased capital shall be capable of being called up, except in the event of and for the purposes of the company being wound up; the third paragraph provides that in cases where no such increase of nominal capital may be resolved upon, an unlimited company by the resolution assenting to registration as a limited company may provide that a portion of its uncalled capital shall not be capable of being called up except in the event of and for the purpose of the company being wound up. It will be observed that the condition in paragraph 2 is a condition of the increase of capital, and not a condition of registration as a limited company. The statutory condition is of course irrevocable, and the resolution to the same effect in paragraph 3 seems equally irrevocable, as being a condition of the constitution of the company as a limited company. If one may speculate on the intention of the

Legislature in creating this condition of the increase of its nominal capital on the registration of an unlimited company as a limited company, and in empowering the unlimited company on registration as a limited company to provide that a portion of its uncalled capital shall be subject to a similar condition to that contained in the proviso, it would seem to be that, whereas the unlimited company while it existed as such afforded to its creditors, in the unlimited liability of its members, a fund for the satisfaction of their claims, outside and beyond the nominal amount of its capital as defined by the nominal amount of each of its shares, which fund was not available for the company in the conduct of its business, or in any way at the disposal of the company, the Legislature seems to have intended to empower the company as a limited company to appropriate a portion of its capital to the creation of a fund which should be limited to the same purposes—viz., which, while available for the satisfaction of creditors, should not be available for the company in the conduct of its business or in any way at the disposal of the company. I do not think, however, that the Legislature by the provisions in these paragraphs had in view the protection or security of the creditors. If the Legislature had so intended, it would have made the appropriation of a portion of the capital to such a purpose a condition of registration under this Act. I think the view of the Legislature was to enable the company on registration to improve its credit, by affording to its creditors to a limited extent a security somewhat of the character which the company whilst unlimited afforded to them. Now, the primary object of the Act of 1879 being to enable an unlimited company to convert itself into a limited company, and the Legislature having thought fit to enable the unlimited company at the time of its conversion to maintain or improve its credit by the appropriation of a portion of its capital as a reserve of this character, the Legislature seems to mean by section 5 to extend this power or privilege to companies which were originally registered as limited companies under the Act of 1862. [His lordship read the fourth paragraph of the section, and continued:] It will be observed that the final words of this paragraph give a statutory effect to the resolution when passed. The effect of this would seem to be to make the resolution irrevocable. Apart from this section I doubt whether a resolution providing that a portion of the capital of a limited company should not be capable of being called up except in the event of and for the purposes of the company being wound up could have been effectively passed by the company, even in the shape of a resolution altering the articles, unless the memorandum of association in general or specific terms authorized the passing of such a resolution; but I gather from the observations of Lord Herschell in *In re The Ooregum Gold Mining Co. of India* v. *Roper*, 41 W. R. 90, [1892] A. C. 125, that such a resolution might validly be passed if authorized generally or specifically by the memorandum of association. It may be that such a resolution passed independently of the memorandum of association and independently of the statute would have been revocable except so far as acted on, and would have merely limited the control of the company over this portion of the capital in respect of calls, and would have left the power of mortgaging untouched; but the effect of a resolution passed under the memorandum of association or the statute is certainly to render the resolution irrevocable. Now, supposing such a clause to have been validly introduced into the memorandum of association, what would have been the effect of such a clause in the memorandum on this portion of the capital? I am not speaking here of its effect as an alteration of the memorandum, or of the constitution of the company authorized by this Act, because in such case its effect would undoubtedly, to my mind, be the same as the effect of the identical resolution authorized in this section if passed by an unlimited company at the time of its conversion by this Act into a limited company. I am speaking of its effect as a valid clause in the memorandum of association, if such there could be, independently of some statute outside the Act of 1862. Would not the effect of such a clause by necessary implication be to withdraw the portion of the capital of the company affected by it from the control of the company as a going concern and to convert it into a fund applicable only to the payment of debts in the event of a winding up? I think it would have this effect by negativing *quâ* this portion of the capital, the implication of a power to mortgage; just as Knight Bruce and Turner, LJJ., held in *In re British Provident Life and Fire Assurance Society Ex parte Stanley*, 12 W. R. 894, 4 De G. J. & S. 407, that the necessary discretion of the directors from time to time to make calls negatived the implication of a power to mortgage or assign uncalled capital. It is true that the inference of the Lords Justices must be taken to be overruled by *In re Pyle Works*, but the principle that you may negative such implication by an intent drawn from the terms of the memorandum is not overruled. I agree with the contention of the appellants that the payment of secured creditors is a purpose of the winding up, and I agree that this portion of capital is an asset of the company which has to be collected by the liquidator; but neither of these propositions seems to me to negative the appropriation of this portion of the assets to the exclusive purpose of the payment of debts, or, at all events, the appropriation of this portion of the assets to purposes exclusive of sale or mortgage. It must be remembered that the Act of 1862 contains no express power to a company to sell or mortgage the whole or any part of its property, and that you must look at the memorandum of association to find whether there is by implication a power of sale or mortgage of its property, and what part of its property, and whether there is any prohibition, express or implied, contained in it prohibiting sales or mortgages of the whole or any part of its property. And I think that a clause in the memorandum negativing the power to call up a portion of the capital except for the purpose of winding up would by implication negative the power of the company to sell or mortgage such portion. At all events, whatever may be the effect of a resolution passed independently of this statute, I think that a statutory resolution, passed under section 5 of this Act, by implication negatives the implied power to mortgage the portion of capital affected by it which would otherwise be inferred in respect of every portion of the capital of the company, and renders invalid, *pro tanto*, any mortgaging power given by the articles. I wish to add that in the case of *Newton* v. *Debenture-holders, &c., of the Anglo-Australian Investment Co.* the articles did not render the capital incapable of being called up except for the purpose of winding up, but only unless a special resolution was passed by the company to the effect that the paid-up capital of the company had become insufficient to meet its liabilities, and that it was therefore necessary to call up the balance of the shares. Those articles obviously left the whole capital at the disposal of the company.

Appeal dismissed.

Solicitors, *Munns & Longden; Mackrell, Maton, Godlee, & Quincey.*

From Q. B. Div.
(A. L. Smith, Chitty, and Collins, L.JJ.) March 29.

In re GOETZ, JONAS, & CO. (*a*.)

Bankruptcy—Order and disposition—Debts growing due to bankrupt in the course of his trade—Unaccepted bills drawn in respect thereof—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44, *sub-section* 2 (*iii.*)

Merchants in England sold goods to customers in Spain, giving them six months' credit, the customers undertaking to accept three months' bills for the price at the expiration of three months from the date of the invoices. The English merchants, in order to put themselves in funds, drew bills upon their Spanish customers at six months from the date of the invoices for the price of the goods, and handed these bills to their bankers in London, together with copies of the invoices and duplicate bills of lading. These bills were not presented for acceptance. Upon receipt of these documents the bankers handed their acceptances to the English merchants at three months for a sum less than the invoice price, which the merchants got discounted. Before the Spanish customers had paid for the goods, or had accepted bills for the price thereof, the English merchants became bankrupt.

Held, that the debts owing by the Spanish customers to the bankrupts for the goods supplied were debts due or growing due to the bankrupts in the course of their trade and business, and were in the order or disposition of the bankrupts at the commencement of the bankruptcy with the consent of the bankers within the meaning of section 44, *sub-section* 2 (*iii.*), *of the Bankruptcy Act*, 1883.

Appeal by the trustee in bankruptcy of Goetz, Jonas, & Co. from the judgment of a Divisional Court (Wright and Bruce, JJ.) reversing an order of the Manchester County Court Judge.

The facts and arguments are sufficiently stated in the judgments.

E. Sutton and *F. Mote*, for the trustee.

J. Lawson Walton, Q.C., and *Muir Mackenzie*, for Armstrong & Co.

Cur. adv. vult.

March 29.—A. L. SMITH, L.J., read the following judgment: Upon the 13th of May, 1896, Messrs. Goetz, Jonas, & Co., who then carried on the business of general shippers at Manchester, were adjudicated bankrupts upon their own petition, they having called their creditors together upon the 7th of that month. At this date certain Spanish customers to whom Messrs. Goetz, Jonas, & Co. had sold and consigned goods were indebted to them in sums amounting in all to £1,936, which sums were payable to Goetz, Jonas, & Co. at different dates, according to the times at which the respective credits expired. The question is whether these debts were upon the 7th of May, 1896, in the order or disposition of the bankrupts with the consent of the true owners thereof within the meaning of section 44, sub-section 2 (iii.), of the Bankruptcy Act, 1883, so as to be divisible amongst the creditors of the bankrupts, or whether they belonged to Messrs. Armstrong & Co., bankers in London, who had financed the bankrupts as hereinafter mentioned. The course of business between Messrs. Goetz, Jonas, & Co. and their Spanish customers, as appears from the evidence, was this. Messrs. Goetz, Jonas, & Co. purchased goods from the manufacturers in England and then sold and consigned them to, amongst others, customers in Spain. The terms of credit were as follows: The Spanish customers had six months' credit from the date of invoice, and for the first three months from that date were under no obligation to accept any draft for the goods purchased. They had what has been called an open credit for these first three months, though if they liked they might remit in cash during that period. It is said that they sometimes did so. Why, I do not understand, nor has the learned counsel been able to explain why they should do so, but such appears on occasions to have been done. Upon the expiration of the first three months from the date of invoice the customers were bound to come under acceptance for the price of the goods purchased and to accept the draft of Messrs. Goetz, Jonas, & Co. upon them at three months. Contemporaneously with this course of business between Goetz, Jonas, & Co. and their Spanish customers the former sought financial aid from Messrs. Armstrong & Co., who are bankers in London, the terms agreed upon between them being as follows: Messrs. Goetz, Jonas, & Co. drew a draft upon their Spanish customers at six months from date of invoice, and then handed this draft to Messrs. Armstrong, together with a copy invoice and duplicate bill of lading. Upon receipt of this draft at six months Messrs. Armstrong handed to Messrs. Goetz, Jonas, & Co. their acceptance at three months for something less than the invoice price, which draft Messrs. Goetz, Jonas, & Co. were at liberty to discount and thus place themselves in funds. When three months from the date of invoice arrived, Messrs. Goetz, Jonas, & Co. then drew a bill at three months upon their Spanish customers for the value of the goods sold and consigned to them, and handed it to Messrs. Armstrong for them to get it accepted by the Spanish customers, who returned it accepted to them, and when met Messrs. Armstrong handed back the unaccepted draft at six months to Messrs. Goetz, Jonas, & Co., its function having then been exhausted. It will be seen that during the first three months, whilst the six months' draft was running, Messrs. Armstrong could not call upon the Spanish customers to accept this six months' draft, nor any other bill, and this six months' draft was but a security to the bankers for the due performance by Messrs. Goetz, Jonas, & Co. of their engagement with them—that is, at the termination of the first three months to draw at three months upon their Spanish customers and hand the bill so drawn to them (the bankers) in order that they might get it accepted by the Spanish customers and at maturity obtain the proceeds thereof. At the date of the bankruptcy the position of Messrs. Armstrong & Co. was this. Their acceptances which they had given to Messrs Goetz. Jonas, & Co. had been discounted by them, and Messrs. Armstrong & Co. were either under cash advances or were liable upon their acceptances. They held the six months' drafts of Messrs. Goetz, Jonas, & Co. unaccepted by and unpresented to the Spanish customers, copy invoices, and duplicate, but not the original, bills of lading. It appeared that in the case of all these six months' bills, except two, the three months' period of open credit had not expired at the commencement of the bankruptcy.

In these circumstances the question arises, were the debts owing by the Spanish customers to Goetz, Jonas, & Co. at the date of the bankruptcy in the order or disposition of the bankrupts? That they were "debts due or growing due to the bankrupts in the course of their trade or business" is clear. For these debts the Spanish customers had accepted no bills and unquestionably they were debts for which Messrs. Goetz, Jonas, & Co. could give the Spanish

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

customers valid discharges, and I do not doubt that they were in the order and disposition of the bankrupts at the date of the bankruptcy. But it is said that although this might be so they were not debts in the order or disposition of the bankrupts in their trade and business by the consent and permission of the true owners under such circumstances that they (the bankrupts) were the reputed owners thereof. It is not suggested that the bankers gave notice to the debtors of the assignment of the debts to them by means of the six months' drafts handed as they were by Messrs. Goetz, Jonas, & Co. to them, but it is said that this was not necessary because these six months' drafts were negotiable instruments and consequently no notice of the assignment need be given. It is not disputed that absence of notice to a debtor by the assignee of a debt leaves a debt within the order and disposition and reputed ownership section of the Bankruptcy Act, but it is said that if the assignment of the debt be by a bill of exchange it is otherwise, because of the negotiability of the instrument. If the six months' drafts had been accepted before bankruptcy by the Spanish debtors for their debts owing to the bankrupts, this would be so, and, as it appears to me, the reason why notice of such an assignment is not required is that by accepting the bills the debtor has notice of the assignment, and what is more, if more be necessary, he has agreed to pay the debt not to the original creditor, but to the assignee—that is, to the holder of the bill. Cases have been cited as to bills accepted by the debtor constituting an assignment of a debt, so as to take the case out of the order and disposition section; but none have been cited to show that an unaccepted draft without notice to the debtor completes an assignment so as to take the debt of such debtor out of the order and disposition of the bankrupt. Assignment coupled with notice to the debtor is equivalent to taking possession of the debt by an assignee, and thus takes the debt out of the reputed ownership section. But there has been no notice to the debtors in the present case.

It was further argued for the bankers that the debts owing by the Spanish customers were not within the reputed ownership section; because reputation of ownership may be excluded by a well-known custom of trade, such, for instance, as in a wine merchant's trade, whereby it is well known to all, that wine the property of another is constantly left with the wine merchant, so that a bankrupt wine merchant in such a case is not the reputed owner of the wine left in his possession: *Ex parte Watkins, In re Couston*, 21 W. R. 530, L. R. 8 Ch. App. 520. There are many cases based upon notorious customs applicable to other trades. It is argued that the reputation of ownership by the bankrupts of the debts in question was excluded by a custom in the Spanish trade. The analogy is certainly ingenious, if not far-fetched, but I think Mr. Sutton for the trustee pointed out one fallacy lurking in the suggestion, which is a sufficient answer to this point. In the case put the custom is notorious to all the world, whereas in the present case the custom spoken to by Praga and Strong is known only to those who deal in a particular market, and it appears to me that such a limited custom cannot affect persons who know nothing of the custom, and do not deal in the particular market. There is no evidence that the manufacturers, who sold their goods to the bankrupts, and who, through the trustee in bankruptcy, are now seeking to get the £1,936 in question to part pay them for their goods sold to the bankrupts, knew to what part of the world or to what markets the bankrupts were about to consign the goods, or that they were going to Spain, or knew anything whatever of the particular custom. The usual course of retaining the bills of lading until the drafts of the sellers are accepted by the purchasers has not been followed in this case by the bankers. If this had been done, all would have gone well, but as it was not, these debts were in the order and disposition of the bankrupts on the 7th of May, 1896, and in my opinion the trustee's title is superior to that of the bankers, and the learned county court judge was right when he so held, and this appeal from the Queen's Bench Division must therefore be allowed with costs here and below.

CHITTY, L.J.—The debts in question were debts due or growing due to the bankrupts in the course of their trade. In my opinion they were at the commencement of the bankruptcy in their order and disposition in their trade by the consent and permission of Messrs. Armstrong, the true owners of the debts, under such circumstances that the bankrupts were the reputed owners thereof; and consequently the debts passed to the trustee in bankruptcy and were divisible among the general creditors. According to the course of business between the bankrupts and their Spanish customers, the latter were entitled to a six months' credit from the date of the invoices for the price of the goods bought by them from the bankrupts. The Spanish customers seem, however, to have been at liberty to pay at any time before the expiration of the credit. At the end of the first three months but not before, the Spanish customers came under an obligation to accept the bankrupts' drafts on them for the price. The first three months' period has conveniently and appropriately been termed a period of open credit. The bankrupts, who carried on business at Manchester, being in want of funds, applied to Messrs. Armstrong, bankers in London, for assistance, and obtained it on the security of the debts owing by the Spanish customers. The debts in question were at the commencement of the bankruptcy debts owing by the Spanish customers for which they had not given nor been asked to give their acceptances. No notice had been given to the Spanish customers of the equitable title of Messrs. Armstrong to the debts. The case thus far is simple and clear.

But reliance is placed by Messrs. Armstrong on the arrangements which had been come to between them and the bankrupts. The short effect of these arrangements was as follows. The bankrupts had drawn six months bills on the Spanish customers, and had deposited them with Messrs. Armstrong as security for bills for lesser amounts which Messrs. Armstrong had accepted to enable the bankrupts to raise money on them in their own locality, which they had done. These six months' bills were in the hands of Messrs. Armstrong at the commencement of the bankruptcy. I understand that they had not negotiated any of them; it is immaterial whether they had or had not. These six months' bills were equal in amount to the debts in question. None of these bills had been presented to the Spanish customers for acceptance before the commencement of the bankruptcy; apparently it was not intended that they should be. The bankrupts had solemnly undertaken to hand to Messrs. Armstrong any remittances which might come to their hands from their Spanish customers. As to the greater part of these six months' bills, the three months open credit had not expired; as to some it had. But I see no difference between the bills in this respect.

Now, the argument founded on these facts was that the debts were represented by three six months' unaccepted bills, of which the Spanish customers had no notice; and it was contended that the debts, being represented by these bills, passed at law by

the bills to the holders of them. The argument is involved and difficult to follow. The answer to it is simple and easy. The debts owing by the Spanish customers had not passed into these bills, nor were the Spanish debts represented by them. The drawee of a bill who does not accept is not liable on the instrument, and such a bill of itself does not operate as an assignment of funds in the hands of the drawer available for payment: see section 53 of the Bills of Exchange Act, 1882. An agreement to accept a bill does not run with the draft so as to pass any right of action to the holder for the time being. The bills were good bills as between the parties to them, but this does not affect the question. The six months' bills were sent out to Spain for acceptance after the adjudication; most of them were accepted; but it was then too late. The result is that these Spanish debts were still owing on the open credit.

Messrs. Armstrong's counsel then argued that the debts were not in the order or disposition of the bankrupts under such circumstances that they were the reputed owners thereof. They relied on the authority of such cases as those relating to wine merchants and others, where there is a general and notorious custom in the bankrupt's trade that he should have in his possession goods belonging to some other person. The custom relied on in this case has already been sufficiently described by the Lord Justice. It was a custom or practice, such as it was, confined to the limited area of persons engaged in Spanish trade; it was not a notorious custom well known among traders in general. It is not shown that it was known in Manchester or by the manufacturers or merchants who supplied the bankrupts with the goods which they afterwards exported to Spain. A custom not to give notice to the debtor of an assignment would, in my opinion, be bad, and it would not avail to take a case out of section 44 of the Bankruptcy Act, 1883.

For these reasons I think that the order of the county court judge was right, and that the appeal ought to be allowed.

COLLINS, L.J., concurred.

Appeal allowed.

Solicitor for the appellant, *R. Page.*

Solicitors for the respondents, *H. Clarkson & Sons.*

From Q. B. Div.
(A. L. Smith and Collins, L.JJ.) March 28.

REG. *v.* LEIGH RURAL DISTRICT COUNCIL. (*a.*)

*Local government—Rate—Special expenses under Public Health Act—Judgment debt due from local authority —Retrospective rate—*Mandamus *to levy rate—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 230.

In 1893 *the T. Council agreed to supply the L. Rural Council with water on certain terms. In May,* 1895, *the T. Council demanded of the L. Council payment of £92 for water supplied in excess of the minimum quantity. The L. Council complained of a breach of contract on the part of the T. Council, and claimed to be entitled to damages. A long correspondence passed between the two councils, and in March,* 1897, *the T. Council commenced an action to enforce their claim. The L. Council delivered a counter-claim. In May,* 1897, *judgment was entered by consent for the plaintiffs for £63. In October,* 1897, *the T. Council obtained a rule for a* mandamus *to the L. Council to levy a rate to pay the judgment debt. In January,* 1898, *the rule was made absolute. The L. Council contended that they had no power to make a retrospective rate.*

Held, that, inasmuch as the debt due from the L. Council was not ascertained till the judgment, and the mandamus *was obtained within the rating year, the rate which was ordered was not retrospective.*

Held, also, that, even if it was retrospective, yet, being not a poor rate, but a rate for special expenses, excuse might be shown for not having moved for a mandamus *earlier, and that in this case ample excuse had been shown.*

Appeal from an order of a Divisional Court (Day and Lawrance, JJ.) making absolute a rule for a writ of *mandamus.*

In January, 1893, an agreement was entered into between the Tyldesley Urban District Council and the Leigh Rural District Council, whereby the Tyldesley District Council agreed to supply the Leigh District Council with water at a minimum rate of 75,000 gallons a week on payment of £146 a year. The Leigh District Council was to be at liberty to take more water than 75,000 gallons a week on paying an additional sum according to the amount so taken. The Tyldesley District Council was to supply a water meter and keep it in repair.

In accordance with this agreement a supply of water was provided from January, 1893, till the 6th of May, 1895. It was then discovered that the meter was out of order, and that a very much larger quantity of water had passed through the meter than had been registered. The Tyldesley District Council demanded payment of £92 for the water supplied in excess of the specified minimum quantity. The Leigh District Council, on the other hand, complained that there had been a waste of water by reason of a leak in their main, and that they had been prevented from discovering this by the failure of the Tyldesley District Council to keep the meter in repair, and they claimed to be entitled to damages for breach by the Tyldesley District Council of their contract to keep the meter in repair.

A long correspondence passed between the two councils, and in March, 1897, the Tyldesley District Council commenced an action claiming £92. The Leigh District Council delivered a counter-claim for damages, and in respect of this counter-claim the Tyldesley District Council paid a sum of money into court. On the 15th of May, 1897, judgment was entered by consent for the plaintiffs for £63 13s. 5d.

On the 25th of October, 1897, the judgment debt not having been paid, the Tyldesley District Council obtained a rule *nisi* for a *mandamus* to the Leigh District Council to issue precepts to the overseers for the purpose of levying a rate to pay the judgment debt. The Leigh District Council contended that it would be illegal to levy a rate in 1897 for the payment of a debt incurred in May, 1895.

On the 18th of January, 1898, the Divisional Court ordered that the rule should be made absolute.

The Leigh District Council appealed.

Macmorran, Q.C., and *Tindal Atkinson,* for the appellants, cited, besides the cases mentioned in the judgment, *Saul* v. *Wigton Rural Sanitary Authority,* 35 W. R. 252, 56 L. T. Rep. 438; and *Reg.* v. *Rotherham Local Board,* 6 W. R. 248, 8 E. & B. 906.

McCall, Q.C., and *Horridge,* for the respondents, cited *Harrison* v. *Stickney,* 2 H. L. Cas. 108.

A. L. SMITH, L.J.—The question in this case is whether, where a just debt is due from a rural district council which has no funds, and the district council will not levy a rate to pay the debt, a *mandamus* must be moved for within the rating year

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

or otherwise the creditor must go without his debt. It seems to me that there would be something wrong if the answer to that question must be—Yes; and I think for the reasons I am about to state that the answer must be—No.

In the first place, when was this debt ascertained? When was it due from the Leigh Council to the Tyldesley Council? The debt of £63, the balance of the claim after setting off the counter-claim as ascertained by the judgment, was not due till it was ascertained that it was due—viz., on the 15th of May, 1897. There had been claims and counter-claims and controversies going on, but the amount of the debt was not ascertained till judgment was given. The Leigh Council said they could not pay the judgment debt because they had no assets, and they refused to levy a rate. The Tyldesley Council thereupon obtained a rule *nisi* for a *mandamus* calling upon the Leigh Council to levy a rate, and that rule has been made absolute. The Leigh Council appeal, and the ground of their appeal is that under the circumstances of this case a *mandamus* cannot be directed to them to levy a rate, because such a rate would be retrospective, the debt having become due, as they allege, in May, 1895. But the debt was not ascertained till the judgment was given in May, 1897, and it seems to me that the Tyldesley Council were well within the rating year when in October, 1897, they obtained the rule which was made absolute in January, 1898. There is nothing retrospective in that, and these facts seem to me to decide the case.

We have been pressed by the appellants with authorities showing that retrospective rates are not allowed. But first they argued that section 210 of the Public Health Act, 1875, does not apply to this case. In that I think they are right, for that section, which allows a rate to be made retrospectively for the payment of expenses incurred not more than six months before the making of the rate, by its terms only applies to urban authorities. They said that the sections to be considered in this case are sections 229 and 230. Section 229 says that the expenses incurred by a rural authority in the execution of the Act shall be divided into general expenses and special expenses. In the latter are included the expenses of providing a supply of water. Then section 230 says that a separate rate under this section shall as respects the powers of the overseers in relation to making, assessing, and levying such rate, and as respects the appeal against such rate, and all other incidents thereof, except the purposes to which it is applicable, and except the allowance of justices, which shall not be required, be subject to the same provisions as apply in law to a rate levied for the relief of the poor. The appellants say it is settled law that rates for the relief of the poor must be levied within the rating year. No doubt there is a good deal of authority to that effect, and there is good sense in it, because what is required for the relief of the poor can be known beforehand, and can easily be provided for. But when we come to questions like this with regard to special expenses, the amount of which cannot be foreseen, and upon which claims and counter-claims are made, I doubt very much whether that section binds down a local authority hard and fast to the rule as to retrospective rates which does apply to a rate made for the relief of the poor. I am of opinion, on reading the cases which have been cited, especially *Worthington* v. *Hulton*, 14 W. R. 632, L. R. 1 Q. B. 63, that there is no absolute rule of law that a rate for special expenses must be levied within the rating year.

It is true that Watson, B., in *Waddington* v. *Guardians of the City of London Union*, 7 W. R. 93, E. B. & E. 370, at p. 405, said this: "It was said that upon a judgment being obtained against the guardians the Court of Queen's Bench would by *mandamus* compel the making of a rate to pay it. We apprehend this is not so. The party obtaining the judgment would be left to the ordinary executions, and, if we are right in our view, the Court of Queen's Bench has no power to do so. It has no power to order the making of an illegal rate." He was dealing there, however, with the poor rate pure and simple—in that passage undoubtedly—and in the view that I am taking the present case is clearly not affected by his decision; and I cannot think that, if the Exchequer Chamber had been dealing with the case of special expenses and not with a poor rate pure and simple, such a passage would have been found in the judgment in that case.

The case of *Burland* v. *Hull Local Board of Health*, 11 W. R. 33, 3 B. & S. 271, was also cited. But that case was commented on in *Worthington* v. *Hulton*, where the judges said: "All that was necessary for the decision of *Burland's case*, and all that can be considered as really decided by it was, that a plaintiff could not claim as of right a *mandamus* to enforce a judgment where there was great and unexcused delay in commencing the original action."

It seems to me that the court in that case did not think that there was a hard and fast rule as regards the non-granting of a *mandamus*, that the *mandamus* must be moved for within the rating year, but that they thought that excuses might be made for not moving for a *mandamus* within that time. I am of opinion that in this case there was ample excuse shewn for not moving before the debt was ascertained by the judgment, and I think that the appeal fails.

COLLINS, L.J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Robbins, Billing, & Co.*, for *Marsh, Son, & Calvert*, Leigh.

Solicitor for the respondents, *C. W. Saffell* for *W. Holland Owen*, Liverpool.

From Q. B. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 22, 25; March 1, 24.

PAGET v. PAGET. (a.)

Married woman — Separate property — Removal of restraint on anticipation — Charge for payment of husband's debts — Wife's right to indemnity — Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 39.

If a married woman raises money for payment of her husband's debts by means of a charge upon her separate property, the presumption in equity ordinarily is that her husband becomes bound to indemnify her; but this is merely an inference of fact, and may be excluded, without express waiver of her right, by the circumstances of the particular case.

Effect of orders creating such a charge upon property subject to a restraint on anticipation, and not reserving any right to indemnity, considered.

Where the money was raised for the purpose of providing means for both husband and wife, who were living together in an expensive style, and of averting the bankruptcy of the husband, which would have seriously affected the social position of both,

Held, on the whole facts of the case, that no presumption arose of a right to be indemnified.

(b.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

Decision of Kekewich, J. (ante, *p.* 232, [1898] 1 Ch. 47), *affirmed.*

Appeal from a decision of Kekewich, J. (reported *ante*, p. 232, where such facts as do not appear from the judgment of the Court of Appeal are sufficiently stated).

Renshaw, Q.C., and *A. & B. Terrell*, for Mrs. Paget, who appealed, cited *Huntingdon* v. *Huntingdon*, 2 Wh. & Tu. L. C., 6th ed., 1147; *Aguilar* v. *Aguilar*, 5 Madd. 414; *Hudson* v. *Carmichael*, 2 W. R. 503, Kay 613; *Ferguson* v. *Gibson*, L. R. 14 Eq. 379, 21 W. R. Dig. 6; *Caton* v. *Rideout*, 1 Mac. & G. 599; *In re Pollard's Settlement*, 44 W. R. 474, [1896] 1 Ch. 901 (affirmed 45 W. R. 18, [1896] 2 Ch. 552); *Bagot* v. *Oughton*, 1 P. Wms. 347; and the Conveyancing Act, 1881, s. 39.

Cozens-Hardy, Q.C., and *John Henderson* (*Warrington, Q.C.*, with them), for the defendant Mr. Paget.—The matter is fully discussed in *Clinton* v. *Hooper*, 1 Ves. jun. 173, 3 Bro. C. C. 200. There is nothing in the relation of husband and wife to support the plaintiff's claim. *Huntingdon* v. *Huntingdon* and similar cases should not be extended. This is a stale demand.

They also cited *Gray* v. *Dowman*, 6 W. R. 571.

Renshaw, Q.C., replied.

[VAUGHAN WILLIAMS, L.J., referred to *Lewis* v. *Nangle*, Amb. 150.]

Cur. adv. vult.

March 24.—LINDLEY, M.R., read the judgment of the court as follows: This is an appeal by the plaintiff, Mrs. Paget, against a judgment of Kekewich, J., dismissing an action brought by her against the defendant, her husband. The object of the action was to obtain a declaration that the plaintiff's husband was liable to indemnify her against two charges for £23,000 and £22,000 created by her on her separate property for the payment of his debts. The case is reported in [1898] 1 Ch. 47. The material facts are there set out, and it is unnecessary to repeat them at length here. It is sufficient to state that Mr. and Mrs. Paget were married in January, 1877. The husband was entitled to some reversionary property. His interest in this property was settled on the marriage, but this property produced no income to him. The wife was a lady of fortune, and the bulk of her property was settled on her for her life for her separate use without power of anticipation. The sum of £2,000 a year derived from her property was, however, settled on her husband for life, but so that if he attempted to alienate it, or if he became bankrupt, this annuity became payable to his wife. The other provisions of the settlement need not be referred to.

The husband and wife moved in good society, and large as their income was, they lived far beyond it. So recklessly extravagant were they that five years after their marriage £23,000 was sorely needed to relieve them from the pressure of debts for which the husband was legally liable, but which had been contracted to defray the expenses of the extravagant mode of living they both apparently enjoyed. It is impossible, in our opinion, to read the evidence in the case without coming to the above conclusion. The affidavits filed in support of the plaintiff's application in June, 1882, for the order to which we will refer presently, leave no doubt in our minds that these debts had been contracted, not for the purposes of the husband with which the wife had little to do, but in order to enable them both to live in the style they both thought suitable and perhaps necessary, to enable them to maintain and enjoy that high social position which they both so greatly desired. We attach more importance to what the wife said in these affidavits than we do to what she said some fifteen years later when examined in this action, and when she was endeavouring to support her present claim. In the affidavits sworn by her and her solicitor in 1882 there is nothing to lead to the inference that any of the debts which then had to be met were incurred by her husband for purposes of his own as distinguished from the purposes of himself and his wife as already stated. In her affidavit of June, 1882, the plaintiff referred to the debts, as contracted by her husband and herself, and as "our debts." It is true that she said that until 1880 her attention was not called to the fact that she and her husband were getting into difficulties; but her affidavit shows that after she knew of those difficulties all she really cared about was to increase the net income of herself and her husband, and to maintain their position in society. Her solicitor's affidavit leads to the same conclusion.

On the 28th of June, 1882, the plaintiff applied for and obtained an order under section 39 of the Conveyancing Act, 1881, enabling her to mortgage her life interest to secure £23,000 and interest and the premiums of a policy on her life. We do not think it necessary to refer in detail to the arrangements made for raising this sum, nor to its application when raised. It is sufficient to say that the money was raised as authorized by the order, and, except as to £3,600, was applied in paying the debts intended to be paid off by its means. The £3,600 not so applied, was misappropriated by the solicitor who raised the money. Five years afterwards another sum of £22,000 was wanted for similar purposes. Another application was made to the court, supported by further affidavits by the plaintiff and her then solicitor, and on the 11th of August, 1887, another order was made enabling the plaintiff to mortgage her life interest for £22,000 and interest, and for the premiums on another policy. This sum was accordingly raised and applied as authorized by the order. The plaintiff's affidavit filed on this occasion, the 28th of July, 1887, referred to what had been done in 1882, and to the misappropriation of £3,600, and to the fact that debts had been contracted to pay off the creditors who ought to have been paid off with that sum, and to the impossibility of avoiding bankruptcy and loss of social position if the arrangements then contemplated were not carried out. The plaintiff stated her desire to raise this sum of £22,000, and she spoke of the debts as "our debts," as she had done in 1882. She represented the debts to be hers quite as much as her husband's, and she treated his income and hers as one which it was desirable to maintain as far as possible.

These transactions of 1882 and 1887 having been completed, the question arises whether Mrs. Paget is entitled to be indemnified by her husband against these sums of £23,000 and £22,000 when called in, and in the meantime against the interest and premiums charged on her life interest by the above orders. The fact that the plaintiff and her husband were separated in 1893 explains how this controversy has arisen, but does not, in our opinion, affect the question of law which has to be considered. The plaintiff's rights, whatever they are, were not created in 1893, but arose in 1882 and 1887, although she might not care to enforce them whilst she and her husband lived happily together. What, then, were her rights in 1882 and 1887? In this action she has given evidence, and has stated that nothing was ever said about her giving anything to her husband; that he managed all her affairs, and she did not understand them and did not want to do so; that in making her former affidavit in 1882 she ought not to

when regard is had to the statements made by her in order to obtain them. It was urged that it could not be for her benefit that she should be deprived of her right to indemnity; but the force of this observation depends on the tacit assumption that she had the right. The question comes back to the proper inference to be drawn from all the facts, including the orders themselves. And bearing in mind that the plaintiff's paramount object was to save her and her husband's joint income, and thus, as far as possible, to preserve her and his position in society, and that this object might have been defeated if she reserved a right to be indemnified by him, the proper inference to be drawn is, in our opinion, adverse to the existence of such right. In our opinion, therefore, the appeal fails, and must be dismissed with costs.

Appeal dismissed.

Solicitors, *Leman & Co.; Dawes & Sons.*

From Q. B. Div. (Bkcy.) (A. L. Smith, Chitty, and Collins, L.JJ.) March 4, 18.

In re PIERS.
Ex parte PIERS *v.* READ. (*a.*)

Bankruptcy—Proof—Amendment—Secured creditor—Omission to value security owing to inadvertence—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Schedule I., r.* 10; *Schedule II., rr.* 11, 12, 13.

Rule 10 *of Schedule I. of the Bankruptcy Act*, 1883, *provides that "For the purpose of voting a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the court on application is satisfied that the omission to value the security has arisen from inadvertence."*

A secured creditor who, owing to false information, omits to value his security, does not omit to value such security from inadvertence within the meaning of the above rule.

A secured creditor who states in his proof the particulars of his security, and states that he considers it is worthless, does not (Collins, L.J., *dissenting*) *omit to value such security from inadvertence within the meaning of the above rule.*

Judgment of Wright, J. (ante, *p.* 207), *affirmed.*

This was an appeal from Wright, J. (*ante*, p. 207), who refused an application by C. P. Piers, the assignee of Thomas Turnbull, a secured creditor in the bankruptcy of Sir Eustace Piers, for leave to amend his proof by altering the valuation of his proof from *nil* to the full amount of the debt proved for. Turnbull, owing to false information as to the value of his security, had valued it at *nil*, and had voted at a meeting of creditors in respect of the full amount of the debt.

Wright, J., relying upon the case of *Ex parte Clarke, Re Burr*, 40 W. R. 608, came to the conclusion that the omission to value the security did not arise from "inadvertence" within the meaning of the Bankruptcy Act, 1883, Schedule I., r. 10. He held that what "inadvertence" means is the contrary to deliberate election, and he therefore refused the application.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

From this decision C. P. Piers now appealed.

From the facts of the case it appeared that on the 1st of October, 1890, a receiving order was made against Sir Eustace Piers, who was subsequently adjudicated a bankrupt. In the same month Thomas Turnbull sent in his proof against the estate, which, so far as material, was as follows: "The said Sir Eustace Piers was at the date of the receiving order—viz., the 1st of October, 1890—and still is justly and truly indebted to Thomas Turnbull in the sum of £494 5s. for professional services rendered, work done, and fees payable by the said Thomas Turnbull as solicitor for and on behalf of the above-named bankrupt at his request, for which sum I say that I have not received any manner of satisfaction or security whatsoever, save and except a charge upon certain debentures which is considered worthless." This charge was a third mortgage of debentures of a company, Read, the respondent, being the first mortgagee. Turnbull came to the conclusion that his security was worthless on hearing that Read had appointed a receiver under the terms of his mortgage deed, and that he had stated in the bankruptcy proceedings that his mortgage was not sufficient to cover the debt. It appeared, however, on an action for account being brought in 1896 by the second mortgagee against Read, that the latter had been largely overpaid. In March, 1896, Turnbull assigned his debt and the security to C. P. Piers, who in 1897, on hearing that the security was good, applied to the registrar in bankruptcy for leave to amend his proof under Schedule II., rule 13, of the Bankruptcy Act of 1883, from *nil* to the full amount. This application was granted. Read, who was a creditor in respect of other debts, applied to the registrar to set this order aside, which he did.

Piers then made the aforesaid application to Wright, J., and, on his refusal to make the order, Piers now appealed.

By the Bankruptcy Act, 1883, it is provided as follows:

Schedule I., rule 10: "For the purpose of voting a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the court on application is satisfied that the omission to value the security has arisen from inadvertence."

Schedule II., rule 11: "If a secured creditor does not either realize or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

Rule 12 (*a*): "Where a security is so valued, the trustee may at any time redeem it on payment to the creditor of the assessed value."

Rule 13: "Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing to the satisfaction of the trustee, or the court, that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but any such amendment shall be made at the cost of the creditor, and upon such terms as the court shall order, unless the trustee shall allow the amendment without application to the court."

McIntyre, for the appellant.—There was here an

omission to value the security through "inadvertence." That word does not only mean accident or mistake. This case comes within rule 10 of Schedule I.

He cited *Ex parte Clarke*, 40 W. R. 608, and *In re Lister & Co.*, 40 W. R. 589, [1892] 2 Ch. 417.

Cozens-Hardy, Q.C. (*E. A. Nepean* with him), for the respondent.—Rule 10 applies to an entirely different state of facts to those which exist here. It relates only where there is an omission to value at all. There was here no omission to value within that rule. The security was valued, and valued as worthless. Even if there was an omission to value, the omission did not arise from "inadvertence."

McIntyre replied.

Cur. adv. vult.

March 18.—A. L. SMITH, L.J., read the following judgment: The question raised upon this appeal is whether Mr. Turnbull, who was a creditor of Sir Eustace Piers, a bankrupt, has omitted to value his security, and such omission has arisen from inadvertence within the meaning of rule 10 of Schedule I. of the Bankruptcy Act, 1883. Wright, J., decided against Mr. Turnbull's assignee, Mr. Piers, who appeals. Rule 10 is as follows: [His lordship read the rule.] Sir Eustace Piers was adjudicated a bankrupt upon the 1st of October, 1890, and Mr. Turnbull, upon the 3rd of October, 1891, sent in his proof against the estate, which, so far as material, was as follows: [His lordship read the proof above set out, and proceeded:] Having thus sent in his proof, Mr. Turnbull in March, 1892, voted at a meeting of creditors in respect of his whole debt of £494 5s. Mr. Turnbull's assignee in the year 1897 for the first time contended that when Mr. Turnbull sent in his proof upon the 3rd of October, 1891, he omitted to value his security, and that this arose from inadvertence.

Now, pausing here, can it be truly said that Mr. Turnbull, when he sent in his proof upon the 3rd of October, 1891, omitted to value his security? It seems to me that he did not, for he then deliberately elected to assess the value of his security as being worthless, and to prove against the estate of Sir Eustace Piers in respect of his whole debt, and having done so proceeded to vote at a meeting of creditors as being a creditor against the estate for the whole amount of his debt. It appears to me that he then omitted nothing. He assessed the value of his security at what he then believed to be its value—*i.e.*, as worthless. Assessing the value of a security as worthless is equally an assessment as if the assessment had been of some value. This, in my opinion, suffices to determine the present case against the appellant.

But assuming that Mr. Turnbull had omitted to value his security, which I think he had not, did he do so by inadvertence? What is said is this: that Mr. Turnbull was induced, in October, 1891, to assess the value of his security as being worthless by information which led him to believe that it was so, but that by reason of a litigation which has taken place in subsequent years it has been found out that his security is not worthless, and in 1897 the appellant sought to amend the proof by valuing his security at £494, and to adhere thereto rather than to prove, as had been done, against the estate for his debt. The finding out by subsequent events that in October, 1891, Mr. Turnbull was in error in electing to assess as worthless his security is not, in my opinion, "inadvertence" within the meaning of the rule. This word points to forgetfulness or accident, and not, as Vaughan Williams, J., well puts it in *Ex parte Clarke*, 40 W. R. 608, to the case of a creditor having the choice before him of what he will do and balancing the advantages and deliberately electing to prove and abandon his security. I agree with Wright, J., that the word "inadvertence" in this rule means the opposite of deliberate election, and that it does not cover a deliberate election, though based upon false grounds. What Mr. Turnbull did in October, 1891, did not arise either from forgetfulness or accident though it may have been a mistake. But this is not the word in the rule, and when I see that in rule 13, Schedule II., the Legislature has used the words "mistaken estimate," it shows me that it meant by "inadvertence" something other than a mistake. If North, J., in the case of *In re Lister & Co.*, 40 W. R. 589, [1892] 2 Ch. 417, intended to hold that the words "inadvertence" and "mistake" were convertible terms, I cannot agree with him. In my judgment, the appellant fails to show that Mr. Turnbull has either omitted to value his security, or that he did so by inadvertence, and the appellant must establish both to bring himself within the rule.

I say nothing about the length of time which has elapsed nor the other circumstances of this case, for the appellant does not, in my judgment, bring himself within the rule. I agree with the judge of the court below, and the appeal must be dismissed with costs.

CHITTY, L.J., read the following judgment: I am of the same opinion. I think that Wright, J., came to the right conclusion and on the right grounds. Turnbull in his proof mentioned his security, and stated that it was considered worthless. Did he omit to value his security? I think not. A man whose mind is directed to the question of the value of a thing, and who says, "I value it at nothing," nevertheless in my opinion values it. I am unable to read this 10th rule of the 1st schedule as applying only to the case of the creditor putting some positive value on his security. I read the word "balance" in the rule as applying to the case where he does put some positive value on the security, and not as restricting the latter part of the rule to those cases only where a positive value is placed on the security. This view is supported by reference to the 12th rule of the 2nd schedule. If the creditor puts a value on his security, the trustee may at any time redeem the security on payment of the value which the creditor has put upon it. Where he values it at nothing, and votes for his whole debt, his security is deemed to be surrendered, unless the court grants relief under the 10th rule of the 1st schedule. By valuing the security at nothing, the creditor deprives the trustee of the right to redeem which he would possess if some positive value had been put on the security.

Then the further question arises whether the omission (supposing there was an omission) to value the security, did in fact arise from inadvertence on the part of Turnbull. I think it did not. It is said that, when he stated that his security was worthless, he was acting on information which he has since discovered to be erroneous. Is this an omission arising from inadvertence? I think not. His mind was addressed to the point. He knew he had two funds to which he could have recourse: his third mortgage, either in the whole or in part or not at all, and the bankrupt's estate either for the whole or some part or no part of his debt. He seems to me to have deliberately elected to have recourse to the estate for the whole of his debt. I agree with what Vaughan Williams, J., said on this subject, when sitting in bankruptcy, in *Ex parte Clarke*, and also with the proposition stated by Wright, J., in the present case—namely, that a deliberate election founded on misinformation as to the facts, is not inadvertence. *In re Lister & Co.* is distinguishable. There the creditor in his proof did not mention his security or put any

value on it. He considered, though erroneously, that his security did not affect the bankrupt's estate.

The truth is that there are two minds brought to bear on this matter—the mind of Turnbull and the mind of Piers, his assignee. Turnbull carried in his proof as long ago as October, 1891, for his whole debt of £494 5s., and voted upon it in March, 1892. He rested satisfied with his proof until March, 1896, when he assigned his debt and his security (if he had any) to Piers, son of the bankrupt, for £30 paid and a covenant to pay £20 more. The avowed object of Piers, as stated by his counsel at the bar, is to assist his father in getting his bankruptcy annulled by amending Turnbull's proof and striking out the proof of the debt altogether. The application is founded on an allegation that the value of the security, as since discovered, is equal to the debt. The amount due to the first mortgagee, Read, on his security, has apparently been greatly reduced, but not finally ascertained. The amount due to the second mortgagee, Eley, on his security is not stated. It has not been ascertained. Eley is solicitor for Piers. I am not satisfied by the evidence that Turnbull's security is now of a value equal to the amount of the debt. No doubt for his ulterior purpose Piers is now willing to estimate Turnbull's security (if he had one to transfer) at that amount. One of his objects is to attack Read in the protracted litigation that is going on, Read holding a fourth mortgage on the same property. These facts show that there has been a change of mind and of purpose brought about by Piers. They tend to confirm me in the opinion that there has not been any omission arising from inadvertence on Turnbull's part.

COLLINS, L.J.—I am of the same opinion. I agree that upon the facts of this case it cannot be brought within the meaning of the word "inadvertence."

As regards the other point—namely, whether the words "omission to value" contained in rule 10 of Schedule I. may not cover both the case where there is a valuation at *nil* and where there is no valuation at all. I confess I am by no means satisfied that the Legislature did not intend those words to cover both these cases. I cannot think that it was intended that two acts so very much alike should lead to such totally different results, and that it was intended to penalize one of two courses which practically amount to the same thing. According to the respondent's contention it would seem that if the creditor values his security at nothing, he cannot, on the one hand, benefit under the provision with regard to omission to value through inadvertence; and, on the other hand, he cannot benefit under rule 13 of Schedule II. because that rule seems only to apply where there has been a valuation at a specific amount. Looking at the whole scheme of the rules I am inclined to think that a valuation at *nil* is equivalent to an omission to value at all. It is clear that under Schedule II. the security must be valued at a positive value so as to enable the trustee, if he thinks fit, to redeem it. But rule 10 of Schedule I. appears to me to apply to the case where a creditor votes in respect of his whole debt because he puts no positive value upon his security. However, it is not necessary here to decide this point, as I agree that the omission on the part of the appellant to put any value on his security did not arise from inadvertence. If a case should arise where a creditor, through inadvertence, values his security at nothing, I should be inclined to hold that it would come within the meaning of the words in rule 10 of Schedule I.

Appeal dismissed.

Solicitor for the appellant, *W. Eley.*

Solicitor for the respondent, *Thomas Edwards.*

High Court of Justice.

Chan. Div. Stirling, J. — March 24.

In re GIBBS.
THORNE *v.* GIBBS. (*a.*)

Inland revenue—Estate duty—Settlement estate duty—Settled legacy—Duty payable out of residue—"The deceased"—Finance Act, 1896 (59 & 60 *Vict. c.* 28), *ss.* 19, 24, 39.

By section 19 *of the Finance Act,* 1896, *the settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall* (*unless the will contains an express provision to the contrary*) *be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate.*

Held, that this section is not retrospective, and does not apply to the estate of a testator who died before the commencement of the said Act of 1896.

[In re Webber, Gribble *v.* Webber, 44 *W. R.* 489, [1896] 1 *Ch.* 914, *followed.*

Richard Gibbs, who died on the 31st of May, 1896, by his will dated the 2nd of December, 1892, bequeathed a sum of £150,000 upon certain trusts for the benefit successively of his widow, his daughter, and his granddaughter, and he also bequeathed one moiety of his residuary personal estate upon trust for certain charities.

The testator's estate was being administered by the court in an action brought by the trustees and executors of his will.

Pursuant to an order made on the further consideration of the action, settlement estate duty to the amount of £1 546 4s. 8d. had been paid upon the legacy of £150,000 out of a balance certified to be due from the plaintiffs in respect of the testator's personal estate, but without prejudice to the question out of what fund this duty should ultimately be paid. A summons was now taken out by the plaintiffs upon the second further consideration of the action to determine the question whether the duty should be borne by the settled legacy or by the residuary personal estate.

Buckley, Q.C., and *Medd,* for the applicants.—The question arises from the fact that the Finance Act, 1896, does not by section 24 (the interpretation section) expressly define the expression "the deceased" which is used in section 19 of that Act; but by section 39 thereof it says that Part IV. of that Act shall be construed together with Part I. of the Finance Act, 1894. Now, by section 22, Part I., of the Act of 1894, the expression "the deceased" means "a person dying after the commencement of this part of *this* Act," that is, after the 1st of August, 1894. We therefore submit that section 19 of the Act of 1896 is retrospective, and that although the testator died before the 1st of July, 1896, the date fixed for the commencement of Part IV. of the Act of 1896, yet section 19 of that Act is applicable. The Act of 1896 was intended to alter the rule laid down in *In re Webber, Gribble* v. *Webber,* 44 W. R. 489, [1896] 1 Ch. 914, and the construction we contend for carries out that object.

Upjohn, Q.C., and *Rashleigh,* for the widow.—*In re Webber, Gribble* v. *Webber* applies, and the present case is unaffected by the Act of 1896; "the deceased" means the same thing as "deceased person," which expression is expressly interpreted to mean a person dying after the 1st of July, 1896.

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

Grosvenor Woods, Q.C., and *R. J. Parker*, for the daughter and granddaughter.

Sir R. E. Webster, A.G., and *Ingle Joyce*, for the charities.

Buckley, Q.C., replied.

STIRLING, J.—The point which arises on this summons is a short one, and the question has been raised by reason of some obscurity in the enactments to which I have been referred. The Finance Act, 1894, was passed in the year 1894, and imposed certain duties called estate duty and settlement duty. In the beginning of the year 1896 it was decided by North, J., in the case of *In re Webber, Gribble* v. *Webber*, that, "When pecuniary legacies or shares of the residue of a testator's personal estate are settled by his will no part of either the estate duty or the settlement estate duty imposed by the Finance Act, 1894, is to be borne by the settled legacies or shares, but the whole of those duties must be borne by the general residue." I am bound, I conceive, by that decision; and at any rate the Legislature appears from the Act which I have now to deal with to have adopted that as a correct interpretation of the Act of 1894, and it has not been argued before me on the present occasion that it is otherwise than correct. Therefore I assume, as I think I am bound to assume, that North, J., correctly interpreted the Act of 1894, and that but for the Act of 1896 the settlement estate duty would in the present case have been payable out of the general residue of the testator's estate. The question is whether the Act of 1896 has made any difference. [His lordship read sections 19 and 24, and continued:] Now let us look for one moment at that Act as it stands. In section 19 the expression "deceased person" does not occur; the expression which is used is "the deceased." But if one were left simply to interpret this Act standing alone, I do not think that anybody, seeing that the Legislature has defined what it means by "deceased person," would suppose that there was any difference to be drawn in interpreting the Act by reason of the fact that in one section of it the words "deceased person" or "the deceased person" are used, and in another section the words "the deceased." It is difficult to suppose that the rule of interpretation laid down for the expression "deceased person" was to vary when the Legislature in another portion of the Act chose to use the expression "the deceased."

No doubt a certain amount of difficulty is caused by the fact that in section 39 it is provided that Part IV. of the Act of 1896 shall be construed together with Part I. of the Finance Act of 1894; and section 22 of that Act says this: "In this part of this Act, unless the context otherwise requires, the expressions 'deceased person' and 'the deceased' mean a person dying after the commencement of this part of this Act." The Legislature has there given interpretations to be placed both on the expression "deceased person" and "the deceased," but it draws no distinction between the two; they are both to be treated as meaning the same thing—namely, a person dying after the commencement of that Act—which was in August, 1894. Why, if I read and construe the Act of 1896 as part of Part I. of the Finance Act, 1894, I am to draw any distinction between "deceased person" and "the deceased," I fail to see. It has been ingeniously pointed out that there are certain sections in the Act of 1896 to which the use of the words "deceased person" is confined, and there are certain other sections in which the words "the deceased" are used, and it is said, and it may be possible, that the Legislature meant that there should be a difference between them; but I cannot see that the Legislature, if that were the meaning, has sufficiently indicated its intention. It seems to me, therefore, that I must put the same interpretation on the words "the deceased" in section 19 as is given to the words "deceased person" in section 24, and that in this case the old rule under the Act of 1894, as settled by the case of *In re Webber, Gribble* v. *Webber*, must be applied.

Solicitors, *Simpson & Co.; Smiles & Co.; Treasury Solicitor.*

Chan. Div. }
Romer, J. } April 22.

In re RITSON.
RITSON *v.* RITSON. (*a.*)

Partnership—Deposit of title-deeds by a partner to secure overdraft of firm—Specific devise of real estate charged—Partnership assets sufficient—Locke King's Act (17 & 18 *Vict. c.* 113).

A testator who was a partner in a shipbuilding firm had deposited at a bank the title-deeds of certain parts of his private real estate and signed a memorandum of charge of the said real estate, to secure the partnership overdraft. By his will he specifically devised the said real estate. The partnership assets were, at the testator's death, sufficient to pay the firm's debts.

Held, that the charge only extended to the debts of the partnership, and that, as the partnership assets were sufficient to pay these, the specific devisees of the real estate charged could not be called upon to pay the charge.

Adjourned summons.

This was a summons taken out by the executors of the testator, John Ritson, for the determination of questions arising in the administration of his estate.

The testator to the time of his death on the 15th of September, 1897, had been in partnership with his brother, Thomas Smith Ritson, as timber merchants and shipbuilders, but there were no articles of partnership.

In August, 1896, the testator had deposited with the Cumberland Union Bank the title-deeds to certain rent-charges issuing out of property in Liverpool belonging to him personally, amounting to £750, as security for the partnership account with the bank, signing at the same time a memorandum of deposit.

The charge contained in this memorandum was in the words following: "I, John Ritson, of Ellen Bank, Maryport, in the county of Cumberland, Esquire, do hereby declare that the title-deeds and writings, a list of which is contained in the schedule hereto, relating to the hereditaments situate at Liverpool, in the county of Lancaster, and to the rent-charges thereon have been delivered and deposited by me to and with the Cumberland Union Banking Co. (Limited) for securing to the said banking company, their successors and assigns, the payment of all monies (not exceeding £ , together with interest and other banking charges and expenses (if any) in respect thereof as hereinafter provided) which now are or which shall from time to time be or become due and owing to the said banking company, their successors or assigns, by me and Thomas Smith Ritson, trading under the style or firm of Ritson & Co., our heirs, executors, or administrators, either alone or jointly, or together with any other person or persons being or not being either now or at any time or times hereafter a partner or partners in business with us either in account current or in respect of bills or notes accepted, discounted, or paid, or for

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

loans, credits, and advances made or granted, or for interest, commission, or any other usual or lawful charges, or for or in respect of any other matter, transaction, or account whatsoever, together with all costs and expenses which may be incurred in respect of the premises. And I do hereby as beneficial owner charge all the said hereditaments and premises and the said rent-charges and all other hereditaments, if any, belonging to me or over which I have any disposing power to which the said deeds and writings or any of them relate, with the payment of all monies due or to become due as aforesaid."

Then followed the usual undertaking by the said John Ritson, his heirs, executors, or administrators, to execute a legal mortgage if required to do so.

By his will in 1897 the testator devised the ground-rents arising and payable out of messuages and hereditaments in Liverpool, and included in the said memorandum of deposit, subject to a life interest to his widow, to his son Robert Ritson, the first-named defendant, absolutely. The residue of his estate, real and personal, subject to the widow's life interest, the testator gave among his other children, who were made the other defendants.

The testator did not exempt the said rent-charges from the charge to the bank. At the time of his death the banking account of the partnership was overdrawn to nearly £10,000; and the testator's private account, as well as that of his brother, the other partner in the firm, was also considerably overdrawn.

The chief questions to be decided were whether the memorandum of deposit extended so as to cover the private account of the testator, and whether such part of the amount due from the partnership to the bank and secured by the said memorandum as was payable by the estate of the said testator ought to be paid out of the real estate of the said testator included in the said memorandum, or out of his share of the assets of the said partnership.

R. F. Norton and *Christopher James*, for the parties.

ROMER, J.—I personally feel no difficulty about this question. The debts of the partnership are not the testator's debts. The assets of the partnership are not his assets. Nor is the devisee claiming to have the mortgage debt satisfied out of the testator's personal estate. The case, therefore, is not one "between the different persons claiming through or under the deceased person" within the words of section 1 of Locke King's Act. The only right of the executors is to have paid over to them the testator's share of the surplus assets of the partnership. And all the devisee says is that the partnership assets primarily liable to discharge the mortgage debt shall be accordingly made to pay it, and he is insisting on that, just in the same way as the surviving partner could have insisted on the partnership assets being applied to paying off partnership debts. If the surviving partner had done that, I fail to see how when he had done so, that the executors would have had any right to make the devisee account. I have said before during the course of the argument, and I repeat it now, that I am not deciding what ought to have been done if the partnership assets had not been sufficient to pay the debts in full. If the bank could not have obtained payment a very different question would have arisen. The executors might then have said to the devisee, "You must indemnify us against the bank's claim." I have no difficulty in holding that the specific devisee, under the circumstances of the present case, takes the real estate in question without the burthen of satisfying the overdraft.

Solicitors, *Speechly, Mumford, & Rodgers*, for *Hayton & Simpson*, Cockermouth.

Chan. Div. }
Romer, J. } April 19, 20.

In re WHITE'S CHARITIES.

CHARITY COMMISSIONERS *v.* LONDON CORPORATION. (*a*)

Vendor and purchaser—Soil of highway—Conveyance of adjacent land—Presumption of highway passing ad medium filum viae *—Street in town—Rent-charge issuing out of—Liability—Charitable Trusts Recovery Act*, 1891 (54 & 55 *Vict. c.* 17), *s.* 3.

The rule of construction—that where there is a conveyance of land (even although it is described by reference to a plan, and by colour, and by quantity), if it is said to be bounded by a public thoroughfare, half of the road passes in the absence of expressions or circumstances indicating a contrary intention—applies to conveyances of land adjacent to streets in towns.

Where the conveyance is of land belonging to the corporation of the town, the rights of the public over the highway are not a reason for presuming a contrary intention on the part of the corporation.

The rule applies, where the conveying party owns the soil beyond the medium filum viae (*and*, semble, *where his ownership does not extend thereto*), *to pass whatever interest he has in the soil of the highway.*

Dictum of Cockburn, C.J., *in* Leigh *v.* Jack, 28 *W. R.* 452, 5 *Ex. D.* 264, *at p.* 270, *disapproved of.*

Summons.

This was an application by the Charity Commissioners, under the provisions of section 3 of the Charitable Trusts (Recovery) Act, 1891, and rule 2 of the Rules of the Supreme Court (Charitable Trusts Recovery), 1892, for an order directing the defendants, the Corporation of London, or (alternatively) the defendant Hy. Thos. Tubbs, to pay certain amounts alleged to be due in respect of two annual rent-charges of £7 and £6 12s. 6d. respectively, issuing out of land whereon the messuage known as 24, Shoe-lane formerly stood. These rent-charges were admitted to be charged by the will of T. White, dated in 1619, upon the premises then known as 24, Shoe-lane, and the only question argued was whether the corporation or Tubbs were now liable to pay them.

The premises were acquired by the corporation in 1825, under statutory powers to acquire property for a market known as Farringdon Market—see the Farringdon Market Act, 1824 (5 Geo. 4, c. cli.)—and were with other property conveyed to them by the freeholder, subject to the above and other rent-charges. The property, formerly 24, Shoe-lane, was thrown by them into the roadway so as to widen Shoe-lane and Stonecutter-street.

In 1892 the corporation under statutory powers (for which see the London Central Market Act, 1886, 49 Vict. c. viii., s. 14), sold the site of Farringdon Market to Tubbs, subject to particulars and conditions of sale which showed that the land was sold subject to annual rent-charges amounting in the aggregate to £28 16s. 6d., but not upon what particular part of the land each rent-charge comprised in such aggregate was charged, and the purchaser was barred thereunder from requiring an abstract of title or production or delivery to him of any deeds.

The property was conveyed to the purchaser or his nominees in several plots, and each plot was conveyed "subject to such part or parts, if any, of the said rent-charges or any of them as may be charged upon the said hereditaments and premises hereby conveyed." None of the conveyances contained any covenant for payment of the rent-charges or for the

(*a*.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

indemnification of the corporation. Part of the property, which was conveyed to Tubbs himself, abutted on Shoe-lane and Stonecutter-street, and the centre line of Stonecutter-street, where this property abutted on it, ran through the site of the former messuage, 24, Shoe-lane.

Vaughan Hawkins, for the applicants.—The procedure is under the Charitable Trusts (Recovery) Act, 1891, and the rules thereunder: see Annual Practice, vol. 2, p. 372; and the question is, which of the respondents is liable to pay these rent-charges.

Neville, Q.C., and *A. J. Allen*, for the corporation.—Tubbs is legally and equitably liable. The presumption is that the property to the middle of the adjacent street passed to him under the corporation's conveyance: *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133, p. 145, 35 W. R. Dig. 71, *per* Cotton, L.J.; and he therefore became owner of part of the land charged. Further, Tubbs is under an equitable obligation to indemnify the corporation.

Farwell, Q.C., and *Sheldon*, for the defendant Tubbs.—There is no authority for applying the presumption to the soil of a street in a town. *Beckett* v. *Leeds Corporation*, 20 W. R. 454, L. R. 7 Ch. App. 421, against so applying it. Moreover, the ownership of is the corporation extends beyond the *medium filum*, so that the case does not come within the ordinary rule at all.

They also cited *Doe* v. *Pearsey*, 7 B. & C. 304; *Leigh* v. *Jack*, 28 W. R. 452, 5 Ex. D. 264, p. 270, *per* Cockburn, C.J.; and *Plumstead Board of Works* v. *British Land Co.*, 23 W. R. 133, 634, L. R. 10 Q. B. 16, 203, *per* Blackburn, J., at p. 24. [ROMER, J.—The *dictum* of Cockburn, C.J., in *Leigh* v. *Jack* that the presumption does not apply to recent conveyances where there is evidence available on the point is not in accordance with what is now the settled law on the subject.]

It was also contended that the corporation were not authorized to part with the soil of the street, and in the interest of the public must be presumed to have intended to retain it.

ROMER, J. [after stating the facts and referring to the several Acts of Parliament under which the corporation bought, applied, and finally sold the property, continued:] It is not denied that these rent-charges are payable, and the question is as between the defendants whether the corporation or Tubbs is liable.

It was, no doubt, difficult for the corporation to say out of what lands the several rent-charges included in the £28 16s. 6d., subject to which the whole property was sold, respectively issued, and for that reason the land was sold subject to their aggregate amount in the manner stated. One thing is clear, as between the corporation and Tubbs, Tubbs ought to pay. And I am able to do justice, for, in my opinion, Tubbs is legally liable.

The corporation in the conveyances to Tubbs conveyed portions of a site which abutted on Shoe-lane and Stonecutter-street, and the part of the highway which abutted on the property covered the site of the houses on which the two rent-charges were originally imposed; so that if the conveyance to him included that part of the highway which was at the time vested in the corporation, he became liable under the circumstances stated. The corporation, at the date of the conveyance, owned at any rate a moiety of the site of 24, Shoe-lane. The general rule as to the presumption of the highway passing *ad medium filum* was stated by Cotton, L.J., in *Micklethwait's case*, 33 Ch. D., at p. 145, and, whatever the origin of the doctrine, the law is now settled. Cotton, L.J., there said: "The rule of construction is now well settled that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to show that it is not the intention of the parties."

It is suggested that the rule does not apply to streets in towns. Why should it not? Where is the line to be drawn? At country towns, small towns, villages, hamlets? Where is the limit to the suggested exception? In my opinion the rule does apply to streets in towns. Is there anything, then, in the case before the court to rebut the presumption? I cannot find anything. The site of Shoe-lane was acquired under the same Act as the site of Farringdon Market, both for the same purpose. As owners of the market the corporation had remained owners of the soil of Shoe-lane. They are not the owners of the property opposite to the property sold to Tubbs. Being authorized to sell the market, they are authorized to sell the soil of the adjacent street, and the inclusion of the soil of the highway in the sale under the powers conferred is justified. Under these circumstances there is no reason for presuming that the corporation wished to retain the soil. The public are not prejudiced by its sale; they will enjoy the use of the highway just the same. The circumstances of the purchase by Tubbs, the sale by the corporation, the difficulties in ascertaining what parts of the property were charged, are, in my opinion, circumstances tending to support the presumption. It is suggested that the corporation owning the soil beyond the *medium filum* tends to rebut. I feel no doubt that if A. owns houses on one side of the highway and B. on the other, the soil of the highway not being evenly divided between them but as to the greater part owned by A., supposing that A. conveyed his houses as bounded by the highway, the presumption would pass A.'s part of the highway. The ordinary presumption is ownership *ad medium filum* on the part of the conveying party. If the extent of his ownership be not an admitted fact, the sole effect is—not that the presumption is negatived, but—that it passed whatever interest the conveying party had.

I therefore hold that the defendant Tubbs is legally liable in respect of the rent-charges.

Solicitors, *Clabon; H. H. Crawford; Leonard Tubbs.*

Q. B. Div.
(Wills and Kennedy, JJ.) } May 11.

KINNIS v. GRAVES. (*a*.)

Local government—Building line—Information—Dismissal—Justices equally divided—Continuing offence—Public Health (Buildings in Streets) Act, 1888 (51 & 52 *Vict. c.* 55), *s.* 3.

On the 5th of March, 1897, *the appellant was charged, in an information before justices, with an offence under section 3 of the Public Health (Buildings in Streets) Act*, 1888. *The justices, being equally divided, dismissed the information upon that ground. On the 19th of November*, 1897, *the appellant was charged with continuing the acts which formed the subject-matter of the first information.*

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Held, that the justices who heard the first information must be taken to have decided that no offence was committed, and that the appellant was therefore entitled to an acquittal upon the second information.

Case stated by justices under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.

On the 19th of November, 1897, an information was laid against the appellant under section 3 of the Public Health (Buildings in Streets) Act, 1888, charging him that on the 6th of March, 1897, having unlawfully and without the written consent of the urban authority erected and brought forward a certain house in a certain street beyond the front main wall of the house or building on either side thereof in the same street, he did continue the said offence for fifty days on and after the 6th of March, 1897, and after he had received a written notice to set back the building in accordance with the proper building line.

On the 5th of March, 1897, an information was laid against the appellant under the same section, charging him that on the 30th of December, 1896, he did unlawfully and without the written consent of the urban authority erect and bring forward a certain house in a certain street beyond the front main wall of the house or building on either side in the same street and did continue the said offence for twenty-eight days after he had received a written notice to set back the building in accordance with the proper building line.

The last-mentioned information was heard on the 13th of March, 1897, by a bench of justices who, in the result, were equally divided, half of them being in favour a conviction and the remainder in favour of an acquittal. Being of opinion that there could be no conviction except by a majority, the justices dismissed the information on that ground, with costs. A case for the opinion of the High Court was granted but not proceeded with.

The matters in respect of which the appellant was charged in the information laid on the 19th of November, 1897, were identical with those in respect of which he was charged in the information laid on the 5th of March, 1897, with the exception that the former information was for continuing the offence charged in the latter information.

The justices who heard the information laid on the 19th of November, 1897, convicted the appellant, granting a case for the opinion of the High Court.

Section 3 of the Public Health (Buildings in Streets) Act, 1888, provides as follows: "Section 156 of the Public Health Act, 1875, is, save as hereinafter mentioned, hereby repealed, and in lieu thereof it is hereby enacted that it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same. Any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice in this behalf from the urban authority."

Ashton, for the appellant.—The justices who heard the first information, being equally divided, rightly dismissed the information: *Reg.* v. *Ashplant*, 52 J. P. 474. That information was heard and determined and adjudicated on: *Ex parte Evans*, [1894] A. C. 16. The second information dealt with a continuance of that which had already been adjudicated on in the first information. It cannot be an offence to continue to do that which has been held not to be an offence.

H. C. Richards, for the respondent.—The decision of the bench on the first information did not amount to an acquittal.

WILLS, J.—The bench having been equally divided, we must hold, on the authority of the cases cited, one of which was decided by a Divisional Court and the other in the House of Lords, the effect of what they did to be a properly constituted dismissal. I do not think the justices took a wise course. What we should have done in the High Court would have been to adjourn the case and reconstitute the court so as to obtain an effective decision. But that was a matter entirely in their discretion. The case having been dismissed we must take it that there was no offence.

It is suggested by the learned counsel for the respondent that after fifty days he could proceed against the appellant for continuing the offence with which he was originally charged. That would be to treat as an offence that which had been held to be no offence and so, in effect, to alter the first decision. The first decision stands as a decision. It was a decision made between the same parties and with regard to the same subject-matter. That according to all authority is an end of the matter. I have nothing to say as to the merits. My first impression is not against the view taken by the magistrates who heard the second information. At all events the matter before them had been decided by a competent tribunal, and there was no more to be said. The appeal will be allowed with costs and the conviction quashed.

KENNEDY, J.—I agree.

Conviction quashed.

Solicitors for the appellant, *Martin & Co.*, for *Albert Neve*, St. Leonards.

Solicitors for the respondent, *Langham, Son, & Douglas*, Hastings.

Court of Appeal.

From Q. B. Div.
(A. L. Smith and Chitty, L.JJ.) April 27.

CHAPLIN v. PUTTICK & SIMPSON.
LAING (*Claimant*). (*a*.)

Practice — Evidence — Inspection — Examination of witnesses on commission — Order to send abroad property in dispute—Jurisdiction—R. S. C., 1883, *ord.* 37, *r.* 5; *ord.* 50, *r.* 3.

In interpleader proceedings as to the right to the possession of a stamp album, one of the claimants applied for an order that the album might be sent abroad for inspection by witnesses who were to be examined there on commission.

Held, that the court had jurisdiction to make such order under ord. 37, *r.* 5, *and ord.* 50, *r.* 3.

Leader *v.* Smyth, 8 *Times L. R.* 612, *overruled.*

Appeal from an order of Grantham, J.

The action was brought by the plaintiff Chaplin to recover possession of a stamp album from the defendants Puttick & Simpson, who were auctioneers.

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The plaintiff alleged that the album belonged to him and had been stolen from him at Johannesburg, in South Africa. A claim was also made to the album by the claimant Laing, who had placed it in the hands of the defendants to be sold, and who alleged that he had bought it in London.

The defendants having interpleaded, an interpleader issue was directed to be tried between Laing and Chaplin.

On the application of Chaplin an order was made for a commission to be sent out for the examination of witnesses on his behalf at Johannesburg. A further application was then made by Chaplin, on which Grantham, J., made an order that the album should by sent by post to the British vice-consul at Johannesburg for inspection by the witnesses who were to be examined there, and that it should be returned to the auctioneers.

From this order Laing appealed.

G. A. Blackwell, for the appellant.—The court has no jurisdiction to order property which is the subject-matter of the dispute in an action to be sent abroad. In *Leader* v. *Smyth*, 8 Times L. R. 612, the plaintiff complained that the defendant had accused her of stealing a brooch, and the defendant having justified, the plaintiff applied for an order that the brooch might be sent abroad to be identified by a witness on commission as being a brooch which the plaintiff had in her possession before the date of the alleged theft. The court held that there was no jurisdiction to make such order.

Hansell, for the respondent.

Colam, for the stakeholders.

A. L. SMITH, L.J.—I am of opinion that the court has jurisdiction to make this order. Ord. 37, r. 5, says that "the court or judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge or any officer of the court, or any other person, and at any place, of any witness or person." Those words are very wide and clearly cover the present case. I am also of opinion that the court has jurisdiction to make this order under ord. 50, r. 3, which says that "it shall be lawful for the court of a judge, upon the application of any party to any cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein." With regard to *Leader* v. *Smyth*, I think it is impossible to read that case without seeing that my brother Mathew simply deferred to the opinions which had been expressed by other judges, and that, if he had followed his own opinion he would have held that the court had jurisdiction to make the order which was asked for. I am prepared to say that in my opinion that case was wrongly decided.

CHITTY, L.J.—I am of the same opinion. I think that the court has jurisdiction to order the persons who have the custody of this album to send it out to the British vice-consul at Johannesburg to be placed before the witnesses who are to be examined with regard to it. I do not see that the fact that the album is the thing in dispute in the action prevents our having jurisdiction. Ord. 37, r. 5, gives power to make "any order" for the examination of a witness. An order for a commission for the examination of the witnesses abroad has been made and is not appealed against; and I think that the order which we are now considering is a necessary supplement to that order. With regard to ord. 50, r. 3, I see no reason for limiting it to inspection within the United Kingdom. As to *Leader* v. *Smyth*, I prefer the unexpressed opinion of Mathew, J., to that which he expressed in deference to others.

Appeal dismissed.

Solicitor for the appellant, *R. G. Porteous.*

Solicitor for the respondent, *H. H. Fanshawe.*

Solicitors for the stakeholders, *Stock & Slater.*

From Q. B. Div.
(A. L. Smith and Chitty, L.JJ.) April 26.

LODGE v. MAYOR, &c., OF HUDDERSFIELD. (*a*.)

Practice—Appeal—Case stated for opinion of Queen's Bench Division—12 & 13 Vict. c. 45, s. 11—Judicature Act, 1873, *s.* 19.

An appeal lies from a decision of the Queen's Bench Division on a special case stated with respect to an appeal to a court of quarter sessions under section 11 *of* 12 *&* 13 *Vict. c.* 45, *although judgment has been entered in the court of quarter sessions in conformity with that decision.*

Appeal from a decision of the Queen's Bench Division (Lord Russell of Killowen, C.J., and Ridley, J.), on a special case stated under 12 & 13 Vict. c. 45, s. 11.

The Corporation of Huddersfield, having obtained from justices an order for payment by P. Lodge of certain paving expenses under the provisions of the Huddersfield Improvement Act, 1871, Lodge gave notice of appeal to the quarter sessions for the West Riding of the county of York.

By consent of the parties a special case was stated for the opinion of the High Court under section 11 of 12 & 13 Vict. c. 45.

That section enacts as follows: "At any time after notice given of appeal to any court of general or quarter sessions of the peace against any judgment, order, rate, or other matter . . . for which the remedy is by such appeal, it shall be lawful for the parties, by consent and by order of any judge of one of the superior courts of common law at Westminster, to state the facts of the case in the form of a special case for the opinion of such superior court, and to agree that a judgment in conformity with the decision of such court . . . may be entered on motion by either party at the sessions next or next but one after such decision shall have been given; and such judgment shall and may be entered accordingly, and shall be of the same effect in all respects as if the same had been given by the court of general or quarter sessions upon an appeal duly entered and continued."

On the hearing of the special case on the 1st of April, 1898, the Divisional Court were of opinion that the order of the justices ought to be set aside.

On the 2nd of April the corporation gave notice of this appeal from the decision of the Queen's Bench Division.

On the 4th of April the quarter sessions, on the motion of Lodge, ordered that judgment should be entered in conformity with the decision of the Queen's Bench Division.

Tindal Atkinson, Q.C. (*Waugh* with him), for the respondent Lodge.—There is a preliminary objection

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

to the hearing of this appeal. The decision of the Queen's Bench Division in this case was not a judgment or order within the meaning of section 19 of the Judicature Act, 1873, and, therefore, no appeal lies. The court was exercising a merely consultative, and not a judicial, jurisdiction. The quarter sessions never parted with their jurisdiction, and they entered judgment after the decision of the Queen's Bench Division in accordance with that decision. *Corporation of Peterborough* v. *Overseers of Wilsthorpe*, 32 W. R. 548, 12 Q. B. D. 1, and *Guardians of Holborn* v. *Guardians of Chertsey*, 33 W. R. 698, 15 Q. B. D. 76, were both cases under section 11 of 12 & 13 Vict. c. 45, as the present case is, and in each of them it was held that an appeal lay from the decision of the Queen's Bench Division; but in neither of those cases did it appear that the quarter sessions had entered judgment. This case may be distinguished from them on that ground. In *Overseers of the Poor of Walsall* v. *London and North-Western Railway Co.*, 27 W. R. 189, 4 App. Cas. 30, Lord Cairns recognized that, where the court of quarter sessions did not part with its jurisdiction, the function of the Queen's Bench Division was consultative. And in *Ex parte County Council of Kent and Council of Dover*, 39 W. R. 465, [1891] 1 Q. B. 725, it was expressly held that, where the High Court exercised a consultative jurisdiction, no appeal lay.

Sir R. T. Reid, Q.C. (*Macmorran, Q.C.*, and *A. Glen* with him), for the appellant corporation.—The cases recognized by Lord Cairns in *Overseers of the Poor of Walsall* v. *London and North-Western Railway Co.* as being instances of consultative jurisdiction are a very special class of cases. No doubt *Ex parte County Council of Kent* was a case of such consultative jurisdiction. But the *Peterborough case* and the case of the *Guardians of Holborn* show clearly that decisions of the High Court on cases stated under section 11 of 12 & 13 Vict. c. 45 are not consultative but judicial. And the fact that the quarter sessions have entered judgment can make no difference.

A. L. SMITH, L.J.—This is an appeal from a decision of the Queen's Bench Division on a case stated under section 11 of 12 & 13 Vict. c. 45, in an appeal to a court of quarter sessions. The preliminary objection is taken that no appeal lies to this court. The authorities which have been cited show that decisions of the Queen's Bench Division on such cases are subject to appeal. But the point taken here is that in this case the quarter sessions have since the decision of the Queen's Bench Division entered judgment in accordance with that decision. I am of opinion that this case cannot be distinguished from the prior cases on that ground, and that the decision of the Divisional Court is a "judgment or order" from which an appeal lies under section 19 of the Judicature Act. It is not necessary to say now how, if we should think the Divisional Court were wrong, effect could be given to our judgment. But in my opinion there must in such circumstances be some way of putting the matter right.

CHITTY, L.J., concurred.

Objection overruled.

The appeal was then heard on its merits and dismissed.

Solicitor for the appellants, *F. C. Lloyd.*

Solicitors for the respondent, *Capel-Cure & Ball*, for *Ramsden, Sykes, & Ramsden*, Huddersfield.

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — April 19.

ALLHUSEN v. EALING AND SOUTH HARROW RAILWAY CO. (a.)

Railway company—"Part only of any house or other building"—Avenue—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 92.

Prior to 1890 *a mansion-house and grounds, and a private road forming the approach thereto, formed part of the T. Estate. In* 1890 *the then owners conveyed to the plaintiff* (inter alia) *the mansion-house and grounds and the site of the private road, reserving to themselves a right of way over the road. The defendant railway company having served notice to treat for a portion of the road,*

Held, that the said portion of the road did not form part of the plaintiff's "house" within the meaning of section 92 *of the Lands Clauses Consolidation Act*, 1845, *and that the plaintiff could not require the defendants to take the whole of the house and grounds.*

Decision of Stirling, J., ante, *p.* 388, *affirmed.*

Appeal by the plaintiff from a decision of Stirling, J. (*ante*, p. 388, where the facts are sufficiently stated).

Balfour Browne, Q.C., Butcher, Q.C., and *E. Moon*, for the appellant, cited *Lord Grosvenor* v. *Hampstead Junction Railway Co.*, 5 W. R. 812, 1 De G. & J. 446; *Steele* v. *Midland Railway Co.*, 14 W. R. 367, L. R. 1 Ch. App. 275; *Barnes* v. *Southsea Railway Co.*, 32 W. R. 976, 27 Ch. D. 536; *Marson* v. *London, Chatham, & Dover Railway Co.*, L. R. 6 Eq. 101, 16 W. R. Ch. Dig. 80; *Richards* v. *Swansea Improvement and Tramway Co.*, 26 W. R. 764, 9 Ch. D. 425, 434, 437; and *Furniss* v. *Midland Railway Co.*, L. R. 6 Eq. 473, 475, 17 W. R. Ch. Dig. 145.

Phipson Beale, Q.C., Freeman, Q.C., and *R. F. Norton*, for the defendant company, the respondents.

Balfour Browne, Q.C., replied.

LINDLEY, M.R.—I think this case turns, after all, on the true construction of section 92 of the Lands Clauses Consolidation Act, 1845, which, of course, must be construed upon the same principles as have been applied to its construction ever since the Act was passed. As to those principles I do not think there has ever been any conflict of judicial opinion. Section 92 of the Act of 1845 enacts that "no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." Now, it has been laid down ever since this Act was passed that by the word "house" is meant, not a mere building, whether for residential or for other purposes, but whatever would pass under conveyance of "a house." There is no doubt at all about that; but, as I observed during the argument, it is very seldom that you have a conveyance of "a house" without some sort of context which enables you to see what is meant. The use of the word "house" may convey a piece of land more or less large, but it does not follow that every garden which is enjoyed with the house is part of the house. Still, that is the point we have got to consider, Is the company here proposing to take "part only of a house"?

If we look at the conveyance of November, 1890,

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

we find that the vendor is selling a portion of a larger estate. Paragraph 14 shows that he is selling under the order of the court, and the recital is that it is ordered that the vendor should be at liberty to sell. Therefore what he was ordered to sell, or authorized to sell, was something more than a house —a good deal more than would pass by a grant of the house. He is authorized to sell a house called Twyford Abbey. Then, if we look at the parcels, what is it that he does sell? He sells the messuage commonly called Twyford Abbey, together with the grounds and the site of the private road, and the advowson of the church adjoining the said mansion-house and premises, and so on. When we look at the plan we find what is meant by Twyford Abbey mansion-house. Now, how much of all that can be said under this conveyance to be part of the house? I doubt very much whether the pieces of land marked on the plan 30 and 36—that is, the avenue or private road, are part of the house at all. They are, no doubt, part of the land occupied with the house; but I think they are not part of the house itself. I think it would be stretching language to say that that avenue, situated as it is, is part of the house, or would be included in a conveyance of the house, if we had nothing else. If that is so, the company are absolutely in the right.

But it is said that the authorities against that view are too strong; we are pressed with authorities which, it is said, have gone to such an extent that we cannot logically avoid going a step farther. I do not feel disposed to be so logical as to do that which appears to me to be contrary to the right construction of the Act of 1845. I think, perhaps, the strongest of the cases relied upon is *Furniss* v. *Midland Railway Co.* But what was being done there was to destroy the waterworks, or so to interfere with them that the judge felt bound to prevent that. But I am satisfied that in the present case nobody looking at this plan and attending to the mode in which the house and the land are joined can reasonably say that they are parts of one whole. The land does not fairly come within the description of "part of any house," extensively as that description has been construed by some of the decisions. To hold otherwise would be pressing those decisions too far, and would, I think, be to make a very bad precedent. The appeal must therefore be dismissed.

RIGBY, L.J.—I am of the same opinion. It is important to observe that the defendants are not bound to take the house simply because they have rendered it less valuable. That is not the test. The test is stated in section 92 of the Act; if you take part of the house or building you must take the whole. It would, in my opinion, be most dangerous to take a decided case and say that, because something which did not appear to be part of a house was held to be within the section, therefore you must in the present case so hold. I think we should be making a wrong use of the authorities if we felt driven to reverse the decision of the learned judge in the court below.

COLLINS, L.J.—I am of the same opinion, and have nothing to add.

Appeal dismissed.

Solicitors, *Crossman, Prichard, Crossman, & Block; Baxter & Co.*

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 30, 31.

LONDON AND NORTH-WESTERN RAILWAY CO. v. RURAL DISTRICT COUNCIL OF RUNCORN. (a.)

Local government—"Sewer" or "drain"—Land drains constructed by railway company—Sewer made for draining land under a local or private Act—Vesting in local authority—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *s.* 68—*Public Health Act,* 1875 (38 *& 39 Vict. c.* 55), *ss.* 4, 13.

The special Act of a railway company expressly incorporated the provisions of the Railways Clauses Consolidation Act, 1845, *and, pursuant to such last-mentioned Act, the railway company laid down pipes and constructed certain drains for the purpose of carrying away water from lands lying near the railway. Down such pipes and drains, but without the knowledge of the railway company, some sewage from houses erected on adjoining lands within the district of the local authority found its way.*

Held, affirming the decision of Stirling, J. (ante, p. 121), *that the drains were sewers within the meaning of the Public Health Act,* 1875, *but, being made under a private Act of Parliament, fell within the second exception contained in section* 13 *of the Public Health Act,* 1875, *and were consequently not vested in the local authority.*

Appeal of the defendants from Stirling, J. (reported *ante*, p. 121, and [1898] 1 Ch. 34).

The plaintiffs in the action claimed an injunction to restrain the defendants from connecting certain new sewers at Helsby, in the county of Chester, with certain land drains and ditches of the plaintiffs', and from causing or permitting sewage or water to flow therein.

The question at issue was whether the land drains and ditches, which were constructed on their own lands by the plaintiffs or their predecessors in title, were vested in the plaintiffs or, under the provisions of the Public Health Act, 1875, in the defendants, as the rural sanitary authority of the district. Stirling, J., held that they were vested in the plaintiffs, having been made under a private Act of Parliament, and falling within the second exception of section 13 of the Public Health Act, 1875.

The defendants appealed.

Buckley, Q.C., and *E. P. Hewitt*, for the appellants.

Cripps, Q.C., and *Shearman*, for the plaintiffs.

LINDLEY, M.R.—I cannot bring myself to doubt that the judgment appealed from is right. The judgment appealed from declares that the land drains, ditches, and sewers of the plaintiffs, in the *locus in quo*, are not vested in the defendants, but in the plaintiffs; and it restrains the defendants, who are the Rural District Council of Runcorn from connecting the sewers of the defendants with the drains and so on of the plaintiffs.

It appears to me that the argument for the appellants entirely fails. It is (if not conceded) pretty plain, I think, that the defendants have no right to turn sewage into the drains of the plaintiffs unless those drains are sewers vested in the defendants by virtue of the Public Health Act. That those drains are sewers within the definition clause seems to me to be tolerably plain. Whether sewage passes into them or not, does not seem to be a test. Every drain is a sewer, except that which is specially defined to be a

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

drain within the meaning of the Act. These do not come within the narrow interpretation of a drain, they come within the popular conception of a drain—that is to say, they are sewers as distinguished from drains so far as the interpretation clause is concerned. There is no doubt, I think, about that. Then we must look and see what the Public Health Act of 1875 says. By section 13, "all existing and future sewers"—that would include all the plaintiffs' drains, I think—within the district of the defendants, shall vest in the defendants and be under their control. Then there are certain exceptions. The first does not apply, so I will not read it. The second does apply, in my judgment. The second exception runs, "sewers"—which, I repeat, these things are—"made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament or for the purpose of irrigating land." These do not come within the irrigating purpose, but the question is whether they do or do not come within the exception, "sewers made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament."

Now, what is the history of these drains? The history of them is simple enough. It is possible that they were made by the plaintiffs or their statutory predecessors—some railway company—under the provisions of a special Act passed in 1846, which incorporated the Railway Clauses Consolidation Act of 1845, and that they were made under the obligation or power of section 68 of the Railway Clauses Act of 1845. Then comes the question again whether they were made under any local or private Act. Mr. Buckley has contended that they were not—that they were made under the public Act. That depends upon the proper mode of considering these two Acts of Parliament. What does the public Act say? In the first section it explains the reason of its passing. It is to prevent endless repetitions, and it says it is expedient to comprise in one Act the clauses usually introduced into what I will call railway Acts, and which had been repeated from Act to Act; and it says that, after the passing of this Act, this Act shall apply to every railway which shall, by any Act which shall hereafter be passed, be authorized to be constructed—that is to say, this general Act applies. Now, how does it apply? It does not apply otherwise than as declared by the Act of Parliament, and it goes on to say how. "And this Act shall be incorporated with such Act." Stopping there, what does that mean? It means that the provisions of this Act are to be read as if they were set out at length in the special Act, as was the old practice before. "And all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall as well as the clauses and provisions of every other Act which shall be incorporated with such Act form part of such Act and be construed together therewith as forming one Act." All that is expressing in somewhat lengthy language the short form of saying that all the sections in this Act are to be treated as written into the special Act. Then read them in and then ask yourself under what are these things made? The answer is, "Under the special Act." It appears to me that that is so plain that I am surprised that there should be any conceivable doubt about it. If so, what becomes of the defendants' contention? It seems to me to be perfectly plain that if that is the true construction, which it appears to me to be, these particular sewers have not vested in the defendants. Mr. Buckley contended that there ought to be some distinction drawn between drains and so on made in the exercise of powers, and drains and so on made in the performance of statutory duties. Whichever way they are made, whether they are under powers or under statutory duties, if the powers are conferred or the duties are imposed by a local Act, the exemption seems to apply. Turn it about as you will, it appears to me that the learned judge is quite right, and that this appeal ought to be dismissed.

RIGBY, L.J.—I am of the same opinion. I will only deal with one subject, and that is about the exemption. Mr. Buckley's argument was that this sub-section 2 of section 13 was confined to Acts that could properly be called drainage Acts or irrigation Acts. I find nothing to justify that in the section at all. The plain meaning to my mind of the exemption is this. You must find a sewer, which is a sewer, made and used for draining. If there were an Act of Parliament constituting the London and North-Western Railway Co., and there was only one single drain provided for in that Act, it would be made, and it would be used for drainage purposes. It need not be a drainage Act. It need only have that single clause with regard to a single drain. It would nevertheless be made and used for drainage purposes. There was a rather ingenious attempt to transpose the words, which, if it had been permissible, might have altered the construction of the section. If you read it "made and used under an Act for drainage purposes," then that designates the Act as made for drainage purposes and for nothing else, so far as I can see. Therefore, I think the transposition is a matter of serious importance in the construction of the clause, which is not unintelligible. I think Mr. Buckley would have had very little difficulty in understanding it, if it had been all that he desired; at any rate, I have no difficulty in understanding it.

VAUGHAN WILLIAMS, L.J.—I have nothing to add.

Appeal dismissed.

Solicitors, *Preston, Stow, & Preston,* for *Ashton,* Runcorn; *C. H. Mason.*

High Court of Justice.

Chan. Div. North, J. — Dec. 3, 4, 7.

SHEFFIELD CORPORATION *v.* SHEFFIELD ELECTRIC LIGHT CO. (*a.*)

Local government—Provisional order—Construction of—Two provisional orders confirmed by Act of Parliament the same day—Inconsistency between.

Where a provisional order gives power to a local authority to purchase an undertaking upon terms of issuing or transferring to the undertakers such an amount of stock as will produce by the interest or dividends thereon an "annuity" of 5 per cent. per annum upon the sum properly expended by the undertakers upon the undertaking, and chargeable to the capital account, the local authority can only exercise the power to purchase the undertaking by issuing or transferring "irredeemable" stock.

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

Where a subsequent provisional order took away the power of the local authority to issue "irredeemable" stock, the power to purchase given in the above form is then no longer exerciseable; and the fact that the two provisional orders were confirmed by Act of Parliament on the same day does not give the local authority implied power to issue irredeemable stock to carry out the power to purchase.

Action.

The provisional order obtained by the defendants authorizing them to light by electricity the city of Sheffield, provided (*inter alia*) that the "local authority (the plaintiffs) may at any time before the expiration of forty-two years after the commencement of this order give notice in writing to the undertakers (defendants) requiring them to sell their undertaking to the local authority upon the terms of issuing or transferring to the undertakers such an amount of Sheffield Corporation Stock as will produce by the interest thereon an annuity of 5 per cent. per annum upon the sum properly expended by the undertakers upon the undertaking and chargeable to capital account . . . " (section 60, sub-section 1).

Section 3 of the order provided that "This order shall come into force and have effect upon the day when the Act confirming this order is passed . . ."

The Sheffield Corporation Act of 1883 gave the corporation power to issue both redeemable or irredeemable stock, but by a provisional order of the Local Government Board for altering the Sheffield Corporation Act, 1883, and made in pursuance of the Public Health Act, 1875, it was provided that "From and after the date of the Act of Parliament conferring this order (hereafter referred to as the commencement of this order) the following provisions shall take effect—namely, "So much of the local Act or of any Act or provisional order amending that Act as confers upon the corporation the power to create and issue irredeemable stock shall be repealed."

This provisional order and the electric light provisional order were both confirmed by Acts which received the royal assent on the same day—viz., the 27th of June, 1892.

In April, 1897, the plaintiffs gave the defendants the written notice requiring them to sell as required by section 60, sub-section 1, of the electric light provisional order; but the defendants refused to sell on the ground that they were entitled to irredeemable stock which the plaintiffs had no longer power to issue. The plaintiffs then commenced this action, claiming specific performance.

Swinfen Eady, Q.C., Ingle Joyce, and *R. J. Parker,* for plaintiffs.—At the time when the electric light provisional order was confirmed by the Act of Parliament the corporation had only power to issue redeemable stock, and the stock referred to in section 60, sub-section 1, must be redeemable stock. If the stock referred to in section 60 is not redeemable stock then there must be implied power in the corporation to issue irredeemable stock for the purpose of carrying out the contract: *In re Corporation of Dudley,* 8 Q. B. D. 86, 30 W. R. Dig. 120; *Clarence Railway Co.* v. *Great North of England Railway Co.,* 13 M. & W. 706.

Cozens-Hardy, Q.C., Cripps, Q.C., and *Theobald,* for the defendants.—The ordinary use of the word "annuity" implies an annuity in perpetuity. There are no words cutting down the plain meaning of the word and the court cannot grant specific performance as the plaintiffs cannot perform their part of the contract, since the corporation has no longer power to issue irredeemable stock.

Eady, Q.C., replied.

NORTH, J., referred to the electric light provisional order, and continued: "In arriving at the price to be paid for the undertaking of the defendants under that section, the first thing to get at is the amount properly expended and chargeable to capital account. The next thing is to find the amount of the annuity by calculating 5 per cent. upon that capital sum; and the last thing is to find what amount of Sheffield Corporation Stock at the rate of interest which it bears would be required to provide the annuity. Now, suppose that the corporation were exercising their power in, say, 1920—I select that date because 1925 is the time at which existing Sheffield Corporation Stock is redeemable. Take that the capital sum properly expended was £20,000; then, as the annual amount to be provided is 5 per cent. on £20,000, you have to find what amount of stock at the actual rate of 3 per cent. would have to be issued to provide an annuity of £1,000, and that would be more than £20,000. If the contention of the plaintiffs is correct and they can issue redeemable or irredeemable stock, then in 1920 they could give either redeemable or irredeemable stock as the price of this undertaking. They might elect to issue redeemable stock at their option, because in 1925 they could pay off at par, and the defendants would have an annuity of 5 per cent. on their capital for five years, but at the end of five years they would not receive that annuity any longer. The corporation then might say: "We can now borrow at 2½ per cent., it is in our interest to redeem this stock on which we pay at the present time 3 per cent. and to exercise the power to redeem by paying £100 for each £100 stock." If, then, they could borrow at 2½ per cent., being five-sixths of the rate at which they had previously borrowed, they would redeem, and the lighting company having enjoyed an annuity of 5 per cent. for five years would then receive a capital sum upon which, if invested at the then rate of the corporation stock, would give them no longer 5 per cent., but only ⅚ of 5 per cent. or 4⅙ per cent. I do not think that is the meaning of the provisional order. I think that what was intended was not a payment of capital money, but a transfer of such corporation stock as will produce in perpetuity an annuity of 5 per cent. to the persons whose undertaking is being taken by corporation.

But a complication arises from the fact that on the 27th of June, 1892, the day the Act confirming the electric light provisional order received the royal assent, another Act confirming a provisional order relating to the corporation also received the royal assent, and the question has arisen which order took effect first. But I think no difficulty really arises, because the times at which the orders come into operation are fixed by the orders themselves. Now, the electric light order provides that it shall come into operation upon the day when the Act confirming the order is passed, and the other order is to come into operation "from and after" the date of the Act of Parliament confirming the order. Therefore one takes effect on the day the royal assent is given, and the other from and after that day. The distinction, I think, is clear.

I need only refer to one case on the subject, *The South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Corporation,* 39 W. R. 292, [1891] 1 Q. B. 402. [The learned judge stated the facts of that case, and continued:] The word "from" in that case was likened by the learned judges in their judgments to "from and after," which are the very words I have here. Therefore, the time when the provisional order under the Public Health Act came into operation was the day after the day on which the

electric light provisional order came into operation, and on the later day the corporation could no longer issue irredeemable stock although they could do so when the electric light order came into operation.

It is further said that as the order putting an end to the power to issue irredeemable stock came into operation on the day after the day on which the electric light order came into operation, I must compare the two orders and read the repeal in the later order as containing an implied exception so far as may be necessary to carry out any contract made under the electric light provisional order, or it is said, if I cannot do that, the terms of the contract in the electric light order contain an implied power to issue irredeemable stock. I do not agree with either of these arguments. The provisional order made by the Local Government Board is perfectly clear. The words are conclusive and are binding upon me, and I have not been referred to anything in the order itself that can in any way qualify the express provisions contained in it. Neither can I because one provisional order came into effect the day after the other provisional order say that the earlier order is to receive a construction quite inconsistent with its meaning properly construed. I have looked at the recent decision in the House of Lords in *West Derby Union* v. *Metropolitan Life Assurance Society*, [1897] A. C. 647, as throwing light upon the way in which one has to deal with an Act in putting a construction upon it by implication, and I think I should be going entirely contrary to the principles laid down by the House of Lords in that case if I said that there was any implied qualification of that express repeal. It was said that two Acts passed on the same day, receiving the royal assent at the same time, cannot be inconsistent, and that they ought to be reconciled. But I cannot modify the one by the other even if at the time at which the first in point of date came into operation the corporation had only redeemable stock. I must construe the orders as I find them, and I come to the conclusion that the contract, the terms of which are contained in section 60 of the order, can only be performed on the part of the corporation by their issuing or transferring irredeemable stock. I dismiss the action, but without prejudice to any future action when the corporation may have power to issue irredeemable stock.

Solicitors, *Sharpe, Parker, & Co.*, for *Bramley*, Town Clerk, Sheffield; *Johnson, Weatherall, & Sturt*, for *Broomhead, Wightman, & Moore*, Sheffield.

Chan. Div. }
Kekewich, J. } Jan. 25.

MERRY v. POWNALL. (a.)

Trustee—Cestuis que trustent—*Unnecessary or improper parties—Costs—Settlement—Void limitations—Action to set aside—Parties.*

Where a settlement has been set aside by the court, and there is no property left out of which the trustees can claim their costs as a matter of right, nevertheless, if they have acted properly, the court has power to allow them their costs, and the strict rule based on the assumption that the fund is gone does not apply.

Accordingly, where the trustee in bankruptcy of a settlor has succeeded, in an action against the trustees of a settlement of the settlor's own property, in setting aside limitations providing for the determination of the settlor's life interest upon bankruptcy, the court, being of opinion that the trustees had acted properly, directed them to retain their costs out of the accrued income in their hands before handing it over to the plaintiff under the judgment.

The beneficiaries, however, under the discretionary trust arising on such determination of the settlor's life interest, who were added as defendants upon the application of the plaintiff at the suggestion of the trustees, and who appeared at the trial separately from their co-defendants, were not allowed their costs out of the fund recovered by the plaintiff, on the ground that they were unnecessary, though not improper, parties.

Action.

By her will dated the 19th of January, 1893, Maria Vivian directed that if her nephew, William Frederick Hamilton, should within three calendar months from her death or from his attaining twenty-one, whichever should first happen, settle all the property derived by him under and by virtue of the will of her sister, Katherine Anne Vivian, so that the same and the income thereof should become vested in her trustees or in them jointly with his nominee, upon trusts corresponding as nearly as might be with the trusts therein declared concerning "the second portion of her residuary trust moneys," then and in such case, but not otherwise, her trustees should hold such second portion of her residuary trust moneys and the income thereof on trust to pay the income thereof to the said W. F. Hamilton until his death or bankruptcy, and on the happening of any such event upon trust as to the capital and income for his children as therein mentioned.

Maria Vivian died on the 15th of April, 1893.

W. F. Hamilton attained the age of twenty-one on the 24th of November, 1895.

By an indenture dated the 25th of November, 1895, and made between W. F. Hamilton of the one part, and the trustees of Maria Vivian's will of the other part, and executed for the purpose of fulfilling the condition contained in Maria Vivian's will, the trustees declared that they stood possessed of the property therein comprised, and to which the said W. F. Hamilton was absolutely entitled (being the property derived by him under Katherine Anne Vivian's will), upon trust to pay the income to him until he should die or become bankrupt, and after the determination of that trust by bankruptcy upon trust if the trustees should in their absolute discretion think fit to pay or apply the income or any part thereof for or towards the maintenance and personal support or benefit of the said W. F. Hamilton, his wife (if any), and children during the remainder of his life, and upon the determination of that trust upon the further trusts in favour of his children therein declared.

In December, 1895, W. F. Hamilton married. In February, 1897, he was adjudicated a bankrupt, and the plaintiff was appointed his trustee in bankruptcy.

The plaintiff brought this action against the trustees of the settlement—who since the bankruptcy had not parted with any moneys coming to their hands—claiming a declaration that the limitations over on the bankruptcy of the said W. F. Hamilton contained in the settlement during his life were void as against the plaintiff and that the plaintiff was entitled to the income of the property therein comprised during the remainder of the life of W. F. Hamilton.

In their defence the trustees submitted that the beneficiaries under the trusts of the settlement—namely, the bankrupt's wife and child, were necessary parties to the action and ought to be joined as defendants. The plaintiff obtained leave to add them

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

as parties, and the writ and pleadings were amended accordingly. The plaintiff's claim was disputed by the wife and child in their defence.

The plaintiff succeeded in his action, and upon the question of costs the following arguments and judgment were given:

Warrington, Q.C., Mulligan, Q.C., and *C. Gurdon*, for the plaintiff.—There should be no order as to costs. The trustees cannot regard these moneys as a trust fund available for their costs. The fund is gone. Moreover, they are not entitled to their costs: *Ex parte Russell*, 30 W. R. 584, 19 Ch. D. 588. The other defendants were improper, or at any rate unnecessary, parties, and have failed to establish their adverse claim; they were made parties at the suggestion of the defendant trustees, they have been unsuccessful and should not therefore be allowed their costs. The plaintiff will take his costs out of the bankrupt's estate.

Bramwell Davis, Q.C., and *C. L. Coote*, for the defendant trustees.—There is no difference between this case and any ordinary case upon the construction of the trusts of a settlement. The dispute in effect lies between two sets of beneficiaries who both claim the same fund, and the trustees were unable to part with the trust moneys in question until that dispute was decided. The trustees are surely, therefore, entitled to their costs out of the fund. This is not an action to set aside the settlement, but even if it were the trustees would still be entitled to retain their costs: *In re Holden*, 36 W. R. 189, 20 Q. B. D. 43.

Renshaw, Q.C., and *A. B. Shaw*, for the defendants, the bankrupt's wife and child.—We were not necessary parties and did not ask to be brought here, but the plaintiff obtained leave to add us as parties at the suggestion of the trustees, and we therefore ought to have our costs out of the life interest.

Warrington, Q.C., replied.

KEKEWICH, J.—In some of the earlier cases it has been said that where a settlement has been set aside no trust fund existed out of which the trustees could take their costs, but in the later cases I think the court has decided that in similar circumstances it has power to order the trustees to deduct their costs before handing over the trust funds. In the case of *Dutton* v. *Thompson*, 31 W. R. 596, 23 Ch. D. 278, which was a case of a settlor applying to set aside a voluntary settlement on the ground of undue influence, the Vice-Chancellor of the Duchy of Lancaster gave judgment setting aside the settlement, and ordered the defendant trustee to pay the plaintiff's costs. From this judgment the defendant appealed. The decision of the Vice-Chancellor was affirmed on appeal, and on the question of costs Sir George Jessel said: "With respect to the costs, I should not have made this good-natured uncle pay the costs; but the Vice-Chancellor had a discretion, and though the defendant has received hard measure, I cannot see how he can have any appeal from the Vice-Chancellor's decision." That judgment clearly shows that although there was no fund strictly available for the trustees' costs, yet there was a discretion in the judge to allow or refuse them. The strict rule, that where the fund is gone the trustee shall not have his costs, has not been applied lately. Where the trustees have acted properly they ought to be allowed their costs.

It is not easy to know what should be done in the present case. The plaintiff represents the creditors of the settlor, and those creditors ought not to bear any part of the costs of this litigation further than those which the court can make them bear, for they have succeeded in getting that which the defendants said they should not have. The plaintiff certainly has not incurred excessive costs. The statement of claim has been drawn very properly and is confined to a simple claim for that to which the plaintiff is strictly entitled. In their defence the trustees said that some of the beneficiaries should be made parties to the action, and that was accordingly done. Ought not the trustees, then, to have their costs out of the fund which goes to the creditors? I cannot say that the trustees were wrong in suggesting that the beneficiaries should be made parties. The trustees have a very difficult position to fill, and their suggestion was not unreasonable. I gave the plaintiff leave in chambers to add the beneficiaries, but it must not be said that I thereby sanctioned their being made parties. I did not enter into the merits of the question at all, whether they ought or ought not to be joined. It seems to me that the plaintiff might have obtained all he wanted without adding the beneficiaries. But it is one thing to say that the beneficiaries were unnecessary parties and another thing to say that they were improper parties. The old cases go to show that there is a distinction between unnecessary and improper parties. Now, in my opinion these defendant beneficiaries were unnecessary parties, but they were not improper parties; far from it. They had an interest in the fund in dispute and they were quite proper parties to the action, but as they have been unsuccessful I do not think that they ought to get their costs out of the life interest. Then I think it is only fair for the trustees to have their costs out of the fund before it is paid over, and I think they ought, in the circumstances, to have their costs as between solicitor and client.

Solicitors, *G. L. Calcott; Woodcock, Ryland, & Parker.*

Q. B. Div.
(Wills and Kennedy, JJ.) April 29.

PRIOR v. SLAITHWAITE SPINNING CO. (a.)

Factory Acts—Meal-times—Employment—"Work"—Factory and Workshop Act, 1878 (41 *Vict. c.* 16), *ss.* 17, 83, 94.

Section 83 *of the Factory and Workshop Act*, 1878, *provides that "where a child, young person, or woman is employed in a factory or workshop contrary to the provisions of this Act, the occupier of the factory or workshop shall be liable to a fine."*

Held, that, in order to constitute the offence, it was not necessary to show that the child, young person, or woman was employed by order of the occupier.

A young person during the time allowed in a factory for meals, of his own accord and contrary to the regulations of the factory, cleaned and oiled the machinery. It was not part of his duties to clean and oil the machinery.

Held, that the young person "worked" in so cleaning and oiling, and ought, therefore, to be "deemed to be employed" within the meaning of section 94.

Case stated by justices of the West Riding of Yorkshire under 20 & 21 Vict. c. 45.

An information was preferred against the respondents, charging them that they were occupiers of a factory within the meaning of the Factory and Workshop Acts, 1878, wherein they did on the 5th of November, 1897, employ Herbert Garside, a young person, during a time specified on a notice affixed in

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the said factory as a time allowed for meals and absence from work, contrary to the same statute.

It was proved that on the 5th of November, 1897, Garside had his dinner in the mill during the interval allowed for the purpose. He preferred to remain in the mill as it was warmer there than outside. After his dinner, and before the interval was over, he began to clean and oil the spindles in order to while away the time.

It was not part of his duties to oil the spindles. He was a piecer, whose duty it was to tie up ends when they were down. He oiled the spindles of his own accord, and contrary to instructions posted up in the mill.

The justices dismissed the information on the ground that there was no employment by the respondents in contravention of the Act.

Section 17 of the Factory and Workshop Act, 1878, provides: "With respect to meals the following regulations shall (save as in this Act specially excepted) be observed in a factory and workshop:

"(2) A child, young person, or woman shall not during any part of the times allowed for meals in the factory or workshop be employed in the factory or workshop, or be allowed to remain in a room in which a manufacturing process or handicraft is then being carried on."

Section 19 provides that the occupiers of the factory or workshop may fix the time for meals and specify such times in the notice affixed in the factory or workshop, and that the times allowed for meals shall be deemed to be the times so specified.

Section 83 makes it an offence on the part of the occupier where a child, &c., is employed contrary to the provisions of the Act.

Section 94 provides: "A child, young person, or woman who works in a factory or workshop, whether for wages or not, either in a manufacturing process or handicraft, or in cleaning any part of the factory or workshop used for any manufacturing process or handicraft, or in cleaning or oiling any part of the machinery, . . . shall, save as is otherwise provided by this Act, be deemed to be employed therein within the meaning of this Act."

Findlay, S.G. (*Sutton* with him), for the appellant.—The respondent ought to have been convicted. The effect of the Act is to throw upon the occupier the duty of seeing that the Act is observed. Otherwise the Act would become a dead letter. It is not necessary that the work done should be work ordered to be done by the occupier. If the work was done by order of some other person than the occupier the latter could claim exemption under section 87, providing the requirements of that section were complied with.

Rawlinson, Q.C. (*Harper* with him), for the respondents.—The boy was not "employed" to do this particular class of work. There was evidence on which the magistrates could find that the boy was not "working" within the meaning of section 94, but merely playing or mischief-making. The word "employed" in section 94 means "employed by the owner" (*Hopkinson* v. *Caunt*, 33 W. R. 522, 14 Q. B. D. 592) and the word "work" implies some sort of supervision, and means work which it was one's duty to do.

WILLS, J.—This appeal must succeed. There are cases where legislation of this kind seems to lead to extravagant results. For instance, a young person is defined to be a person below the age of eighteen. A person aged seventeen years and 364 days may be just as well able to take care of himself as a person aged eighteen years, but the line must be drawn somewhere, and it is a legitimate consideration to see whether the cases of hardship from which the human mind revolts are not likely to be of frequent occurrence.

It is necessary to see whether the objects held in view by the Legislature do not render it necessary for them to make the enactment cover cases which presented by themselves would seem almost shocking. The policy of the enactment is to ensure that certain classes of persons employed in factories and workshops, who are looked on as comparatively defenceless, should have the times allowed for their meals preserved intact. The legislation is certainly rigorous for the purpose of enforcing that object, but it matters not that it is rigorous if the case falls within the words of the enactment.

What was done in the present case? The magistrates found that this boy was cleaning and oiling the spindles during the prohibited hour. Mr. Rawlinson says he was not working in cleaning, and I agree that the word "work" is used, and I think it is meant to have a significance. I can conceive cases in which a boy might be oiling machinery and yet might not be working; but in the present case it seems to me that the boy was doing exactly what he would have been doing if he had been doing it under orders; and there is no distinction to be drawn between the character of the act whether it is done voluntarily or under orders. A person may work for the sake of amusing himself; it is not the common notion of work, but work certainly does not exclude it. I have worked very often myself, very hard, in my garden, for the sake of amusing myself, but it is still work. The mere fact that the boy did this to please himself does not prevent it from being a case in which he has "worked in cleaning."

The magistrates have not found that the boy did not work. What they have found is that there is no evidence of his being employed by the respondents. I agree there is no evidence that he was employed by the respondents, and in point of fact he was not. I assume that, from the facts which are before us—but then, the Act of Parliament has not introduced any such qualification as that; on the contrary, it has said that if a boy works during these prohibited hours in cleaning or oiling any machinery he shall be deemed to be employed, which I take to mean that for all purposes connected with this particular legislation and in all circumstances in which the Act is used, the expression "employed in a factory" means he shall be deemed to be, and shall be treated as if he were, really employed, although in point of fact he has not been so.

I do not for a moment agree that it merely raises a presumption, which may be rebutted, that employment has taken place. The Act of Parliament, section 83, in those circumstances makes the master liable. It is not for me to say whether it is hard or whether it is right or wrong. The Act of Parliament has so enacted and there is an end of it.

KENNEDY, J.—I agree. The magistrates ought to have convicted in this case. It appears to me that there was evidence of the employment of Garside in contravention of the Factory and Workshop Act, 1878. The words used in section 17 are that young persons shall not, during any part of the time allowed for meals, be employed in the factory or workshop. Then you have got in section 94 the word "employed" described as including, among other things, the work which on the evidence it is clear the boy did in this case.

The scheme is that *primâ facie* the employer will be held responsible for the observance of the pro-

visions of the Act in respect of these comparatively defenceless persons.

It appears to me on the evidence before us that the conclusion of the magistrates was not justified. They found that there was no evidence of employment by the respondents in contravention of the Factory and Workshop Act, 1878. It is not necessary that they should find an employment by the respondents.

Case remitted to the justices to convict.

Solicitor for the appellant, *Treasury Solicitor.*

Solicitors for the respondent, *Learoyd & Co.*

Q. B. Div.
(Commercial Court.)
(Bigham, J.)

March 15, 16, 22.

FIELD STEAMSHIP CO. (LIMITED) v. BURR. (a.)

Insurance—Marine—Policy—Perils to the hurt of ship—Damaged cargo—Liability of ship's underwriters.

A ship was insured by her owners, the plaintiffs, under a time policy, and the perils insured against were, among others, "of the sea, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship or any part thereof."

The vessel was laden with cotton seed, and, while proceeding up the Thames, was run into and so damaged that she had to be run aground to save her from sinking in deep water. After having undergone some temporary repairs, she was floated and taken into dock, but her cargo was so damaged with mud and water that the cargo owners abandoned it, and neither they nor their underwriters would pay freight or take delivery. In dock the damaged cargo became a nuisance, and had to be discharged and got rid of by the plaintiffs, who sought to recover from the ship's underwriters the costs of so doing.

Held, that the expense so incurred by the plaintiffs was not covered by the policy.

Commercial cause.

This was an action brought by the owners of the steamship *Elmfield*, to recover a partial loss under a time policy of marine insurance upon that vessel in the circumstances that are fully stated in the judgment.

The short point was whether the ship's underwriters are liable under a policy in ordinary form to pay expenses incurred by the shipowner in discharging and disposing of her cargo, which had been so aged in a a collision that it became worthless and was rejected by the cargo owner.

Joseph Walton, Q.C., and *Lewis Noad*, for the plaintiff company.

Carver, Q.C., and *Scrutton*, for the defendant.

At the conclusion of the argument judgment was reserved.

BIGHAM, J., read the following judgment: This was an action brought to recover a partial loss alleged to be due by the defendant under a time policy on the plaintiffs' ship *Elmfield*. The policy was "on hull and materials, on machinery and boilers," valued at £10,000, and the perils insured against were, amongst others, "of the seas . . . and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . ship, &c., or any part thereof."

During the currency of the policy the vessel was carrying a cargo of cotton seed on a voyage from Alexandria to London under a charter-party made by the plaintiffs with Messrs. Barnett Bros., acting for the charterers. On the 20th of December, 1896, she arrived in the Thames, when a vessel called *The Derwent* came into collision with her, and caused such serious damage to her hull below the water-line that it became necessary to run her ashore in order to prevent her from sinking in deep water. During the next ten days part of her cargo was put into lighters, and by this means she was sufficiently lightened to enable her to be towed to the Tilbury Dry Dock, where she was temporarily patched. On the 5th of January, 1897, she was towed to Millwall Dock, where it was intended that the remainder of her cargo should be discharged. It was proved, however, that, by the action of the water and mud which had found their way into the ship in consequence of the casualty, the cargo had become rotten and offensive, and was a nuisance, and thereupon the sanitary authorities, acting under the powers of the Public Health (London) Act, 1891, ordered the ship to abate the nuisance and to remove the cotton seed. In the meantime the owners of the cargo had abandoned the cargo to their underwriters, and neither the cargo owners nor their underwriters would pay freight or take delivery, alleging, as the fact was, that the cargo had ceased to be cotton seed and had become worthless. The cargo owners and their underwriters were justified in taking up this position: see *Asfar* v. *Blundell*, 44 W. R. 130. In these circumstances the plaintiffs made a contract with a firm of Samuel Williams & Sons, who are the owners of a pier at Dagenham, near the mouth of the river, to discharge the cargo and to spread it out on some land at a short distance from the pier at a charge of 5s. per ton, and so to get rid of it. The ship accordingly left the Millwall Dock for Dagenham Pier, and was there discharged by Messrs. Samuel Williams & Sons. The claim against the defendant and his co-underwriters on the hull was a very large one, amounting to many thousands of pounds, but all disputes in connection with it have been settled between the parties, except as to items amounting in the aggregate to £1,046 12s. 10d. These items may be divided into two classes—(1) the charges incurred in dealing with the cargo between the date of the casualty and its arrival at Dagenham, amounting to £287 2s. 10d.; and (2) the charges of Messrs. Williams & Sons amounting to £759 10s. for discharging and disposing of the cargo at Dagenham. The question is whether the defendant and his co-underwriters are under any liability to recoup the plaintiffs any, and if so what, part of this expenditure. The matter in the first instance passed into the hands of Messrs. Robert Lindley, Sons, & Davison, a firm of average adjusters of great experience, who were of opinion that the charges in question ought not to fall on the underwriters on ship, but ought to be paid by the Indemnity Club, in which the plaintiffs' ship was entered. After some correspondence they appear, however, to have modified their view, and to have suggested that perhaps the underwriters on ship should be held liable for what the average adjusters called the "bare cost of removing the damaged cargo from the ship." This suggestion did not satisfy either the Indemnity Club or the underwriters on ship, and thereupon this action was brought in the name of the shipowners to get the dispute settled.

Mr Joseph Walton, who represented the plaintiffs, contended that the expenditure in question was recoverable as having been caused by perils which had come to the hurt, detriment, or damage of the ship within the meaning of the policy. He

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

dmitted that, as between the shipowner and the argo owner, it would have been the duty of he former, had the cargo arrived as cotton seed, o put it out of the ship, and to have borne the ost of doing so; but he said that when, as in this ase, that duty did not arise, by reason of the cargo wner being relieved from the correlative duty f receiving the cargo—the ship in the circumstances f this case having become injured or damaged by he presence of a large mass of useless matter ue to the incursion of the water and its action on the argo—that then the cost of dealing with it and isposing of it in accordance with the law was as uch part of his client's loss by the perils insured gainst as the cost of repairing the hole in the ship's ottom. He further suggested that the repairs to e bottom of the ship could not be executed until e cargo was put out, and that therefore he was ntitled to the cost of discharging the cargo; and nally he said that, in any event, he was entitled to e difference, which he alleged was considerable, tween what it would have cost to discharge cotton ed and the actual cost of discharging the putrid ass in the ship. His argument went so far as to ggest that, even if the structure of the ship had not en injured at all, his clients would have been ntitled to recover; as, for instance, if the sea-water d got to the cargo through the hatches, and had ought about consequences similar to those which d in fact happened in this case. I think his conntions were not well founded. There are cases in hich the underwriters on a policy such as this may liable, although the vessel suffers no physical jury, as, for instance, where part of the cargo jettisoned, and it becomes necessary to make od the loss in general average, or, perhaps, ere money has been spent under the suing d labouring clauses. But these are cases which pend upon different considerations. I think that, ere the insurance is upon the hull, materials, d machinery of a ship, it is essential fore any claim at all can be made against the derwriters, either that the shipowner should be rived of his ship, or of the use of her, or that ysical damage should happen to it by the direct ion of one of the perils insured against. It is not ough for the shipowner to say, "The perils of the have caused loss to me." He must go further, d show that they have caused the loss of, or damage his ship. Take an instance: The perils of the , storms and adverse winds, may delay a ship on voyage, causing her to occupy twice the time she erwise would do. This is a grievous loss to the pownor, but it is clear he gets no compensation n his underwriter, either for the cost of keeping ship during the delay or for the extra wear and r she undergoes; and the reason is because the derwriter only promises to indemnify him against or damage to the thing insured which may hapfrom the perils included in the policy, amongst ch are not those ordinary incidents of a voyage ch a ship must encounter when she sails the ocean. ther the wages, nor the provisions, nor the ages arising from the long user of the ship, form part of the thing insured; and I think the cases r, and I am satisfied that the practice business points the same way, that, even n the ship suffers actual physical damage from perils insured against, the underwriter's liability be limited to what may reasonably be regarded e cost of making good the particular damage in tion. Consequential damage which the shipr may suffer the underwriter is not responsible [His lordship referred to the cases of *Robertson wer*, 1 T. R. [1786] 127; and *De Vaux* v. *Salvador*, 4 A. & E. 420, as being in point, and also to Park on Marine Insurance, 8th ed., p. 115; Arnold, 6th ed., pp. 727-730, 800; and Benecke, p. 462.] Now, applying the law as laid down in those authorities to the present case, I come to the conclusion that the cost of dealing with and unloading and disposing of the cargo, or, as Mr. Joseph Walton calls it, the filthy mass into which the cargo had been changed, is not a loss which has happened to the thing insured by any of the perils insured against. Sea perils or no sea perils, the shipowner has to empty his ship if he ever intends to use her again, and therefore the cost of doing it cannot be said to be rendered necessary by reason of the perils insured against; it has to be incurred any way, and the fact that in the one case the shipowner would, by discharging the cargo, become entitled to his freight, whereas in the other case he cannot get his freight, seems to me not to concern the underwriters on ship at all; and if he is not entitled to the cost of discharging it follows *a fortiori* that he is not entitled to the cost of dealing with or disposing of the cargo. As to the contention that the plaintiffs are entitled to be paid the difference between what would be the cost of discharging the cotton seed and the actual cost of discharging the material which was in the ship, I think that also is too remote. It constantly happens that cargo arrives so damaged by sea-water as to make it more difficult and expensive to handle in the discharge than it otherwise would be. But who has ever heard of a claim against the underwriter on hull for such a loss as that? The claims are, in my opinion, too remote and cannot fairly be regarded as forming part of the cost of repairs. I find, as a fact, that the plaintiffs have been fully paid by the underwriters for all that can properly be called the cost of repairing. They have, as it seems to me, incurred further consequential loss, but it is a loss for which the defendant is not in any way liable.

Judgment for the defendant with costs.

Solicitors for the plaintiffs, *W. A. Crump & Son.*

Solicitors for the defendant, *Walton, Johnson, Bubb, & Whatton.*

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) March 14.

In re LAURIE.
Ex parte GREEN. (*a.*)

*Bankruptcy—Fraudulent preference—*Onus *of proof—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

When a trustee in bankruptcy impeaches a payment made by the bankrupt as a fraudulent preference, the onus *of proof of intention to prefer lies upon the trustee throughout the case, and it is not for the respondent to prove absence of intention to prefer after the trustee has proved that the bankrupt knew he was insolvent at the time when he made the payment impeached.*

Dictum of Vaughan Williams, J., *in* In re Eaton, Ex parte Viney, [1897] 2 *Q. B.* 16, 45 *W. R. Dig.* 12, *dissented from.*

Motion by the trustee to declare a payment made by the bankrupt to his wife, within three months of the presentation of the petition against him, void as a fraudulent preference.

Archibald Read (*Muir Mackenzie* with him), having

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

proved that the bankrupt knew he was insolvent at the date when he made the payment impeached, submitted that the *onus* was now upon the respondent to prove that the bankrupt had no intention to make a preference. He cited *In re Eaton, Ex parte Viney*, [1897] 2 Q. B. 16, 45 W. R. Dig. 12.

WRIGHT, J.—The opinion of Vaughan Williams, J., in that case is an isolated *dictum*, and not one upon which I can act in the face of the judgment of Cotton, L.J., in *Ex parte Lancaster, In re Marden*, 32 W. R. 483, 25 Ch. D. 311. There the question was whether a judgment which the debtor had allowed his father-in-law to sign against him was a fraudulent preference, and Cotton, L.J., in giving judgment, says: "In order to show that the judgment was suffered with the view of giving the father-in-law a preference, it is not sufficient to show only that the debtor did not enter an appearance, and that he in that sense suffered the judgment, but it must be shown that he abstained from entering an appearance with the view of giving his father-in-law a preference. . . . This being a matter which it is for the appellant to make out—not, of course, conclusively, but so as to satisfy us—in my opinion he has failed to discharge the *onus*, and the appeal must be dismissed."

The motion then proceeded and was allowed on the merits.

Solicitors for the trustee, *Plunkett & Leader*.

The respondent appeared in person.

Prob. Div. & Adm. Div. } Admiralty. } Jan. 24.

"THE SERVIA" AND "THE CARINTHIA." (a.)

Ship—Pilotage—Recovery of agreed remuneration for services not contemplated by statute under which pilots appointed—Mersey Docks Acts Consolidation Act, 1858 (21 & 22 *Vict. c. xcii.*).

There is nothing in the Mersey Docks Acts Consolidation Act, 1858—*the existing Act regulating pilotage in the River Mersey—rendering it obligatory on a shipmaster to employ a pilot to pilot his ship when she is being navigated in the port of Liverpool when not outward or inward bound; but the pilots licensed by the Mersey Docks and Harbour Board may agree with shipmasters to perform for them within the port of Liverpool extra services in the nature of pilotage services which they are not bound to perform under the provisions of the above-mentioned Act. Among such extra services for which by agreement the pilots may so become entitled to be paid are the following: Navigating a ship from an anchorage in the River Mersey to and alongside a landing-stage for the purpose of embarking passengers, mails, or cargo to be carried by her on her intended voyage outwards. Navigating a ship, after she had been brought as far up the River Mersey as the dock where it was intended she should unload her cargo, to and alongside landing-stages farther up the river for the purposes of discharging cattle.*

Observations as to whether, in case of a collision occurring to a ship at a time when the pilot was performing these extra services, the shipowners would be liable for damage occasioned by his sole fault or default.

This was an action of pilotage instituted on behalf of the Mersey Docks and Harbour Board, suing as the receivers and collectors of pilotage rates and earnings for the port of Liverpool, and Richard John Gore and Robert James Durrant, first-class pilots of the port of Liverpool, against the Cunard Steamship Co. (Limited), to recover the sum of £2 as extra pilotage remuneration due to the plaintiff Gore for removing the defendants' steamship *Servia*, at the request of her master, on the 10th of August, 1897, from the Canada Dock, Liverpool, into the river Mersey to an anchorage off the Prince's landing-stage, and from her anchorage alongside the Prince's landing-stage for the purpose of embarking her passengers and their baggage before proceeding outwards on her voyage to America: And the sum of £2 extra pilotage remuneration due to the plaintiff Durrant for piloting the defendants' steamship *The Carinthia* on her arrival in the Mersey on the 21st of August, 1897, at the request of her master, alongside the Wallasey stage to discharge the sheep she had brought from America, and from the Wallasey stage to the Woodside stage to discharge her cattle; the said sums of £2 and £2 having been fixed by the Mersey Docks and Harbour Board as the extra remuneration for the respective services above mentioned. In the alternative the plaintiffs Gore and Durrant claimed the several sums of £2 as reasonable remuneration for the said extra services.

The defendants appeared to defend the suit, and pleaded that the plaintiff Gore had already been paid the pilotage rates fixed by law for piloting *The Servia* outwards out of the port of Liverpool, and the plaintiff Durrant the pilotage rate fixed by law for the pilotage of *The Servia* inwards into the port of Liverpool; that no services other than those for which the rates so paid had been paid, had been rendered by the plaintiffs respectively, and they never became entitled to the alleged or any extra remuneration; that the whole of the pilotage and the employment of the plaintiffs were compulsory by law upon the defendants, and that the removing *The Servia* to the Prince's landing-stage, and *The Carinthia* to the Wallasey and Woodside stages, were parts of the compulsory pilotage services for which the plaintiffs had been paid, and that the plaintiffs, the Mersey Docks and Harbour Board, had not duly fixed, and had no power or authority to fix, the said respective amounts of £2 and £2 or any extra remuneration.

Dec. 14, 15.—On these days the action was heard before Barnes, J. The plaintiff Durrant and another Liverpool pilot were examined orally in court in support of the statement of claim. The result of their evidence is stated in the judgment.

Joseph Walton, Q.C., and *Carver, Q.C.*, for the plaintiffs.—The amounts claimed by the plaintiffs are either due to them as payments for voluntary pilotage services legally fixed by the Mersey Docks and Harbour Board under one of their bye-laws (bye-law 18), or as reasonable amounts agreed on between the masters and the pilots as proper for the extra services rendered. The real question is what pilotage services must be performed by the pilots for the compulsory rates and other charges fixed by the Mersey Docks Consolidation Act of 1858? The pilotage rates there fixed for outwards pilotage (section 139) only comprises piloting a vessel "ready to proceed to sea" out of the port of Liverpool, and therefore the pilotage rate for outward pilotage paid in the case of *The Servia* did not include the services rendered to her in taking her to the landing-stage to embark her passengers. Until they were on board she was not "ready to proceed to sea." [As to the meaning of "proceeding to sea," they referred to *The City of Cambridge*, 22 W. R. 578, L. R. 5 P. C. 451; *The Cachapool*, 7 P. D. 217, 30 W. R. Dig. 190; *Rodrigues*

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

v. *Melhuish*, 2 W. R. 518, 10 Exch. 117; *The Cockrane* v. *Fisher*, 2 Cr. & M. 581; Phillips on Insurance, s. 772.] So, too, the compulsory pilotage rate, fixed by the Act of 1858, to be paid in the case of vessels bound "inwards" (section 128), only includes the piloting of vessels over the bar from sea into one of the wet docks in the port of Liverpool (*The Annapolis*, Lush 295, 9 W. R. Adm. Dig. 19; *The Princeton*, 3 P. D. 90, 26 W. R. Dig. 217; *The Woburn Abbey*, 38 L. J. Adm. 28, 17 W. R. Adm. Dig. 20), and extra remuneration would have to be paid for taking a vessel elsewhere than to dock. The section of the Act of 1858 under which, in certain cases, five shillings a day is payable for attendance of pilots on the river (section 138), has reference merely to a charge by the pilots when attending on board a vessel at anchor waiting to go into dock or to sea. "Attendance" does not mean "pilotage."

Boyd, Q.C., and *Maurice Hill*, for the defendants.—All the services in respect of which the plaintiffs claim in this action have been paid for by the defendants in the pilotage dues charged in respect of the pilotage of *The Servia* outwards, and *The Carinthia* inwards. The calling of *The Servia* at the Prince's landing-stage was only an incident in her proceeding to sea, and her pilot was bound to perform the duty of navigating her alongside that stage as part of the outward pilotage to sea. She was then just as much "proceeding to sea" as if her passengers had been put on board her by means of a tender in the river on her way to sea, or as if she had then stopped to take cargo on board. As to *The Carinthia*, she was compelled by the regulations and practice as to discharging cattle and sheep to take them to the Woodside and Wallasey stages, and the service of piloting her in from sea to such stage and into dock was one continuous service for which the pilot in charge of her, has properly received the "inward" pilotage rate. Whilst being piloted to the landing-stages she was still under compulsory pilotage and her owners would have escaped liability for any collision caused by the wrongful act of the pilot alone: *The General Steam Navigation Co.* v. *The British and Colonial Steam Navigation Co.*, 17 W. R. 741, L. R. 4 Ex. 238; *The Charlton*, 73 L. T. Rep. 49.

Cur. adv. vult.

Jan. 24.—BARNES, J.—This is a test action brought to try the right of the Liverpool pilots to certain extra remuneration for piloting outward-bound steamers to the Prince's landing-stage for the purpose of embarking passengers, and for piloting inward-bound cattle steamers to the Wallasey and Woodside stages before taking them into dock. Pilotage is compulsory in the port of Liverpool for the vessels in question, and the point in the case is whether the alleged extra services are covered by the compulsory pilotage rates or are to be paid for in addition to such rates.

The pilotage of the port is regulated by the Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), under which the Mersey Docks and Harbour Board is constituted the pilotage authority, with power to licence pilots. The Mersey Docks and Harbour Board is merely a formal party to these proceedings. The other plaintiffs are pilots licensed by the board. One of them, Mr. Gore, was in charge of the defendants' steamship *Servia* on her outward voyage in August last, and the other, Mr. Durrant, was in charge of the defendants' steamship *Carinthia* on her inward voyage in the same month.

The following facts are taken from the evidence given, and admissions made at the hearing before me. First, with regard to outward-bound passenger steamers. Prior to the year 1895 large passenger steamers sailing from the port of Liverpool for foreign ports, loaded their cargoes in one of the wet docks of the port, and embarked their passengers in the dock or from tenders after the steamers left dock, and whilst lying in the River Mersey; but in that year the approach to the Prince's landing-stage in the river was improved so as to enable steamers after leaving dock to come alongside the stage, and there embark their passengers, and at the same time a station was connected by a line of rails with the London and North-Western Railway system, and special trains have since that time conveyed passengers direct to the riverside station.

The practice of the defendants since 1895 with their steamers carrying passengers outwards is typical of that of most of the large lines with their outward-bound passenger steamers, though some lines do not use the stage. This practice, stated as accurately as the materials before me allow, is as follows: The defendants load their steamers in the Canada Dock, some distance below the Prince's landing-stage, and after a steamer's lading is completed she is generally taken out of dock on the high water preceding the afternoon of the day fixed for her departure, and, according to the state of the tide, then proceeds to an anchor, and thence to the Prince's landing-stage, or direct to the stage. Sometimes on account of neap tides it is necessary for the vessel to leave the dock earlier and moor at the defendants' buoy in the Sloyne, further up river than the stage, before proceeding to the stage. The defendants are the only company possessing a mooring buoy in the Sloyne. The vessel reaches the stage shortly before the hour fixed for her departure, usually about 4 p.m. She is assisted alongside by a tug or tugs, and after making fast to the stage she embarks her saloon passengers and their baggage, and the mails, and sometimes receives on board some fine goods. From the stage she proceeds to sea. The time occupied at the stage is sometimes as long as four hours, and on the average about two hours. The steerage passengers generally embark by tender while the vessel is in the river at anchor or at the buoy, but sometimes in dock if the vessel goes direct to the stage. About seven steamers per week belonging to different lines use the stage for the purpose of embarking their passengers, and about the same number use the stage for the purpose of disembarking passengers on their inward voyages. The case does not directly raise any question as to the pilot's remuneration for bringing inward-bound vessels to this stage, though I understand that this question is practically involved in that before the court as to outward-bound steamers.

It is always a difficult operation to bring these large steamers alongside the stage, owing to vessels going in and out of dock and the other traffic in the river, and especially on strong flood or ebb tides. The steamers must always leave dock at high water, but they come alongside the stage at all times of the tide.

In the particular case of *The Servia* she left the Canada Dock on the 10th of August last, on the morning tide, in charge of the plaintiff Gore, and anchored about abreast of the Prince's stage. Shortly before 4.30 p.m. her anchor was weighed, and she was brought alongside the stage under Mr. Gore's charge. There she embarked her saloon passengers, their baggage, and the mails, and thence she proceeded to sea on the same evening, through the Queen's Channel, bound for New York. Mr. Gore piloted the vessel to the outward compulsory pilotage limit at the North-West Buoy. The defendants have paid the outward compulsory pilotage

rate for Mr. Gore's service, and contend that such payment covers his service for taking *The Servia* to the stage. On the other hand, the plaintiff Gore claims £1 for extra remuneration for the last-mentioned service. This sum has been fixed by the plaintiff board as a regular charge to be made by pilots for bringing vessels to the stage for the purpose of embarking and disembarking passengers, on the footing that their services in so doing are not covered by the compulsory pilotage rate. The charge has been paid in respect of all steamers using the stage in manner aforesaid in and since 1895. It is now disputed.

Secondly, with regard to inward-bound cattle steamers. For a number of years a very large trade has been carried on in the importation of live cattle and sheep into the port of Liverpool. The cattle and sheep are landed from the steamers by which they arrive at the Wallasey and Woodside landing-stages, on the Birkenhead side of the Mersey, under the provisions of the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), and the orders made in pursuance thereof fixing these stages for the purpose. There are rules made by the plaintiff board for regulating the time, order, and manner for berthing vessels at the stages. These stages and a part of the Alfred Dock, Birkenhead, near the Wallasey stage, are the only places in the port where the landing of live stock imported from abroad is permitted. The practice of the defendants, which is similar to that of other lines with regard to cattle steamers, is as follows: A pilot is taken off the port, and when the steamer enters the river orders are sent off to her as to berthing at the stages or the Alfred Dock. If the tide suits, and there are no steamers in the way at the stages, the vessel proceeds direct to the stage. If the tide does not suit, or there is no available berth at the stage, the vessel is anchored. If the vessel has both sheep and cattle she generally goes both to Wallasey and Woodside stages, landing sheep at the one and cattle at the other, though sometimes both are discharged at the former stage. If she has only cattle she goes to the Woodside or Wallasey stage, or in some cases to the Alfred Dock, Birkenhead, where there is accommodation for both sheep and cattle. The arrangements depend on the room in the lairages. After landing the live stock, the vessel is taken direct into a dock if the tide serves, or to anchor, and then docked as soon as possible, and the rest of her cargo is discharged in dock.

About fourteen steamers per week belonging to different lines arrive with sheep and cattle. It is difficult to manœuvre vessels alongside the stages owing both to the traffic and tide. The assistance of a tug or tugs is required. The vessels are made fast to the stages and it takes ordinarily an hour or an hour and a-half to land the cattle and one to three hours to land the sheep, though it was stated that longer times are occasionally taken, and that cattle ships had been three tides at the stages and finished in the Alfred Dock.

In the case of *The Carinthia*, she was inward bound with cattle, sheep, and other cargo from America, and about 8.30 p.m. on the 21st of August last the plaintiff Durrant boarded her off Point Lynas, took charge, brought her into the river, and about 2 a.m. on the 22nd she proceeded in the usual way, first to the Wallasey stage, where she discharged her sheep, and then to the Woodside stage, where the cattle were landed. At 5 a.m. she was taken to the Canada Dock entrance, but, owing to her draught, was not permitted to enter, and was therefore anchored and lightened. She did not get into dock till the evening tide of the 23rd. The plaintiff Durrant was in charge throughout.

The defendants have paid the inward compulsory pilotage rate for Durrant's services, and 10s. for two days' detention while at anchor at 5s. per day. They contend that such payments cover all his services, but he claims £2 for extra remuneration for taking the vessel to and from the two stages; £1 for each stage is the regular charge fixed by the Board, in a similar way to that in the outward cases. This charge, which is now disputed, has been paid in respect of all cattle steamers using the stages since the user began, about fifteen years ago.

The questions raised turn upon the construction to be placed upon certain sections of the Mersey Docks Acts Consolidation Act, 1858, which render pilotage compulsory for outward and inward-bound vessels, excepting coasting vessels in ballast or under the burthen of one hundred tons. Section 121 gives power to the board to licence persons to act as pilots "for the port of Liverpool." Section 123 imposes a penalty upon any person who shall pilot any vessel "into or out of the port of Liverpool" without a licence. Section 124 imposes penalties on any pilot who "shall refuse to take charge of any inward-bound vessel upon a proper signal being made for a pilot, or of any outward-bound vessel upon the request of the master thereof." The sections dealing more particularly with outward-bound vessels are the 127th, 133rd, and 139th sections. Section 127, which is under a title "as to the duties of pilots," specifies the distances to which outward-bound vessels are to be piloted, but makes no mention of the point at which the pilot is to take charge. This point would ordinarily be the dock in which a vessel loaded, because, except in these cases of embarking passengers, a vessel would usually proceed from the dock to sea as fast as tide and weather would permit. Section 133 gives power to the board to fix rates of pilotage to be paid to pilots for piloting vessels within certain limits. The rate for "piloting a vessel out of the port of Liverpool" is to be "not less than 3s. and not more than 4s. per foot" draught of water. Section 139 provides that "in case the master of any vessel being outward bound," except the said coasters, "shall proceed to sea, and shall refuse to take on board or to employ a pilot," he shall still pay the full pilotage rate.

The material sections which relate to inward-bound vessels, in addition to the 124th, are the 125th, the 128th, the 130th, and the 133rd sections. Section 125 imposes a penalty on any pilot refusing to conduct an inward-bound vessel. Section 128 defines the duties of the pilot in charge of an inward-bound vessel. It provides that "the pilot in charge of any inward-bound vessel shall cause the same (if need be) to be properly moored at anchor in the River Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the River Mersey and before going into dock, in which case he shall be entitled to receive 5s. per day for such attendance." There is nothing in any other section expressly extending those limited duties or preventing a pilot from making a charge for services performed beyond the limit, nor on the other hand, imposing on the owners or masters of vessels any obligation to employ pilots to perform services other than the limited services specified in this section. Section 130 provides that in case the master "of any inward-bound vessel (except the said coasters) shall refuse to take on board or to employ a pilot, such pilot having offered his services for that purpose," he shall pay full pilotage rates as if the vessel had been piloted "into the port of Liverpool."

Under section 133 the rate for piloting a vessel from the distance of the Great Orme's Head "to the port of Liverpool" is fixed at not less than 5s. nor more than 8s. per foot draught of water, and from any greater distance "to the port of Liverpool" not less than 6s. nor more than 9s. per like foot.

There appears to be nothing in the Act rendering it obligatory to employ a pilot when a vessel is changing docks or coming from the docks on one side of the river to those on the other, or is navigated in the port, when not outward or inward bound; and the word "stage," according to the interpretation clause in the Act (section 3), is included in the term "dock," though not in the term "wet dock" (see also section 596, sub-section (c), of the Merchant Shipping Act, 1894). The above-mentioned sections of the Act of 1858 have been held to render pilotage compulsory for outward and inward-bound vessels, except the above-mentioned coasters, and although the question in the case is in strictness not whether pilotage is compulsory while the services in dispute are being rendered, but whether these services are covered by the pilotage rates fixed in pursuance of section 133, yet, on the argument before me, counsel had great difficulty in severing the two questions, because the sections are correlative, and the rates aforesaid are fixed for the compulsory services; so that if it is compulsory to employ the pilots for the services in question, the services would seem to be covered by the compulsory rates; but if the services are voluntary the rates fixed do not cover them.

The following cases, which are material, have been decided with regard to outward-bound vessels: In *Rodrigues* v. *Melhuish*, 10 Exch. 117, a case under a previous Act containing provisions very similar to those of the Act of 1858, where a ship in the service of the Post Office, and under contract to sail on the 4th of December, 1853, left the docks on the 2nd of December with a pilot on board, and while lying at anchor in the river on the 3rd of December an accident happened to the plaintiff's boat through the negligence of those on board the ship, the master not being on board and certain riggers being engaged in completing the vessel's rigging, it was held that the ship was not at the time proceeding to sea. From the judgment of Pollock, C.B., it appears that if the vessel had been ready for sea and had left the dock with the intention of proceeding to sea, and no steps were being taken except those necessary for her to go on, she might have been considered to be proceeding to sea from the time she left the dock. In *The City of Cambridge*, 22 W. R. 578, L. R. 5 P. C. 451, where a vessel fully equipped and prepared for sea had left her dock in charge of a pilot, and was properly anchored in the river to wait for the tide, it was held that the ship was proceeding to sea within the meaning of section 139 of the Act of 1858 at the time when she left the docks, and that the anchoring was not a discontinuance of her progress to sea, but an act proper and reasonable to be done in the course of it. *The Cachapool*, 7 P. D. 217, was a case where a barque had been towed out of dock into the river the previous day, in order that she might proceed to sea before daybreak in the morning on which a collision happened; but an accident having happened to her mainyard she was unable to proceed to sea as intended, and at the time of the collision was waiting in the river to have repairs executed, and it was held that she was not, at the time of the collision, proceeding to sea within the meaning of the said section.

There are the following cases relating to inward-bound vessels: *The Annapolis*, where a foreign vessel bound for Liverpool took a pilot off Point Lynas, was brought to anchor in the Mersey and lay there two or three days waiting, for want of water, to dock. She was then conducted by the same pilot into dock. In proceeding to the dock a collision was occasioned by the pilot's default. It was held that the vessel was compulsorily in charge of the pilot, and was not liable for the damage. In the next case, *The Woburn Abbey*, an inward-bound vessel at anchor sheered or dragged into another, and it was held that her owners were liable. It does not appear from the report that the vessel was merely waiting for the tide, and I gather that Sir Robert Phillimore considered the master was to blame for allowing the vessel to remain improperly moored. In his judgment, he said, he was not considering the case of a ship only temporarily moored, with the object of shortly afterwards going into dock, but the case of a vessel moored by the pilot for such a length of time as caused him to be *functus officio*, so far as his compulsory employment was concerned. The last case relating to inward-bound vessels is *The Princeton*, 3 P. D. 90. There a pilot, having been employed to pilot a ship from sea and take her into dock, piloted her over the bar, but owing to the state of the tide and weather she was obliged to anchor, and remain at anchor for two days, and whilst at anchor and in charge of the pilot she dragged her anchor and came into collision with another vessel. It was held that the collision was caused solely by the negligence of the pilot, but that his employment was compulsory, and the owners not liable. The grounds of the judgment of Sir Robert Phillimore are that the ship was in *itinere* and in her progress to dock at the time of the collision, and was compelled to remain where she was by *vis major*. He said that if she could have gone into dock, but did not do so, he was not prepared to say that he should consider that she was entitled to the immunity which he was of opinion in the circumstances she was entitled to.

It is convenient to notice section 138 of the Act of 1858 here. It was held in *The City of Cambridge* that this last-mentioned section does not relate to the giving of extra remuneration to those pilots only who are voluntarily engaged. The section provides for the remuneration of pilots voluntarily engaged to attend on vessels in the case mentioned in the section, and for extra remuneration to pilots compulsorily employed where delay in the navigation takes place, compelling a vessel to remain in the river. It was contended before me that it provided for remuneration for such services as those in dispute at 5s. per day, and extended the compulsory services so as to include those in question because of the words "attendance on board any vessel during her riding at anchor, or being at Hoylake, or in the River Mersey." In my opinion, however, this section does not relate to services rendered while a vessel is being actively navigated to the stage or stages for such purposes as those in question, but only to attendance on a vessel lying in the river or at Hoylake as mentioned in the section: see *Attorney-General* v. *Case*, 3 Price 302.

The Act of 1858, so far as the sections relating to pilotage are concerned, is loosely drawn, and these sections are somewhat confused. They appear to have been framed in relation to the known course of business at the port of Liverpool, which is for vessels to load and discharge their cargoes in the wet docks of the port. My review of the above sections and cases has led me to the conclusion that the principle which underlies the decisions is that, if an outward-bound vessel is loaded, equipped, and prepared ready for sea, and in that condition makes such progress to sea as tide and weather permit from her point of starting on her voyage, she is proceeding to sea within the meaning of the Act; but that a vessel is

not so proceeding to sea if, after leaving her dock, she remains waiting in the port for the purpose of performing operations which are necessary in order to complete her loading, or other preparations required in order to render her ready for sea, and similarly that an inward-bound vessel, if she cannot go direct into dock on her arrival in the river, is in course of progress to her dock within the meaning of the Act while she remains at anchor with the intention of docking as soon as tide and weather will permit.

The rates of pilotage referred to in section 133 were, in my opinion, to be fixed to cover the duties which were to be performed by the pilots, in the one case for piloting outward-bound vessels from the time of their start ready to proceed to sea, and in the other case for piloting inward vessels from sea to dock, and, if need be, for anchoring them in the river till they can be docked. The 5s. a day extra is also to be paid for inward and outward-bound ships in case of necessary delay in the navigation on the inward or outward progress.

It follows that for services which are not covered by the compulsory rates and the extra 5s. a day, the pilots ought to receive an extra reasonable remuneration. In the present case the outward-bound vessel, *The Servia*, although her equipment was complete, was not ready for sea until she had taken on board her mails and passengers and their baggage, and in my opinion the compulsory rate paid by the defendants for the plaintiff Gore's services did not cover the service rendered by him in taking the vessel to the Prince's stage. So also the compulsory rate paid by the defendants in respect of *The Carinthia* did not, in my opinion, cover the plaintiff Durrant's services in taking the vessel to and from the Wallasey and Woodside stages. It was admitted that if reasonable extra charges could be made, the pilots were respectively employed on the terms that they should be paid such charges. The charges were fixed by the board in pursuance of the 18th bye-law, made under section 221 of the Act of 1858, and there was no contest as to their reasonableness if they could be legally made.

It was said that the importance of the case to the shipowners is that, if the plaintiffs are right in their contention, vessels proceeding to the stages are not under compulsory pilotage. My decision is only asked upon the question whether or not the pilots are to be paid extra if they are required to take vessels to the stages; but I do not shrink from saying that it may follow from my determination of this question in favour of the plaintiffs that vessels proceeding to the stages are not under compulsory pilotage while so doing. It was suggested in argument that this did not logically follow, and it is not necessary for me to decide that it does, though the reasoning of my judgment leads to this conclusion. The suggestion is founded on the cases of *The General Steam Navigation Co.* v. *The British and Colonial Steam Navigation Co.*, 17 W. R. 741, L. R. 4 Ex. 238, and *The Charlton*, 73 L. T. Rep. 49. These cases decided that where a pilot has been compulsorily taken on board and placed in charge of a ship, and then an accident happens while he is in charge in the district for which he is licensed, though outside the limits of the port in which he is a compulsory pilot, the shipowner is exempt from responsibility for the act of the pilot, on the ground that the relationship of master and servant does not exist, and that the exemption contained in section 388 of the Merchant Shipping Act, 1854 (now section 633 of the Merchant Shipping Act of 1894), does not require that the pilot should be compulsorily employed at the spot where the accident happens, but only that he should have been compulsorily employed within the district where it happens, and that the shipowners are within its protection. In each of these cases, however, the pilot was engaged to take the ship to a point beyond that at which the accident happened, and the shipowner had to pay a rate which covered the pilot's services to this further point. There are, however, obvious distinctions between these cases and the present, and I am unable to see how the principle upon which they were decided can apply to extra services not paid for by the compulsory rates.

It was further said that if this case were to determine that vessels are not under compulsory pilotage while the pilots are rendering services for which they are to receive extra pay, great difficulty will arise in the master of a vessel determining whether he or the pilot is in charge. From what I have said, however, the difficulty will not arise with regard to outward-bound vessels if the compulsory duties are treated as commencing at the time when the steamer proceeds from the stage to sea; and with regard to inward-bound vessels, if it follows from this judgment that it is not compulsory to employ a pilot to take a vessel to the stages, the service for which extra charge is made would begin and the compulsion cease, or it may be would only be suspended, as soon as the vessel deviates to the stage from the route which she would follow in docking without going to the stage. It was also urged that, as an inward-bound cattle steamer is compelled to go to the cattle-stages, or one of them, to land her cattle and sheep before going into dock, unless she lands them in the Alfred Dock the pilot cannot take her into a wet dock direct, and must, therefore, take her to the stage or stages in order to earn his compulsory fee, except when she goes to the Alfred Dock; but the answer to this is that the compulsory rate is paid for bringing the vessel in and anchoring her if necessary, and then docking her; and that he is not responsible for the vessel having cattle or sheep on board, and that if he has to perform duties in consequence which are not provided for in the compulsory rate, and beyond those defined by section 128 (the only section expressly defining the duties of the pilot of an inward-bound vessel), he must be paid extra for his extra services.

As this case only requires a decision upon the question of payment, and not a final determination of the question of compulsory employment of a pilot to take a vessel to the stages, I am not at present called upon to decide a further question which was discussed—namely, whether the interposition of services for which extra remuneration is to be paid, puts an end to or suspends the services to an inward-bound cattle-ship which are covered by the compulsory rate. It is sufficient for me on this claim to decide that if an inward-bound ship is taken to one or more stages her owners will have to pay the extra charge for each stage.

I have not felt disposed to arrive at my conclusions by any narrow construction of the Act. Although it is desirable that no difficulties should be placed by the court in the way of trade developments and the navigation of vessels in the port, yet it is clear to me that the Act of 1858 did not contemplate pilots performing the duties they are now asked to perform and receiving nothing more than the compulsory pilotage rates for them. These duties impose upon the pilots requested to perform them, great additional responsibility, and require the exercise of great care and skill, and it is only reasonable that they should be properly rewarded for performing them.

The case has been contested, as I understand, by the Liverpool Steamship Owners' Association in the name of the defendants, and it was stated that the matter of the payments to the pilots was not of such moment as the question of compulsory pilotage during

the services in question. I have dealt fully with all the points taken, but may state that the broad view presented by the defendants' case is that the services in question of the pilots are requisite in order to enable shipowners to carry on what has become a regular course of practice with most passenger steamers; and as regards the cattle-ships to comply with the provisions of the Diseases of Animals Act, 1894, and that these services should be treated as a necessary part of those which they are compelled to pay for under the Act of 1858, and that this Act should be so construed that the compulsory payments should cover all the services. According, however, to the opinion which I have expressed, this construction is wider than the terms of the sections of the Act bearing on the subject will permit. The questions in the case depend upon the construction of these sections, and not upon general considerations; and if I am right in my opinion, an amendment of the Act will be necessary in order to carry out the object of the shipowners. My judgment is for the plaintiffs for the sum of £3 with costs, and I certify that this was a proper case to be tried in the High Court.

Solicitor for the plaintiffs, *A. T. Squarey*.

Solicitors for the defendants, *Hill, Dickenson, Dickenson, & Hill.*

Court of Appeal.

From Q. B. Div.
(A. L. Smith, Chitty, and Vaughan Williams, L.JJ.) — May 17.

CHINA TRADERS INSURANCE CO. (LIMITED) *v.* ROYAL EXCHANGE ASSURANCE CORPORATION. (*a.*)

Practice—Discovery of documents—Marine insurance—Ship's papers—Re-insurance.

In an action by the original underwriter against the re-insurers upon a marine policy of re-insurance, the defendants are entitled to an order for production of ship's papers.

Appeal from the refusal of Mathew, J., at chambers, to make an order for the production of ship's papers in an action upon two policies of re-insurance on cargo per ship *Conqueror*.

The cargo had been insured with the plaintiffs for a particular voyage, and the plaintiffs had effected policies of re-insurance with the defendants. The plaintiffs alleged that the ship and cargo were lost by the perils insured against and that they had paid the assured for a total loss, and claimed upon the policies of re-insurance for a total loss.

Upon a summons for directions the defendants applied for an order that "the plaintiffs and all persons interested in these proceedings, and in the insurance, the subject of this action, do produce on oath and show" to the defendants all ship's papers as in Form 19 in Appendix K. to the Rules of the Supreme Court, 1883, with the additions specified in the case of *China Transpacific Steamship Co.* v. *Commercial Union Assurance Co.*, 30 W. R. 224, 8 Q. B. D. 142).

Mathew, J., refused to make the order for ship's papers, but ordered the parties to exchange lists of documents and to give inspection.

The defendants appealed.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Joseph Walton, Q.C., and *F. W. Hollams*, for the defendants.

J. A. Hamilton, for the plaintiffs.

The arguments and authorities are sufficiently stated in the judgments.

A. L. SMITH, L.J.—The question on this appeal is whether in the case of a re-insurance the original underwriter can, in an action against the re-insurer, be ordered to produce ship's papers.

I wish to say, however, before I discuss that question, that the order of Mathew, J., that each side should exchange documents and give inspection, is sufficient in the present case. But Mathew, J., went further, and decided that the re-insurer had no right to get production of ship's papers, and it is that question which the parties wish to have decided, and for that purpose Mathew, J., gave leave to appeal.

The rule as to ship's papers is a very old one, and there is a case upon the point before Sir James Mansfield in 1809, *Goldschmidt* v. *Marryat*, 1 Camp. 559. It is a rule peculiar to marine insurance. As between assured and underwriter it was and is common practice to order the assured to produce ship's papers. Then in 1890, a Divisional Court, composed of Mathew and Cave, JJ., in the case of *Nord Deutsche Versicherungs Gesellschaft* v. *Merchants' Marine Insurance Co.* (not reported) held that an order for ship's papers would not be made in a case of re-insurance. That case was referred to in this court in the subsequent case of *Willis & Co.* v. *Baddeley*, 40 W. R. 577, [1892] 2 Q. B. 324, when both Bowen, L.J., and myself said that the question whether that decision was right must be left open. Then it is said that in 1897 Collins, J., made an order at chambers in the case of *Royal Exchange Assurance Corporation* v. *Faber*, which was a case of re-insurance, for production of ship's papers. Mathew, J., sitting as the judge taking commercial causes, has come to the conclusion that in a case of re-insurance he will not order production of ship's papers. I do not agree with that view. Once it is seen that the re-insurer has open to him all the defences which the original underwriter had as against the assured, of which *Chippendale* v. *Holt*, 44 W. R. 128, 1 Com. Cas. 197, is a good illustration, why has he not the same rights against the underwriter as the latter has against the assured? Why is he not to see all the documents which may show a defence available to the original underwriter as against the assured? It is said that the underwriter will probably have no documents. I do not know whether he will or not, but it must be remembered that the rule as to ship's papers applies to an insurance on goods as well as to an insurance on ship, and yet the same objection might be made in such a case in an action by the assured against the underwriter, for the assured would very probably have no ship's papers. In my opinion the rule as to ship's papers applies to the first and all subsequent re-insurers. With reference to *Henderson* v. *Underwriting and Agency Association*, 39 W. R. 528, [1891] 1 Q. B. 557, that case obviously is distinguishable. It was not a claim upon a marine policy at all, but for loss of goods carried partly by land. Though the policy was founded on a Lloyd's policy, it was altered to meet the requirments of the case, the words perils "of the seas" being struck out and "transit or conveyance" substituted (see 60 L. J. Q. B. 406). The court in that case refused to extend the old rule as to ship's papers to a policy on goods carried by land. In my opinion a re-insurer can have the ordinary order for ship's papers against the underwriter, and this appeal must be allowed.

CHITTY, L.J.—I am of the same opinion. In the present case the order for exchange of documents and inspection is sufficient, but the learned judge desired that the question, whether in a case of re-insurance an order for ship's papers would be made, should be brought before this court. The courts at Westminster have long been in the habit of making orders for production of ship's papers. The reason for that practice, which had grown up before 1809, was stated by Sir James Mansfield, C.J., in *Goldschmidt* v *Marryat*, as it often obviated the necessity of going into a court of equity and saved delay and expense. The practice in an action by shipowner against underwriter is well established at the present day. The question is whether the same rule applies to the case of a re-insuring underwriter. I can see no distinction between the two cases. All the defences open to the original underwriter are open to the re-insuring underwriter when sued upon a policy of marine insurance. It has been urged that there is much greater probability that a shipowner when suing would have ship's papers. That is true. But the authorities do not stop at an insurance on ship. They show that an insurance on cargo falls within the rule, and there is not much probability that the cargo owner would have ship's papers. He may, however, have access to them. That exhausts this case. As regards the authorities, A. L. Smith, L.J., has already gone through them. It seems to me pretty clear that two judges in this court in *Willis & Co.* v. *Baddeley* did not agree with the decision in the *Nord Deutsche case.*

VAUGHAN WILLIAMS, L.J.—I agree. The question is whether the practice of ordering the production of ship's papers applies to a case of re-insurance, and it seems that the unreported decision of Mathew and Cave, JJ., in the *Nord Deutsche case* went upon the ground that the practice did not apply to such a case. Since that case there has been an expression of disapproval of that decision by Bowen and A. L. Smith, L.JJ., in *Willis & Co.* v. *Baddeley.* I do not think that we can fall back upon any long-established practice in a case of re-insurance. Mathew, J., who had great experience in these matters when at the bar, said, in the *Nord Deutsche case*, that he had never been able to get an order for ship's papers in a case of re-insurance. Nor can I find any trace of an established practice in the books upon the subject. That being so, we must decide the point partly on considerations of convenience and partly on principle. Why should an assured under a marine policy be called upon to do more than an ordinary litigant is bound to do? Brett, J., in *China Transpacific Steamship Co.* v. *Commercial Assurance Co.*, 30 W. R. 224, 8 Q. B. D. 142, gives some reasons for it. "The reasons for this," he says, "are not far to seek. The underwriters have no means of knowing how a loss was caused; it occurs abroad, and when the ship is entirely under the control of the assured. In addition to this, the contract of insurance is made, in peculiar terms, on behalf of the assured himself and all persons interested, and who these persons are, especially at the time of the loss, is entirely unknown to the underwriters. The practice therefore arose of making the order on all parties interested, without an affidavit." If those were the whole of the reasons I should doubt whether a case of re-insurance fell within the practice. But I do not think that that learned judge intended to give all the reasons for the practice. He gave certain reasons why it is convenient to make such an order. One must therefore see whether there is any reason in the position of the person against whom the order is sought to be made, and in his relation to the underwriter, for calling upon him to make the discovery. The reason seems to me really to flow from the nature of the contract itself. A person who effects a re-insurance is himself an assured, and he takes upon himself the duty, both in entering into and carrying out the contract, of doing everything in the greatest good faith. The doctrine of *uberrima fides* applies, and the original underwriter can be properly called upon to produce such papers as he can produce and to account for those which he is unable to produce. I think that this principle was intended to be affirmed in *Rayner* v. *Ritson*, 14 W. R. 81, 6 B. & S. 888, though the judgment did not in terms say so. The assured has imposed upon him the duty of observing the greatest good faith in elucidating the past in respect of which the underwriter is called upon to pay, and this obligation is equally imposed upon the assured in a case of re-insurance. For these reasons the appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 2, 3, 23.

MANNERS *v.* PEARSON. (*a.*)

Account, action for—Contract—Payment in currency of foreign country—Rate of exchange—Damages.

As a general rule the courts of this country have no jurisdiction to order payment of money except in the currency of this country. Whatever sum is ordered to be paid, whether for principal, interest, or damages, must be expressed in English money.

By a contract dated the 6th of October, 1891. *P. agreed to pay* (inter alia) *to M. one cent. in Mexican currency per cubic metre of certain excavation works mentioned in the contract, to be payable as and when received by P. from the Mexican local authority. P. also agreed to make a monthly statement of the total number of cubic metres of excavation done during each month, when the amount payable under the contract would be ascertainable. M. died in June,* 1894, *down to which time all sums found due were punctually paid, but no legal personal representative to his estate was appointed until May,* 1896. *The excavation works were finished and paid for on the 31st of August,* 1896.

In an action for an account brought in England by M.'s legal personal representative against P., judgment was given declaring that the plaintiff was entitled to an account of what was due to him by P. under the contract with M.; but the judgment contained no declaration or inquiry as to damages. Upon taking the account it was, on the 13th of November, 1897, *found that a balance of* 19·366 *Mexican dollars was due by P. to the plaintiff. Upon a motion by the plaintiff to determine questions as to the currency, in which the account should be calculated and the balance paid:*

Held, by the Court of Appeal (*affirming* Kekewich, J.) (dissentiente Vaughan Williams, L.J.), *that having regard to the form of the judgment at the trial of the action, the balance found due must be turned into English money, as on the 13th of November,* 1897, *when the amount due was first ascertained. An action for an*

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

account is in equity an action for the balance found due on taking the account, and not a series of actions for particular items in the account.

Plaintiff's appeal from a decision of Kekewich, J.

The action was brought for an account of what was due from the defendants to the plaintiff as the legal personal representative of a Mr. Morison under a contract entered into between him and the defendants.

By that contract certain sums of money in Mexican dollars had to be paid by the defendants to Morison, and the question at issue was how the account ought to be taken in this country and at what times the sums payable in Mexican dollars ought to be reckoned in English money, and how the equivalent sums in English money ought to be calculated.

The contract was dated the 6th of October, 1891. It was in the English language, and was made between Morison, described as of the City of Mexico, of the one part, and the defendants, described as of 10, Victoria-street, Westminster, and thereinafter called the contractors, of the other part, and by it the defendants agreed to pay Morison (1) £595 17s. 6d. in English money on the execution of the agreement; (2) one cent. in Mexican currency for every cubic metre of certain excavation works mentioned in the agreement. This money was payable from time to time as and when the same should be received by the defendants from the junta or committee of management of the drainage works of the city and valley of Mexico. The contract also provided as follows: "(3) The contractors shall within one month from the date of this agreement, and monthly thereafter, make and furnish to the said A. D. Morison a statement in writing of the total number of cubic metres of excavation which shall have been done by the contractors and paid for by the junta to them as aforesaid up to the date of such account and of the amount then payable to the said A. D. Morison at the rate of one cent. per cubic metre, and the contractors shall be entitled to take credit for and deduct therefrom all sums paid by them to the said A. D. Morison on account thereof as per statement attached, and they shall immediately thereafter pay the balance appearing by such account to be due to him. (4) Subsequent payments shall be made by the contractors to the said A. D. Morison as and when the contractors shall from time to time receive from the junta, payment for excavation done by them" as therein mentioned.

The £595 17s. 6d. was duly paid, and so long as Morison lived the defendants paid him all that became due to him under the contract. He died in June, 1894, and no one became his legal personal representative until May, 1896, when the plaintiff took out letters of administration to his estate.

In June, 1896, the plaintiff brought this action for an account. It came on for trial on the 4th of November, 1897, and the court then declared, *inter alia*, that the plaintiff was entitled to have an account taken of what was due and payable to him as Morison's legal personal representative under and by virtue of the above agreement, and in taking such an account the defendants were to be credited with a certain sum of £327, as to which no question arose.

The defendants had always kept proper accounts of the sums payable to Morison's estate in Mexican dollars, and the plaintiff accepted these accounts as correct. According to them a balance of 19,366dols. was due from the defendants to the plaintiff.

On the accounts two questions arose. First, the plaintiff contended that the dollars ought to be turned into English money whenever any dollars ought to have been paid by the defendants; whilst the defendants contended that the ultimate balance only ought to be turned into English money; secondly, the plaintiff contended that even if the defendants were right in their first contention, this balance ought to be turned into English money on the 31st of August, 1896, when the excavating work was finished and paid for by the Mexican local authority. At that date Mexican dollars were worth 2s. 6d. The defendants, on the other hand, contended that the balance ought to be turned into English money on the 13th of November, 1897, when the amount due was first ascertained and when the dollar was worth only 1s. 10¼d.

In these circumstances the plaintiff served the defendants with a notice of motion to give effect to his views, and the motion was heard on the 4th of February, 1898.

Kekewich, J., refused the motion with costs.

The plaintiff appealed.

Henry Terrell, Q.C., and *Cecil Walsh*, for the appellant.—The plaintiff asked that on taking the accounts directed to be taken after the trial, the value of the Mexican dollars should be taken on the dates when they became payable. The real point is, what is the rate of exchange? Kekewich, J., dismissed the application, saying the true date was the date when the account was made up pursuant to the judgment. *Scott* v. *Bevan*, 2 B. & Ad. 78, is exactly like this case. The monthly balances ought to be ascertained in Mexican currency and should be converted only when consequential relief is claimed: *Cash* v. *Kennion*, 11 Ves. 314. [LINDLEY, M.R.—Why should we treat you as having recovered judgment for each monthly balance? I never heard of accounts taken on that footing; you ask us to treat the rate of exchange as part of the contract.]

They also referred to *Bertram* v. *Duhamel*, 2 Moo. P. C. 212; *Cockerell* v. *Barber*, 16 Ves. 461; *Suse* v. *Pompe*, 9 W. R. 15, 8 C. B. N. S. 538.

Renshaw, Q.C., and *Joseph Tanner*, for the respondents.—If under a contract there is a liability to pay money in a foreign country, it must be paid in the currency of that country: Story on the Conflict of Laws, section 309. The only ground for conversion here is that the plaintiff has brought his action in this country. *Cockerell* v. *Barber* is criticized by Story in section 313. [VAUGHAN WILLIAMS, L.J.—Yes; but not in the way you want; Story says it does not go far enough against you.] Where a fixed sum is due abroad under a judgment or an agreement payable at a fixed date, the rate of exchange must be ascertained at the fixed date.

Terrell, Q.C., in reply.—The rate of exchange ought to be taken on the day on which payment is made, and the authorities cited settle that proposition. The plaintiff is willing to take the 31st of August, 1896, as the date on which the account was due to him.

[VAUGHAN WILLIAMS, L.J., referred to *Delegal* v. *Naylor*, 7 Bing. 460.]

Cur. adv. vult.

March 23.—LINDLEY, M.R., stated the facts as above set out, and continued: Before considering the questions raised by this appeal it is necessary to ascertain the grounds on which any judgment or order for payment in English money can be properly made in a case where the plaintiff sues upon a contract to pay in the currency of a foreign country. The terms of the contract confer no right to payment in English money. If the defendants had tendered to their creditors either in Mexico or wherever they demanded payment the amounts due from them in Mexican dollars at the proper times they would have offered to perform their obligations in strict accordance with their contract. The necessity for considering what amount the defendants ought to pay in

English money arises simply from the fact that the plaintiff, having the right to sue the defendants in this country for a breach of their contract, has chosen to sue them here instead of in Mexico; and speaking generally the courts of this country have no jurisdiction to order payment of money except in the currency of this country. Whatever sum is ordered to be paid, whether for principal, interest, or damages, must be expressed in English money, or such order cannot be enforced by the ordinary writs of execution. Whether before the Debtors Act an order in Chancery for the payment of so many Mexican dollars could have been made and could have been enforced by attachment I do not pause to inquire. With this possible exception the above statement is correct and affords the true explanation of the necessity for considering how much money in English currency the defendants ought to pay the plaintiff. If the defendants were within the jurisdiction of any other civilized state and were sued there, as they might be, the courts of that state would have to deal with precisely the same problem, and to express in the currency of that state the amount payable by the defendants instead of expressing it in Mexican dollars. If this be the true explanation of the necessity for expressing in English money what the defendants ought to pay, it follows that such necessity does not arise until the court orders payment. But it does not follow that the sum to be inserted in the order is the equivalent at that time of the moneys payable by the terms of the contract, for the defendants may be liable, not only to pay those sums, but also damages in the shape of interest or otherwise for not having paid them at the proper time. The obligations, if any, of the defendants in this respect must be determined before the amount for which they are liable can be calculated and expressed in any order for payment. The foregoing considerations furnish the principle on which the present case must be decided; and that principle was clearly expressed by Lord Eldon in *Cash* v. *Kennion*, 11 Ves. 314. At p. 316 he said: "I cannot bring myself to doubt that where a man agrees to pay £100 in London on the 1st of January he ought to have that sum there on that day. If he fails in that contract, wherever the creditor sues him the law of that country ought to give him just as much as he would have had if the contract had been performed." The application of this principle to various circumstances is illustrated by other decisions (*e.g.*, *Cockerell* v. *Barber*, 16 Ves. 461; *Scott* v. *Bevan*, 2 B. & Ad. 78; *Bertram* v. *Duhamel*, 2 Moo. P. C. 212); but it is unnecessary to refer to them at length, and I pass to the facts of the present case.

It must be borne in mind that for two years after Morison's death he had no legal personal representative to whom the defendants could pay anything. During all that time the defendants did not break their contract in not making the payments which they had agreed to make, and, there being no breach of contract, damages for non-payment during that time are out of the question. Moreover, there is no evidence that interest is payable by the law of Mexico on debts in respect of which there is no contract to pay interest, as is the case here. When in May, 1896, the plaintiff became Morison's administrator he became entitled to demand from the defendants—first, payment at once in Mexican dollars of all arrears due under the contract; secondly, payment in future in Mexican dollars and at the stipulated times, of the amounts which should thereafter become due under the contract. Failure by the defendants to make these payments would be breaches by them of their contract, and would expose them to claims for damages in some shape or other. How these damages would have to be ascertained by an English court if it became necessary to assess them is a question of some difficulty, as will be seen by turning to Story's Conflict of Laws (section 308 *et seq.*) and Sedgewick on Damages (3rd ed., p. 250). But, for reasons which I proceed to state, I am of opinion that no claim by the plaintiff to damages in any shape can be supported in the present case. The order of the 4th of November, 1897, was the judgment on the trial of the action, and it limits the right of the plaintiff to an account of what is due to him from the defendants under their agreement with Morison. This judgment excludes all claim to damages for non-payment of particular sums charged against the defendants in taking the account. If the plaintiff wanted to charge the defendants with damages in taking the account he should have obtained some declaration or inquiry entitling him to such damages. Before the Judicature Acts no one ever heard of investigating damages in taking an account in Chancery of money due under a contract. Since the Judicature Acts damages can be given in the Chancery Division where they could not have been given before; but even now a judgment or order for an account of what is due under a contract, does not involve an inquiry as to damages in taking the account. The absence from the judgment of the 4th of November, 1897, of any declaration or inquiry as to damages is easily explained by the long delay in obtaining letters of administration to Morison's estate, during which time no damages could be payable by the defendants. But even as to damages since the plaintiff obtained letters of administration the judgment pronounced is fatal to the plaintiff's first contention, that he is entitled to have all sums payable by the defendants turned into English money at the times when those sums became payable according to the terms of the contract. Such a contention can only be supported on the theory that the defendants are liable for damages for default in payment. To substitute English money for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of it which the plaintiff can prove that the defendants committed, which is a totally different matter. Even as regards the balance of 19,366 dols. found due to the plaintiff, I see no grounds for awarding him damages for the non-payment of that sum before it was ascertained. The plaintiff urges that it now appears that this sum ought to have been paid on the 31st of August, 1896; but how could it have been paid then when no one then knew what the amount payable was? The sum in question is the balance due on taking the whole account. Under the judgment of the 4th of November, 1897, the defendants are not chargeable with damages for delay in accounting, any more than they are chargeable with damages for not punctually paying sums properly placed to their debit in taking the account. Moreover, no undue delay in accounting was proved so far as we know. As soon as the balance was ascertained the defendants offered to pay it to the plaintiff either in Mexican dollars or in English currency equal to their then value, as the plaintiff might prefer. This offer the plaintiff declined. In my opinion the defendants have been in the right throughout in this particular controversy, having regard as we must to the terms of the contract and to the judgment of the 4th of November, 1897, which is not appealed against. The appeal, in my opinion, fails, and ought to be dismissed with costs.

RIGBY, L.J.—This is an action brought by the par-

sonal representative of a gentleman named Morison who died on the 14th of June, 1894, against the defendants for an account of commissions payable to him under an agreement dated the 6th of October, 1891, and made in Mexico. There had been an earlier agreement to a similar effect, but as to this the accounts were closed in Mr. Morison's lifetime. Under both agreements the commissions were to be paid as the defendants themselves were paid by a Mexican Government department, and monthly accounts were to be rendered. The later of the two agreements is the only one with which we are concerned, and as it is a Mexican agreement, Mexico was the place for the performance of it. Mr. Morison, by a letter of charge dated the 26th of September, 1889, during the currency of the earlier agreement, directed portions of the sums payable to him in terms which included both the agreements to be paid to Mr. Kerrison, an English banker residing in England. All payments becoming due under the agreement during Mr. Morison's lifetime were duly paid either to him or to Mr. Kerrison; but, of course, after Mr. Morison's death there was, until a personal representative of his was duly constituted, no person who could settle accounts or give receipts for payment, except so far as Mr. Kerrison might be able to do so, for the money payable to him. This state of things lasted nearly two years, until the 29th of May, 1896, when the plaintiff became administrator in England of Mr. Morison, and on the 11th of June issued the writ in this action. At the time when the writ was issued the defendants had paid to Mr. Kerrison after Mr. Morison's death, under the charge in his favour, the sum of £327 6s. 6d., and he was, it seems, content to take, and did take that sum in satisfaction of his whole claim. The defendants, however, claimed to be assignees of his charge, and on the construction which they placed upon the charge and the agreement contended that they were not liable to pay anything more to the plaintiff. It was this claim which rendered necessary the plaintiff's action, but though it was brought on the 11th of June, 1896, no judgment was pronounced until the 4th of November, 1897, no explanation of the long delay of nineteen months has been given. The action came on for trial and by the judgment the court—being of opinion that the sum of £327 6s. 6d. in the pleadings mentioned was paid by the defendants to Mr. Kerrison in discharge of the amount due to him under his charge dated the 26th of September, 1889—did declare that the plaintiff was entitled to have an account taken of what was due and payable to him as legal personal representative of Mr. Morison under the agreement of the 6th of October, 1891; and on taking such account the defendants were to be credited with the said sum of £327 6s. 6d., and with all other sums paid to Mr. Kerrison previous to the payment of the £327 6s. 6d. The defendants were ordered to pay to the plaintiffs two-thirds of the taxed costs, and the parties were to be at liberty to apply to the court to have the account taken by the court if necessary. This judgment contains no directions as to the way of taking the account and orders no enquiries for the purpose of fixing the defendants with anything more than the balance which may be found due as the result of taking the account, and under it no claim for damages could arise. The defendants were in the wrong down to the judgment as to the claim to be treated as assignees of Mr. Kerrison, and the court visited them with payment to the plaintiff of two-thirds of the taxed costs. The fact that the order extends only to two-thirds shows, however, that the plaintiff was not himself considered to be free from blame. It is plain that the parties contemplated the probability of their settling the account out of court, and the defendants promptly rendered on the 13th of November, 1897, an account showing a balance due to the plaintiff down to the 31st of August, 1896, of 19,366 dols.—Mexican currency. This account did not profess to be a final account, as certain further sums would become payable on commission on the completion of the excavation contract entered into by the defendants; but it included everything down to the date of its being rendered. So far as the balance in Mexican currency is concerned it has been admitted by the plaintiff to be correct as to figures if only the account is to be taken in the manner in which the defendants had taken it—that is to say, in Mexican currency. The plaintiff, however, contended that it had not been rightly taken, and down to the bringing of the present appeal the parties have been at variance as to the way in which the account should be taken. The difference arose in this way. The defendants, after taking the account in Mexican currency, turned the balance (admitted to be correct as a mere question of figures) into English money at the rate of exchange of the day, 22¼ pence per dollar, which brought out a sum of £1,795 8s. 11d from which they deducted the £327 6s. 6d., and offered the balance of it, £1,468 2s. 5d. This the plaintiff refused to receive, claiming to have the account taken on the principle of charging the defendants with the sums payable monthly estimated in English money at the respective dates on which they became payable. This principle, if allowed, would have necessitated the entire opening of the account from beginning to end, and would, of course, have brought out a balance very different in value from the actual balance of 19,366 dols. shown in the account. After a further unexplained delay of nearly three months the plaintiff, on the 4th of February, 1898, brought on this motion. [His lordship read the notice of motion, and continued:]

The plaintiff was not, in my judgment, entitled to a direction to the effect of any one of the alternatives suggested in the notice of motion, though probably the defendants would have had no objection to that alternative which suggested as the time for ascertaining the value of the dollars the date of the judgment—viz., the 4th of November, 1897. In support of the claim for interest at 4 per cent. from the date of the judgment I can see no possible ground. The judgment was not a final judgment for an ascertained sum, and it would be altogether without precedent to grant interest in the circumstances. This claim, however, plainly shows, as do the others, that the account rendered on the 13th of November, 1897, was not accepted as a sufficient settlement of account. As to the first alternative claim, which seems to have been most argued in the court below as it was on the appeal, it would be sufficient to say that it treats the defendants as having been in default from the death of Mr. Morison, and would be giving the plaintiff the advantage of the delay in taking out administration and in the conduct of the action, which would be plainly unjust. In addition to this it proceeds upon an entire misapprehension of the nature of an action for account in equity, which is an action for the balance found due on the taking of the account, and not for the several items to be included in it. The notice of appeal drops all the claims for directions contained in the motion before Kekewich, J., except the first, and substitutes for the abandoned alternatives one for fixing the 31st of August, 1896, as the day for conversion of the Mexican dollars. It seems to me that a sufficient answer to that claim is that the account showing a balance to that date was not delivered until the 13th of November, 1897, and even if accepted on that date could not have formed the basis of an order at an earlier period. But in

truth, as before pointed out, it was not accepted in any sense as a satisfactory account until at the earliest during the argument of the appeal motion, so that it would be impossible to give a direction on the new alternative. To the present time there has been no settled account. There is no evidence that the law of Mexico is in any material respect different from our own; so that if the suit had been prosecuted there, it would have been impossible to get an order for the payment of the balance before the 13th of November, 1897. This shows that there can properly be no question as to an earlier conversion. Independently of the cases cited as to conversion into English money of foreign currency, not only was the order of Kekewich, J., which is appealed against, quite right, but no order on the substituted alternative could now properly be made, and the only order ought to be that the appeal be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—The only question argued before us in this case has been as to what is the proper mode of taking the account ordered in an action brought in this country by a creditor to have an account taken of money payable abroad by the defendant in foreign currency—whether such account should be taken on the relative values of the English and foreign currencies as of the date of taking the account, or as of the dates when the debts became payable, or as of some other and what date or dates? It was not questioned on either side but that the total debt ordered to be paid after taking the account must be expressed in English currency, and that the amount in English currency must be arrived at by taking the real value in English currency of the foreign currency at the place where payable as a purchasable commodity—*i.e.*, in practice, according to the rate of exchange existing at the particular time between the currencies. The only question has been as to what that particular time was.

Now, I will first consider the question irrespective of the form of action. It seems clear that, in an action in whatever form in the English court for the recovery of a debt payable in foreign currency, the amount of the English judgment or order must be expressed in English currency, and that, unless the relative values of the respective currencies are fixed by statute or some authority binding the English courts, or by the agreement of the litigants, the amount of the English judgment or order must be based on the quantity of English sterling which one would have to pay here to obtain in the market the amount of the debt payable in foreign currency delivered at the appointed place of payment—*i.e.*, the amount payable according to the rate of exchange. *Scott* v. *Bevan* is an authority for this mode of computation. Also this mode of computation is in accordance with the rule applied on the dishonour of a bill of exchange payable in foreign currency in a foreign country: *Suse* v. *Pompe*. It seems plain that this mode of computing the value of foreign currency in English sterling and the converting the one currency into the other is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment. Now, if this is the general rule in an action for the recovery in English courts of sums payable abroad in foreign currency, I see no reason why a different rule should be applied in a case where the form of action is, as it is in this case, an action for an account. Suppose the account had been an account of the number of bushels of maize which the defendant had received in Mexico on account of the plaintiff, the amount payable by the defendant to the plaintiff would have to be fixed according to the value of the maize at the date when the defendant ought to have accounted for the maize in question according to the course of business between himself and his principal; and it seems to me that the Mexican dollar should be accounted for on the same footing. It may be that in the present case it might have been troublesome to ascertain the dates at which the various sums payable as commission in dollars became payable, but this would not in my judgment have been a sufficient reason for fixing the amount of the result of the account in English sterling according to the value of the dollars at the date of the completion of the taking of the account. This difficulty, however, does not arise in the present case, because the plaintiff is willing that the value shall be taken of the dollar as of the 31st of August, 1896, the date as of which the defendants in fact rendered their account, including all the sums now claimed by the plaintiff. [His lordship discussed the cases of *Cash* v. *Kennion* and *Cockerell* v. *Barber*, and Sedgwick on Damages (4th ed. 270) and Story's Conflict of Laws, s. 309, and continued:] With regard to this case I would observe that, although the case is a strong authority for treating the value of the foreign currency in English currency as a question of damages—the declaration of the plaintiff and the judgment of the court both so treating it—I am not sure that the allowance of the interest as from the date of the original debt down to the date of the payment into court in the English action is quite consistent with this view; but, be this how it may, there can be no doubt but that the court took as the measure of value 160 pounds Jamaica to 100 pounds English sterling, and, if this is so, I think it follows that the date for the application of the rate should have been the date of the Jamaica judgment, when the obligation sued on arose, and not the date of the English judgment.

I think that the order of Kekewich, J., ought to be amended by declaring that the plaintiff is entitled to have the amount of Mexican dollars found to be due by the account of the 31st of August, 1896, converted into English money sterling at the rate of exchange prevailing between the said currencies on that day. It seems to me that to hold otherwise would make the plaintiff's remedy for the recovery of what is due to him differ according to the form of procedure, and according as he brings his action in the Queen's Bench Division or in the Chancery Division.

Appeal dismissed.

Solicitors, *Angove & Bromwich; Jaques & Co.*, for *Samuel Wright & Co.*, Bradford.

From Chan. Div.
(Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) March 18.

In re HUGHES.
BRANDON v. HUGHES. (*a*.)

Married woman—Protection order—Power to contract debts—Appointment—Liability of appointed fund for debts—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 4—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1 (*a*), (*b*), (*c*)—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 21, 25, 26.

A married woman who has obtained a protection order under the Matrimonial Causes Act, 1857, *is to be*

(*a*.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

regarded as, for the purpose of contracting, a feme sole. *Consequently, funds appointed by her by a will exercising a general power of appointment will become liable for a debt contracted by her after the protection order, but before the creation of the power of appointment, and before the passing of the Married Women's Property Act,* 1882.

Judgment of Kekewich, J., ante, p. 220, *affirmed.*

Appeal from a decision of Kekewich, J. (*ante*, p. 220), where the facts are sufficiently stated.

Swinfen Eady, Q.C., and *Joseph Tanner*, for Mrs. Walker's executor, who appealed, referred to section 1, sub-sections 2 and 4, and section 4 of the Married Women's Property Act, 1882; *In re Roper, Roper* v. *Doncaster*, 36 W. R. 750, 39 Ch. D. 482; sections 21, 25, and 26 of the Matrimonial Causes Act, 1857; section 1, (*a*), (*b*), and (*c*) of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63); *Cooke* v. *Fuller*, 26 Beav. 99; *Waite* v. *Morland*, 36 W. R. 484, 38 Ch. D. 135; and *Hill* v. *Cooper*, 41 W. R. 500, [1893] 2 Q. B. 85.

Warrington, Q.C., and *A. Dauney*, for Mr. Stogdon, were not called upon.

LINDLEY, M.R.—I think the judgment of the learned judge in the court below, or the order he has made, is quite correct. The order declares that the court is of opinion that the fund appointed by the will of Agnes Ann Walker otherwise Hughes, is assets for payment of the debts of the said testatrix, including the amount (if any) due under the indenture of the 6th of March, 1880. It appears to me that the learned judge was perfectly right there, because when you bear in mind that Mrs. Walker had on the 9th of February, 1880, obtained a protection order, and was therefore, under the provisions of sections 21, 25, and 26 of the Matrimonial Causes Act, 1857, in the position, as from that date, of a *feme sole*, capable of contracting debts and obligations, it is plain that this case is taken quite out of the principle applied by Kay, L.J., in *In re Roper, Roper* v. *Doncaster*. The *ratio decidendi* of that case was that a married woman had not "debts" in any accurate sense of that expression. We start, then, with the fact, that this lady was in a position of a *feme sole* for the purpose of contracting debts. It is plain that she did contract debts. [His lordship read section 4 of the Married Women's Property Act, 1882, and proceeded:] If she has debts and liabilities when she makes her appointment, why should not section 4 apply to the case? It would, I think, be putting far too narrow a construction on this section were we to adopt Mr. Swinfen Eady's suggestion, and to say that its provisions do not apply to debts and liabilities which the married woman already had, when the Act came into operation, although, at the same time, those provisions make the fund over which she has a general power of appointment liable for her debts in general. That would be far too narrow a construction to put on the Act of 1882.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

Appeal dismissed.

Solicitors, *G. H. & S. Brandon; J. C. Stogdon.*

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 10, 11.

In re PIERCY.

WHITWHAM *v.* PIERCY. (*a*.)

Will—Charitable gift—Administration of estate—Mixed fund—Pure and impure personalty—Discretion of trustees—Mortmain—9 Geo. 2, *c.* 36.

P. by his will directed his trustees to apply one-tenth of his estate over and above £110,000 "*to such charitable institutions and objects as my trustees may determine.*"

Held (*affirming* North, J.), *that the gift extended not only to the pure personal estate, but also to the impure personal estate and to the proceeds of sale of the real estate.*

Lewis *v.* Allenby, 18 *W. R.* 1127, *L. R.* 10 *Eq.* 668, *approved.*

The principle on which such gifts are construed by the court is correctly stated in Mayor and Aldermen of Faversham *v.* Ryder, 2 *W. R.* 573, 5 *De G. M. & G.* 350; University of London *v.* Yarrow, 5 *W. R.* 543, 1 *De G. & J.* 72; *and* Carter *v.* Green, 5 *W. R.* 856, 3 *K. & J.* 591.

Appeal of the defendants from a decision of North, J.

By his will, dated the 5th of December, 1883, Benjamin Piercy, the testator, directed his trustees to apply one-tenth of his estate over and above £110,000 "to such charitable institutions and objects as my trustees may determine."

The testator died on the 24th of March, 1888, and left considerable real estate and impure personalty.

In an action commenced by the trustees of his will the usual administration decree was made on the 21st of January, 1889. The estate had been partly realized and the trustees had funds in hand available for distribution under the above charitable gift.

On the 14th of December, 1896, the plaintiffs took out a summons in the action to have it determined what was the Attorney-General's interest under the above bequest in (1) the *corpus* of the testator's estate; and (2) the income accrued thereon and thereafter to accrue.

On the 27th of November, 1896, the Attorney-General took out a summons asking that no further payment be made under the order on further consideration of the 15th of January, 1896, out of the income of the estate of certain quarterly sums therein mentioned, except upon certain stated conditions.

The two summonses came on together for hearing before North, J., who, following *Lewis* v. *Allenby*, 18 W. R. 1127, L. R. 10 Eq. 668, held that the charitable bequest applied not only to pure personalty but also to impure personalty and proceeds of realty; that the power of selection or determination could not be properly exercised except in favour of such charitable institutions as were at the testator's death empowered by law to hold real estate or impure personalty, notwithstanding the statute 9 Geo. 2, c. 36.

The defendants, who were beneficiaries under the will, appealed.

Swinfen Eady, Q.C., and *Badcock*, for the appellants.—North, J., really followed *Lewis* v. *Allenby*. The distinction is that in the will a direction to marshal must be found, and the court never will marshal in the case of charities. In construing the will any question of pure or impure personalty must be ignored. Here there is no

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

indication in any shape or form in the will that any particular part of the estate is to go to charities, and it is quite clear that merely giving to the trustees a discretion does not get rid of the Mortmain Acts.

The following cases were referred to: *In re Clark, Husband* v. *Martin*, 33 W. R. 516; *Baker* v. *Sutton*, 1 Keen 224; *Johnston* v. *Swann*, 3 Madd. 457; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364; *In re Arnold, Ravenscroft* v. *Workman*, 36 W. R. 424, 37 Ch. D. 637; *Nightingale* v. *Goulburn*, 5 Hare 484; *In re Ovey, Broadbent* v. *Barrow*, 34 W. R. 100, 31 Ch. D. 113; *Attorney-General* v. *Stewart*, 2 Mer. 143; *Whicker* v. *Hume*, 6 W. R. 813, 7 H. L. Cas. 124.

Sir Richard Webster, A.G., and *Ingle Joyce*, for the Attorney-General.—In *Johnston* v. *Swann* the main contention was, was there a charitable bequest or not? This is in effect a gift of one-tenth to such charitable institutions as can take; from 1845 down to the present time there is no authority to contravene the law as we maintain it to be. There is no ground for overruling *Lewis* v. *Allenby*, and unless the court does overrule it, it would be a bad precedent to upset a practice so long established.

They referred to *Grimmett* v. *Grimmett*, Amb. 210, and *Carter* v. *Green*, 5 W. R. 856, 3 K. & J. 591.

Cozens-Hardy, Q.C., and *Frederic Thompson*, for the trustees.

Eady, Q.C., replied.

Cur. adv. vult.

March 11.—LINDLEY, M.R.—This is an appeal from the decision of North, J., by which he declared that the gift in the will of one-tenth of the testator's estate over and above £110,000 to such charitable institutions and objects as his trustees might determine, applied and extended not only to the pure personal estate, but also to the impure personal estate and the proceeds of sale of the real estate of the testator. The appeal asks that that may be reversed and that it may be declared that the gift in the will applies, and extends only to the pure personal estate. That was the main controversy. The real question is clear enough—namely, whether this court is prepared to overrule the decision of Stuart, V.C., in the case of *Lewis* v. *Allenby*. I will read the passage in the will. The testator directs all his property, real and personal, to be converted into money, and then he directs his trustees to hold the moneys to arise from such conversion upon trust thereout in the first place to pay the expenses incidental to the execution of the preceding trust, and his funeral and testamentary expenses, and to apply one-tenth of his estate over and above £110,000 to such charitable institutions and objects as his trustees may determine, and at such time or times and in such manner as they may think fit, and to stand possessed of his residuary real and personal estate until conversion, and the surplus of the said moneys and all his estate after conversion thereof upon certain trusts. Now, what is the true test to apply to a disposition of that kind? It is said to infringe an Act which is commonly called the "Mortmain Act," but which is more properly described as the "Charitable Uses Act," of 9 Geo. 2, c. 36, to which I will refer shortly. We all know that that Act of Parliament affected the power of disposition, and was contrasted with the older Mortmain Acts which applied rather to the power to take and to hold land. The important sections in the Charitable Uses Act are the 1st and 3rd. Section 1, which I will read shortly, says that no lands nor any sum of money to be laid out in the purchase of lands shall be given or granted "in [illegible] or for the benefit of any charitable uses whatsoever" unless it is by deed enrolled. Then section 3 says that all gifts and so on, and appointments which are contrary to that section shall be absolutely and to all intents and purposes null and void. Then section 4 introduces some exceptions. I have not got that section before me, but I think I am right when I say it excepts the two principal universities, and Eton, Winchester, and Westminster, and the colleges at the universities. Since the 9 Geo. 2, c. 36, there have been a great number of Acts of Parliament extending the exemptions. When the testator in the present case made this will there were a great many charities which were exempted from the operation of this statute of 9 Geo. 2.

Now, without going into the cases at present, and without considering the question of authority, I will state my own view of what I think is the true principle to be applied here. I cannot read this as a bequest to any charitable institution or object at all so far as the testator denominated it and pointed it out. It is like a power given to persons to appoint a fund. They can appoint the fund according to the will, to any charity or any charitable institution or object they think fit; and until that power is exercised one cannot say what the testator has done and what he has not done. If the trustees having this power, appoint to any institution, then, following out the analogy to which I am alluding, you read that into the will. If the trustees have appointed to a charity which cannot take, then that appointment must fail so far as the Act I have referred to requires. It may be good as to personal estate and bad as to the rest. If, on the other hand, they appoint to some charitable institution which is not hit by the statute, then read that into the will and it is perfectly good. If the question as to a disposition in a will or a devise or bequest to trustees with power to appoint were now to arise for the first time and had not been decided before, I should have thought on principle that the Charitable Uses Act did not hit it. I think you must see the result before you can determine that.

Now, if we look at the authorities I think that *Lewis* v. *Allenby* is a decision which goes that length and says that that is right. I do not myself quite follow the reasoning of Stuart, V.C., in *Lewis* v. *Allenby*. But we must remember that that case has been acted upon, and has been considered right from the time when it was pronounced almost until now. I find it referred to without any comment in the standard text-books to which we are accustomed to look. It is cited in all the editions of Lewin on Trusts and Jarman on Wills, and also in Theobald on Wills. Speaking from my own recollection I do not remember that *Lewis* v. *Allenby* has ever been seriously contested. It has presented difficulties, and that to my mind is because the reasoning of the Vice-Chancellor is open to some comment; but it has certainly been acquiesced in and followed. I think the judgment of Pearson, J., may be called in aid in the case of *In re Ovey, Broadbent* v. *Barrow*, if we want it, and also that of North, J., himself, in the case of *In re Seton Smith, Bright Smith* v. *The Attorney-General*, 73 L. T. Rep. 732, *note*, to which we were referred. But even apart from those authorities I think that the real principle applicable to the case is that upon which Lord Hardwicke proceeded in the case of *Grimmett* v. *Grimmett*, upon which the Court of Appeal proceeded in the case of *The Mayor and Aldermen of Faversham* v. *Ryder*, and Wood, V.C., in *Carter* v. *Green*. It strikes me as good sense and good law. Now, applying that principle to the present case, I come to the conclusion that there is nothing amiss with this gift to the trustees.

Now, it is said that this view is opposed to two cases which were not cited, unfortunately, before Stuart,

V.C., when he decided *Lewis* v. *Allenby*—namely, *Baker* v. *Sutton* and *Johnston* v. *Swann*, and unquestionably if you look at the orders then made, and what was done, those decisions are apparently opposed to the view taken by Stuart, V.C. But in neither of those cases was the precise point argued, and in neither of those cases does it appear what view the trustees took, whether they claimed the legacy and the right to exercise the power, or not. Of course it is quite possible that in both cases they may not have claimed the right at all, but left the court to deal with it. If that is the true view, and if that is the explanation, as it well may be, then they are not opposed to the view I am expressing. If they are, I am bound to say that on principle I think the decision in *Lewis* v. *Allenby* is right, although, as I said before, I do not quite follow the reasoning of the Vice-Chancellor in that case, because he seems to have construed the will as amounting to an exclusion of those institutions which could not take mixed personalty or the proceeds of the sale of realty. I do not think that that is so. I look upon it simply as an ordinary power of appointment which may be properly or improperly exercised, and until we know what the trustees do in the exercise of their power we cannot say that this disposition conferring the power is bad.

I think, therefore, that this appeal must be dismissed with costs.

RIGBY, L.J.—I am of the same opinion. I must say that I very much prefer to treat this case in the first instance as one of principle quite apart from authority. I will, however, say a few words about the authorities. Whatever may have been the idea of *Baker* v. *Sutton* and *Johnston* v. *Swann* at the time when the case of *Lewis* v. *Allenby* was decided—the law to my mind was clearly laid down on such a principle as to justify the order that was made in *Lewis* v. *Allenby* quite irrespective of any reasons that could have been given by the learned Vice-Chancellor or any criticism that has been passed upon it since. I think for my purpose I need only refer to one case. It is a case I mentioned during the argument, which was decided by the Court of Appeal, consisting of Lord Cranworth, L.C., and Knight-Bruce, and Turner, L.JJ. (*University of London* v. *Yarrow*, 5 W. R. 543, 1 De G. & J. 72); it sums up sufficiently the result of previous authority. The Court of Appeal, on an appeal from the Master of the Rolls, had to decide as to the validity of a bequest contained in the will of one Thomas Brown. The gift was for the purpose of founding, establishing, and upholding an animal sanitary institution within a mile of either Westminster, Southwark, or Dublin. The real difficulty was that it pointed to founding and establishing an institution near Westminster, Southwark, or, in the alternative, Dublin. Now, I am perfectly well aware that Lord Cranworth, who gave the leading judgment on that occasion, did express a doubt whether, if the choice had not been given for the founding of an institution near Dublin, he might not still have got over any difficulty. But that was not the matter upon which the case was decided. It was decided upon this point: that where objects were pointed out, some of which were illegal with an alternative which might be legal and would be legal, the power of selection given to the trustees, which might include, and did, I suppose, in that case include, the legal object, was quite sufficient to take it out of the statute. Very well. That goes very much further than the cases, which are numerous—only one or two of which were cited here—as to universities. It went to the question of whether the gift was valid, it being for certain purposes, some of which would be unlawful and others lawful. [His lordship read from the judgments of Lord Cranworth, L.C., and Knight-Bruce, L.J., and continued:]

Now, what does that decision involve? It seems to me to involve the whole question raised in the present case. Down to that time the principle was that if the testator had pointed out two objects, one lawful and the other unlawful, the power of the trustees to select the lawful one, rendered the charitable bequest good. Because it was a charitable bequest you could not say that the charitable bequest was void. I will not say anything more about what the result of the trustees' selection here may be. At present there is a power to the trustees to select objects which are perfectly within the Act. There is no doubt at all about the testator's intention that all this mixed fund should go to charities, and that intention can have effect perfectly well given to it by handing over the impure personalty to any one or more of the exempted charities. It would be impossible to hold after that decision (*University of London* v. *Yarrow*) and the broad extent of the reasoning of the judges that, even if there had never been such a case as *Lewis* v. *Allenby*, there is any fatal objection to the gift in the present case such as Mr. Swinfen Eady's clients ask us to hold.

There was a question raised about a subsequent part of North, J.'s, judgment, and I think I may say that, for the purpose of shortening the case, we asked the Attorney-General to submit to a modification of that, and I think that he was ready to go so far as to say that he would omit it if it were necessary. I have not consulted my colleagues on this point, but, for my own part, I think it would be better, in order that we should keep faith with counsel, to change that part of the order without saying that it is all wrong. I do not say that it is all wrong; but we did not allow it to be fully argued, and I think we might change it by putting it into a negative form, so that we might say that no gift of mixed personalty to any unexempted charity would operate as a gift to that charity—that is to say, as an effectual gift. That would remove the ambiguity which appears to exist, and then the state of things would be this: The trustees would know plainly, being parties to this, that they would be doing that which would frustrate as far as they could the testator's intention if they applied any part of this fund to unexempted charities. There may be a question whether they can, if they choose to do that, frustrate the testator's intention. They are trustees who have accepted the trusts of the will, and whose *primâ facie* duty, at any rate, is to carry out those trusts in a legal manner, if it can be done. I say nothing further than that. The other authorities, *Baker* v. *Sutton* and *Johnston* v. *Swann*, I take to have been overruled if and so far as they differ from *Lewis* v. *Allenby*.

We ought to have an express decision to the contrary before anything can be said to exist in the way of authority against *Lewis* v. *Allenby*. To the cases that have happened since I do not attach that importance that I might do in some cases. I think that *Lewis* v. *Allenby* was questioned by Kay, J., in the case of *In re Clark, Husband* v. *Martin*. But then I think that both he and Stuart, V.C., were dealing with questions which are not relevant here. I cannot see how in the particular case of *Lewis* v. *Allenby* the mere mention of the class of charities—hospitals—could assist one way or the other. All charities are divided into two categories for this purpose—those that can take notwithstanding the Act of Geo. 2, and those that cannot take. You get no nearer to the question when you say "hospitals"; for

they are not divisible into the two categories of some that can take and some that cannot; and I do not think that the presence of such a word assists at all or that the absence of it can in any way differentiate the case. In *In re Clark* there was a gift for a plain object—viz., for the poor in such manner as the trustees should think fit. I think it very likely that that was considered quite a sufficient circumstance to distinguish that case in principle from one such as we are now deciding.

VAUGHAN WILLIAMS, L.J.—I agree. I should add nothing at all if it were not that I myself think that we are not, in giving this decision, following *Lewis* v. *Allenby*, and as I take that view I think it right to say so. It seems to me that in *Lewis* v. *Allenby* it is tolerably clear that Stuart, V.C., meant to decide that a gift would not be outside the provisions contained in the first and third sections of 9 Geo. 2, c. 36, unless in a case where it included the gifts avoided by those sections. You might include gifts within those sections unless there were words excluding that which might be so included. It seems to me that, the learned Vice-Chancellor having decided that, proceeded to say that in his opinion he did find in *Lewis* v. *Allenby* something that excluded the object from the words of the bequest. The words were general enough to include a bequest within the avoiding scope of those sections. There was something which in his opinion was sufficient to exclude such matters. I entirely agree with what has been said by Rigby, L.J., that it is very difficult to see what it was that the learned Vice-Chancellor found which could operate as such an exclusion. But still, to my mind it is perfectly plain that he did mean to lay down the rule that you must have such words of exclusion. I want to point out also that when Kay, L.J., gave his decision in *In re Clark*, he clearly was right and understood the decision of Stuart, V.C. He proceeds to decide *In re Clark* itself upon the very ground that he cannot find in the bequest any sufficient words of exclusion. But he says: "Yet I cannot say that that class of charity"—that is, the class of charitable institutions which are exempted from the operation of this Act—"is sufficiently indicated as being amongst the objects intended to be benefited by the testatrix to enable me to read this as a gift of the impure personalty to charities authorized to hold property of that nature, and I have certainly no wish to extend the rules applicable to cases of this kind."

What we have really to decide is whether or not it is necessary that the gift to be outside this Act of Parliament should contain some words excluding legacies of the kind defined in sections 1 and 3 or some disjunctive words enabling you to treat the bequests as two alternative bequests. To my mind if you look at the authority which was cited before us of *Grimmett* v. *Grimmett*, it seems clear that Lord Hardwicke took a view in accordance with the view that I think Stuart, V.C., and Kay, J., took. Because he says, quoting his own decision in *Sorresby* v. *Hollins*, 9 Mod. 221: "If a devise is in the disjunctive and leaves the executors two methods to do a particular thing, one lawful and the other prohibited by law, can any court say, because one method is unlawful, that therefore the other is so too, and that the whole bequest is void." He seems to consider that the law which he is there laying down only applies to a case where you have got a disjunctive form of words such as he speaks of there. I agree entirely that it is very much better that we should not limit the doctrine there laid down in the way in which to my mind it has been limited both in *Grimmett* v. *Grimmett* itself and in *Lewis* v. *Allenby* and *In re Clark*, and tacitly as was done both in *Baker* v. *Sutton* and in *Johnston* v. *Swann*. Therefore I quite agree with what I understand to be our decision to-day, that it is sufficient to prevent a gift from being avoided by this statute—even though the gift is a gift under words sufficiently wide to include the cases which clearly fall within the sections—if the gift gives a discretion to trustees enabling them to select from the general class including some valid objects and some invalid such as are valid. It seems to me a much more reasonable and convenient doctrine to hold that in such a case the gift would be a good gift and outside the statute in respect of such purposes—the trustees in their discretion applying the gifts to them—as are valid and not within the exception. I only wish to add that I do not for myself express any opinion as to whether if the trustees in this particular case were to select institutions to benefit under this charitable gift which fall within the class which is not exempted from the operation of this statute, that that would be an exercise of their powers in such a sense as that they could not subsequently exercise the powers in respect of objects which were not covered by this section.

Appeal dismissed.

Solicitors, *Crowders & Vizard; Solicitor to the Treasury; Field, Roscoe, & Co.*, for *Evan Morris & Co.*, Wrexham.

High Court of Justice.

Chan. Div. North, J. } Nov. 30; Dec. 1.

PINET ET CIE. v. MAISON LOUIS PINET (LIMITED). (a.)

Trade-name—Change of name—Injunction restraining use of name altogether in connection with a particular trade.

A person taking the name of another in order to pass off and sell goods under the name of that other will be absolutely restrained by injunction from using that name in carrying on a business similar to that other's business.

Action.

Pinet et Cie. are well-known bootmakers carrying on business in Paris and in London, and selling boots and shoes which are known as "Pinet's boots and shoes." The defendant company was a company formed to take over the business of the "Maison Pinet" (Limited), which had gone into liquidation. The "Maison Pinet" (Limited) had been floated originally by one Dutch, a defendant in the action, for the purpose of taking over the business of boot and shoe makers which had been carried on by Dutch under the name of Pinet. Dutch, who had been a solicitor, had by deed enrolled in Chancery taken the name of Pinet in 1892, on beginning the business of a boot and shoe maker.

On the Maison Pinet commencing business an injunction was granted against them by the Court of Appeal at the suit of the present plaintiffs, restraining them from using the name of Pinet in connection with the sale or manufacture of boots and shoes without distinguishing their articles from those of the plaintiffs. At that time it was not known that Pinet was not the defendant Dutch's real name.

(a.) Reported by R. SILLEM, Esq., Barrister-at-Law.

The present applications were for injunctions in two actions, one commenced against the Maison Louis Pinet and its directors and Louis Pinet, and the other against the Maison Pinet (Limited) and its liquidators and the trustee for the Maison Louis Pinet.

Moulton, Q.C., Swinfen Eady, Q.C., and *Sebastian*, for the plaintiffs.—As the name Pinet has been taken for a fraudulent purpose its use will be absolutely prohibited: *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Reddaway* v. *Banham*, 44 W. R. 638, [1896] A. C. 199; *In re Brinsmead*, [1897] 1 Ch. 46.

Vernon Smith, Q.C., and *E. B. Cooper*, for the defendants.—The injunction ought not to be unlimited. We are willing to submit to an injunction with the words "without distinguishing the defendants' goods from those of the plaintiffs' manufacture." This is the usual form and was followed in the former action: see *Thompson* v. *Montgomery*. 37 W. R. 637, 41 Ch. D. 35.

NORTH, J. [After referring to the facts, saying that Louis Pinet had adopted that name in order to commit a fraud, and referring to the injunction granted in the former action, continued:] At that time it was asserted by Louis Pinet that Pinet was his real name and the contrary was apparently not known or suspected; and the case was dealt with on the footing that he was using his own name and could not be restrained from trading under it. No doubt a man may by law change his surname if he likes; he cannot be prevented from doing so, and an Act of Parliament is not necessary for the purpose; but if he wants to have the benefit arising from any such change, it must be an honest change. It must not be a change for the purpose of putting on the semblance of somebody else, and passing off his goods as the goods of that other person. It is quite clear to me in this case that the defendants cannot get any benefit from the fact that a short time since Louis Pinet took that name when it was not his own; they cannot have any advantage from that, any more than they could have had if he had never taken that name at all and they were now doing all that has been done, his name Dutch retained and nothing else substituted for it. It seems to me quite clearly a case in which the plaintiffs are entitled to an order against the defendants to restrain them from interfering with the thoroughly well-known trade of the plaintiffs by using the name Pinet. The injunction was granted by the Court of Appeal to restrain the old company from using the name without distinguishing and pointing out that they were not the plaintiffs' company. The fact that such an order has been granted has not deterred the new company from attempting to do the very same thing. Under these circumstances I think an injunction must be granted to restrain them from using the name "Pinet" at all, in connection, of course, with the manufacture or selling of boots and shoes. I do not go beyond that, or restrain them from using the name for any other purpose they think fit, and which is within their memorandum of association, but I restrain them from using the name "Pinet" at all in the manufacture of boots and shoes.

Solicitors, *Wilson, Bristows, & Carpmael; George Lloyd Wickes.*

Chan. Div. Kekewich, J. — Feb. 16.

HUMMEL v. HUMMEL. (a.)

Appointment—Power—Exercise by will—Foreign unattested will—Invalid execution—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *ss.* 9, 10, 27—*Wills Act*, 1861 (*Lord Kingsdown's Act*) (24 & 25 *Vict. c.* 114), *s.* 1.

A foreign unattested will or testamentary instrument, though valid according to the law of the place where the testator was domiciled when the same was made, and admissible to probate in this country under section 1 *of the Wills Act*, 1861, *will not operate as a valid exercise of a testamentary power of appointment, since it does not fulfil the requirements of sections* 9 *and* 10 *of the Wills Act*, 1837.

D'Huart v. Harkness, 13 *W. R.* 513, 34 *Beav.* 324, *distinguished.*

In re Kirwan's Trusts, 32 *W. R.* 581, 25 *Ch. D.* 373, *followed.*

Action.

By his will dated the 8th of January, 1864, Edmund George Hummel, after appointing trustees and executors and making certain pecuniary bequests, gave his residuary estate to his trustees in trust for and to be equally divided among all his children who being sons should attain the age of twenty-one years or being daughters should attain that age or marry, and the children of any son dying under twenty-one and leaving issue. And the testator declared that if any of his children or of his grandchildren born in his lifetime should be daughters or a daughter, then the share to which such daughter should become entitled in the trust estate should be held by his trustees in trust to pay the income thereof to her for her separate use during her life and after her death upon the trusts therein contained in favour of her children, and in default of such children then in trust for such person or persons as she, whether married or not, should by her will or codicil appoint, and in default of such appointment, in trust for such person or persons as at the time of the failure of all the trusts thereinbefore contained concerning such share should be her next-of-kin according to the Statute of Distributions in case she had died intestate and unmarried, and if more than one such person in the shares directed by such statute.

The testator died on the 13th of April, 1871, leaving five children surviving him, all of whom attained the age of twenty-one. They were Louisa Ann Hummel, and the defendants Edmund Henry Hummel, Eliza Jane de Brandt, Marion Horton Clough, and Sarah Ellen Hummel. The value of the testator's residuary estate amounted to about £18,000.

In 1876 Louisa Ann Hummel married the defendant Franz Auton Greif, an Austrian subject, who, however, deserted her in 1888, and never subsequently lived with her. Louisa Ann Greif was residing in her own house at Nice, in France, at the time of her death, which occurred on the 24th of July, 1896. She left no children.

The only testamentary disposition by Louisa Ann Greif which could be discovered was contained in a document in her handwriting found in the house after her death. The document was set out in full in paragraph 10 of the statement of claim in this action and was as follows: "To my executors,—I leave Arthur Brandt in case of my death the sum of (£600) six hundred pounds. Louisa Ann Greif, Nice, June 26, 1896."

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

The defendant Arthur Brandt was the person referred to by the testatrix.

This action was brought by the present trustees of the will of the testator, Edmund George Hummel, against the persons who would have been the next-of-kin according to the Statute, of Louisa Ann Greif in case she had died intestate and unmarried, and also against the defendants Franz Auton Greif and Arthur Brandt for the determination (*inter alia*) of the question whether the paper writing set forth in paragraph 10 of the statement of claim was an exercise of the power of appointment given to Louisa Ann Grief by her father's will.

The statement of claim alleged that the paper writing constituted a valid will according to the law of France, but that the same had never been registered or otherwise dealt with in France as a will, nor had it been proved in England.

The defendant Sarah Ellen Hummel had taken out administration in France to Louisa Ann Greif's estate, and she was the only one of the defendants in this action who delivered a defence. She contended that the paper writing did not constitute a valid will according to the law either of France or Austria, and that whatever the domicil or *status* of the defendant Franz Auton Greif and his wife respectively since their marriage, there had been no exercise by the latter of her testamentary power of appointment under her father's will.

The action now came on for trial as a non-witness action, together with a summons by the plaintiffs for the determination of the question whether Louisa Ann Greif's share was distributable upon the assumption that she died without having exercised her power, and for certain inquiries.

T. L. Wilkinson, for the plaintiffs.—In *D'Huart* v. *Harkness*, 13 W. R. 513, 34 Beav. 324, Sir John Romilly held that a power of appointment had been well executed by the unattested will of an English lady married to a Frenchman and domiciled in France. The will was valid according to French law and had been admitted to probate in this country. But in the later case of *In re Kirwan's Trusts*, 32 W. R. 581, 25 Ch. D. 373, in which *D'Huart* v. *Harkness* was not referred to, Kay, J., held that a holograph will made in France, and unattested, was not a valid testamentary exercise of a power of appointment, on the ground that although it had been admitted to probate in England under the Wills Act, 1861, it did not fulfil the requirements of sections 9 and 10 of the Wills Act, 1837, which had not been repealed by the later Act. The same argument applies to this case, to which the later decision applies.

MacSwinney, for the defendant Edmund Henry Hummel.

Austen Cartmell, for the defendant Sarah Ellen Hummel.

Ingpen, for the defendant Arthur Brandt.—If this is not a valid exercise of the power through non-compliance with sections 9 and 10 of the Wills Act, 1837, then my client is entitled by virtue of section 27 of that Act, which provides that a bequest of personal estate shall operate as an execution of a general power of appointment.

KEKEWICH, J.—The difficulty in this case arises from two apparently conflicting decisions—namely, those of *D'Huart* v. *Harkness* by Sir J. Romilly, M.R., in 1865 and *In re Kirwan's Trusts* by Kay, J., in 1883, a case in which *D'Huart* v. *Harkness* was not cited. In *D'Huart* v. *Harkness* Sir J. Romilly, M.R., said this: "When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognized by the law of this country, but any will which is entitled to probate here. A power to appoint by will simply, may be executed by any will which according to the law of this country is valid, though it does not follow the forms of the statute."

The document submitted to my consideration is set out in paragraph 10 of the statement of claim. I will assume that it is, as stated in paragraph 12, a valid will according to the law of France, but it is not a will that could under the provisions of the Wills Act be proved in this country. The question is, Can it operate as an exercise of a general power of appointment by will? As to that the decision of Kay, J., in *In re Kirwan's Trusts* is conclusive that it cannot, even if it had been a will that could be proved in this country. Is that decision inconsistent with *D'Huart* v. *Harkness*, where Sir J. Romilly, M.R., decided that a power to appoint "by a will duly executed" is well exercised by a will good according to the law of the country of the testator's domicil, though ill-executed according to the law of England? That case, as already mentioned, was not referred to in *In re Kirwan's Trusts*, but the latter case is cited in a note on p. 308 of Williams on Executors (vol i., 9th ed.) as the authority for the proposition that in the case of a will which is only valid by reason of the Wills Act, 1861, sections 9 and 10 of the Wills Act, 1837, must be complied with. That appears to me to form the distinction between the two cases. The Wills Act, 1861—Lord Kingsdown's Act—provides in section 1 that every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place were such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicil of origin. Now, if the testamentary instrument in question here could be admitted to probate in this country under the statute just cited, it would still, according to the decision in *In re Kirwan's Trusts*, and in my judgment, be necessary in order that it might operate as a good execution of the power given to the testatrix, to consider whether it complies with the requirements of sections 9 and 10 of the Wills Act, 1837, which provide that no appointment by will in exercise of a power shall be valid unless attested by two or more witnesses. This document is not attested, and therefore in any case this testamentary instrument cannot operate as an execution of the power. It is said that the defendant Arthur Brandt can claim under section 27 of the Wills Act, 1837, which says that a general bequest shall include estates over which the testator has a general power of appointment; but that section cannot be read as an exception to section 10, unless the language to that effect is clear, and in my opinion it would not be right to treat section 27 as controlling section 10, which expressly says that "no appointment made by will in exercise of any power shall be valid unless the same be exercised in manner hereinbefore required," that is to say, attested by two or more witnesses.

There must, therefore, be a declaration that the paper writing referred to in paragraph 10 of the statement of claim is not a valid exercise of the power of appointment given to Louisa Ann Greif by

the testator's will, and the trustees of that will must divide the trust fund on the footing that there has been no exercise of the power by Madame Greif. The costs of all parties, as between solicitor and client, will be taxed, and paid out of Madame Greif's settled share under the will. There will be one order in the action and on the summons.

Solicitors, *A. F. Church; Travers Smith, Braithwaite, & Robinson; Deacon & Co.; Hughes & Bartlett.*

Chan. Div. } April 1, 26.
Romer, J. }

EHRMANN v. BARTHOLOMEW. (a.)

Contract — Master and servant — Wine merchants' traveller—Negative stipulation against doing other business—Injunction.

The defendant, under the articles of agreement regulating his employment as traveller for the plaintiffs, a firm of wine merchants, had bound himself to devote the whole of his attention and time during the usual business hours to the business of the plaintiffs, and not directly or indirectly to employ himself in any other business or transact any business with any other person than the plaintiffs for a period of ten years. There was no provision enabling the defendant to determine his employment, but he assumed to do so by writing a letter giving notice of his intention to leave, and entered the service of a rival firm. The plaintiffs moved for an injunction to restrain him from thus engaging himself in any other business than that of the plaintiffs' under his contract with them.

Held, that the negative stipulations in the contract were unreasonable, and ought not to be enforced.

Motion.

The plaintiffs were a firm of London wine merchants. The defendant had been a traveller in their employment engaged to act as such for ten years by articles of agreement dated the 24th of August, 1897.

The present motion was brought by the plaintiffs to restrain the defendant from engaging or employing himself in any other business than that of plaintiffs' firm, and in particular from acting as traveller for Messrs. Marzell & Co., another firm of London wine merchants, and from soliciting orders from them during the term of the said agreement.

Clause 3 in the agreement was as follows: "The traveller shall diligently and continuously employ himself as traveller of the firm for the purpose of selling the firm's goods, and shall use his best endeavours to obtain new customers for the firm and to extend business, and shall devote the whole of his time during the usual business hours to the transaction of the business of the firm and shall not in any manner directly or indirectly engage or employ himself in any other business or transact any business with or for any person or persons other than the firm during the continuance of this agreement."

The only provision for determining the term of employment under the agreement was by notice given by the plaintiffs, and there was nothing in the provisions to enable the defendant to determine his employment thereunder. Notwithstanding this the defendant wrote a letter to the plaintiffs dated the 1st of March, 1898, in which he purported to resign his position as traveller to their firm. The plaintiffs in reply wrote to him refusing to accept his resignation and pointing out that under the terms of the agreement there was no power for the defendant to determine his employment. Having ascertained that the defendant had begun to work for a rival firm of wine merchants, the plaintiffs instituted the action in which the present motion was brought.

H. E. Wright, in support of the motion.

S. O. Buckmaster, for the traveller.

ROMER, J.—The serious question arises whether the court ought to enforce such a negative stipulation as is contained in this covenant. It would in terms prevent the defendant, at any rate during the usual business hours, from employing himself in any business other than that of the plaintiffs', and from transacting any business with or for any persons or person other than the plaintiffs, and this for a period of ten years from the 30th of August, 1897, or for so much of that period as the plaintiffs choose. And it is clear that in this clause the word "business" cannot be held limited by the context to a wine merchant's business, or in any similar way; so that the court, while unable to order the defendant to work for the plaintiffs, is asked indirectly to make him do so by otherwise compelling him to abstain wholly from business, at any rate during all usual business hours. In my opinion such a stipulation is unreasonable, and ought not to be enforced by the court. As the present Master of the Rolls stated in *Whitwood Chemical Co.* v. *Hardman*, 39 W. R. 433, [1891] 2 Ch. 416, cases where negative stipulations in contracts of service are enforced by the court ought not to be extended, and are to be regarded as anomalies which it would be very dangerous to extend. To enforce such a general negative stipulation as I find here would be, in my opinion, a dangerous extension, for here the stipulation extends to business of any kind, while the negative stipulations enforced in the prior cases, such as *Lumley* v. *Wagner*, 1 De G. M. & G. 604, were confined to special services. For these reasons I refuse the motion; but, looking at the conduct of the defendant, I do so without costs. Of course, by this order the plaintiffs will be in no wise prevented from enforcing another clause of the agreement which prohibits the defendant, after the determination of his employment, from supplying or soliciting the plaintiff's customers.

Solicitors, *W. H. Southern; Goren & Tapp.*

Chan. Div. } March 12, 19, 24.
Byrne, J. }

ANDERSON v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.
MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO. v. ANDERSON. (a.)

Landlord and tenant—Covenant for quiet enjoyment—Reversion assigned to a railway company—Exercise of statutory powers — Damages — Lands Clauses Act, 1845, *s.* 68—*Railway Clauses Act*, 1845, *s.* 6.

A. was lessee of a house under a lease containing a covenant for quiet enjoyment. The reversion, subject to the lease, was acquired by agreement by a company empowered under a special Act to construct a railroad, and for that purpose to acquire certain lands, which included the demised house. The house was not, however, required for the actual construction of the railroad. The special Act was passed previously to the lease. In the construction of the railroad the company damaged, but did not destroy, the house, without being guilty of negligence.

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Held, that an action by A. against the company for damages for breach of the covenant for quiet enjoyment would not lie; and

Held, that, in an action by the company against A. for rent, the alleged breach of the covenant was no defence, and that the damage sustained by the house could not be set off against the demand for rent.

A railway company taking lands under statutory powers, and constructing works within such powers, is entitled to take the interest of any person having an interest in land without incurring liability in respect of any existing covenant entered into by the owner whose interest the company acquires, so far as the enforcement of such a covenant would impose a burden upon such company in derogation of its statutory rights and obligations.

Semble, *that such a covenant only covers the acts of the voluntary assignees of the original lessor.*

In the first of these actions the plaintiff claimed an injunction to restrain the defendant company from interfering with the support of a certain passage or otherwise with the peaceable enjoyment by the plaintiff of his right of user of such passage, and he claimed damages in respect of that matter as well as in respect of the injury done by the company in excavating the ground adjoining the plaintiff's premises, whereby, as he alleged, they had caused the walls and ceilings of his premises to crack. The plaintiff was the lessee and occupier of a house and buildings upon a piece of land in Hampstead, known as No. 1, Goldhurst-terrace, under a lease dated the 7th of April, 1894, and made between James Findlay of the one part, and the plaintiff Anderson of the other part. By this lease Findlay demised to the plaintiff the land, house, and premises in question with a right of footway in common with all other parties then entitled or thereafter to be entitled to a like right over the passage above mentioned which lay at the side of the premises, for a term of twenty-one years from the 25th of March, 1894, determinable at the option of the tenant at the end of seven or fourteen years, at a yearly rent rising from £180 to £250 and subject to the covenants and conditions contained in the lease. The lease contained a covenant on the part of the lessor that the lessee, paying the rent reserved and performing the covenants in the lease, might peaceably hold and enjoy the demised premises without any interruption by the lessor or any person claiming through him.

By the Manchester, Sheffield, and Lincolnshire Railway (Extension to London) Act, 1893, the defendant company were authorized to make and maintain a certain railway, and for that purpose were empowered to enter upon, take, and use certain lands mentioned in the Act. These lands included the property demised by the lease, but that property did not form any portion of the actual site of the railway as constructed. The company, however, acquired by agreement the reversionary interest of the plaintiff's lessor in the demised premises, and by an arrangement made in October, 1895, the lessor assigned the property to the company subject to the plaintiff's lease. The company proceeded with the construction of their railway in pursuance of its statutory powers, and in the course of such construction it to some extent injured the structure of the plaintiff's premises, but, as was admitted, without negligence on the company's part. The plaintiff claimed to be entitled to damages for such injury on the ground that the company, by taking an assignment of the reversion, had rendered itself liable under the covenant for quiet enjoyment.

The second action was brought by the company against Anderson for rent due under his lease, and in this action the defendant set up the covenant for quiet enjoyment as a defence, and counter-claimed for damages for its breach.

Witt, Q.C., and *A. Statham*, for the plaintiff Anderson.—The defendants are bound by the covenant for quiet enjoyment, and have broken it, and are answerable in damages. The case is not one of compensation under the Lands Clauses Act, 1845. The plaintiff is not claiming against the defendants as tort feasors, but as being bound by contract. The plaintiff may have no remedy under the Lands Clauses Act, 1845, or the Railway Clauses Act, 1845, but the defendants are estopped from denying their liability under the covenant: *Grosvenor Hotel Co.* v. *Hamilton*, 42 W. R. 626, [1894] 2 Q. B. 836. At any rate Anderson may set off the damage done, as against the rent demanded in the second action.

They also cited *In re East London Railway Co.*, 38 W. R. 312, 24 Q. B. D. 507; *Ricket* v. *Directors of Metropolitan Railway Co*, 15 W. R. 937, L. R. 2 H. L. 175.

Eve, Q.C., *Macnaghten*, and *L. A. Sampson*, for the defendant company.—The remedy of the plaintiff, if any, is the statutory one under the Lands Clauses Act, 1845, s. 68, or the Railways Clauses Act, 1845, s. 6: *Clark* v. *School Board for London*, 22 W. R. 354, L. R. 9 Ch. App. 120; *Kirby* v. *School Board for Harrogate*, [1896] 1 Ch. 437, 44 W. R. Dig. 144; *Baily* v. *De Crespigny*, 17 W. R. 494, L. R. 4 Q. B. 180. The defendants are acting under their statutory powers, and have shown no negligence, and have power to do all necessary things: *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409, 39 W. R. Dig. 140. The defendants are under no implied covenant to give support to the plaintiff's premises: *Colebeck* v. *Girdlers Co.*, 24 W. R. 577, 1 Q. B. D. 234; *Popplewell* v. *Hodkinson*, 17 W. R. 806, L. R. 4 Ex. 248. Moreover, the covenant was not intended to cover a case such as the present, and the action of the railway company in acquiring the land under their special Act was not foreseen or contemplated by the parties at the date of the lease: *Harrison, Ainslie & Co.* v. *Lord Muncaster*, 40 W. R. 102, [1891] 2 Q. B. 680; *Sparling* v. *Bantoft*, 40 W. R. 157, [1891] 2 Q. B. 334. Again, if the covenant was intended to apply to the present case it would be in derogation of the defendants' statutory duties, and void: *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623, 32 W. R. Dig. 112.

They also cited *Jenkins* v. *Jackson*, 37 W. R. 253, 40 Ch. D. 71; *Sanderson* v. *Mayor, &c., of Berwick-upon-Tweed*, 33 W. R. 67, 13 Q. B. D. 547.

Cur. adv. vult.

Mar. 24.—BYRNE, J. (after stating the facts).—The plaintiff does not dispute that but for the covenant for quiet enjoyment he would not be entitled to sue for damages in respect of the injury, but would be relegated to such remedy as he might have under section 6 of the Railway Clauses Act, 1845, and section 68 of the Lands Clauses Act, 1845; but he says that the company, having neglected to acquire his interest in the property, and having put themselves into the position of assignees of the reversion, are liable by reason of the existence of the covenant. Had the plaintiff's land been required for the actual construction of the railway, the question would not have arisen, because the railway company could not have constructed their works without acquiring the plaintiff's interest in the property. The land in which he had an interest is, however, land which the company was entitled to take compulsorily, and, although they have acquired the reversion by agreement, I do

not think that any distinction can be drawn on this ground, having regard to the authorities bearing on the matter. The precise point that I have to determine is, so far as I am aware, new, but there are authorities which it is necessary to consider in order to arrive at a proper conclusion.

In the case of *Kirby* v. *School Board for Harrogate* it was held, by the Court of Appeal affirming the decision of North, J., that when a School Board acquires land, whether by agreement or compulsion, for the purposes of the Elementary Education Act, 1870, and purchases with notice of a restrictive covenant to which the land is subject in the hands of the vendor, the covenantee cannot maintain an action against the School Board for breach of such covenant, and his only remedy is compensation under section 68 of the Lands Clauses Consolidation Act, 1845. In that case the vendor to the board of a plot of land had previously covenanted, on the conveyance of an adjoining plot, that no buildings (except bay windows and porches) should without consent be erected within thirty feet of the northern boundary, and that no noisome or offensive trade or calling should be carried on on the plot of land afterwards conveyed to the School Board. The principle applied in that case was that the remedy which might otherwise have existed against the School Board in respect of breach of covenant was destroyed by reason of the statute authorizing the construction of the works, and Kay, L.J., says: "Therefore it seems to me that, even if this were a railway company and they were executing works which would injuriously affect another landowner, section 68 would apply, and that other landowner would not be entitled to obtain an injunction, but would be bound to apply for compensation under this section 68." The decision in this case is in accordance with the decision in *Clarke* v. *School Board for London*, applying the principle which had previously been applied in the case of an easement, to the case of a right created by restrictive covenant. In the case of *Baily* v. *De Crespigny* it was determined that where the defendant, who had demised certain premises to the plaintiff for a long term of years, and had covenanted with the plaintiff that neither he the defendant, nor his heirs nor his assigns, should build on certain adjoining premises belonging to him, except as therein particularly mentioned, and where subsequently to the lease a railway company had acquired from the defendant this adjoining land under powers given them by Act of Parliament, the assignment from the defendant to the railway company being in completion of the compulsory purchase; and where the company had subsequently built the erections complained of which were reasonably required for the purposes of their undertaking, the defendant was discharged from his covenant by the subsequent Act of Parliament which compelled him to assign to the railway company, and so put it out of his power to perform the covenant; and Lord Hannen (then Mr. Justice Hannen), in delivering the judgment of the court, says: "The defendant when he contracted, used the general word 'assigns,' knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The legislature, by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make a entirely new contract for the parties."

In each of the cases to which I have referred the point now raised is not precisely involved, because what has happened is not that the covenantor has sold to the railway company adjoining land in respect of which he has entered into restrictive covenants, but that he has sold his reversion in the same land included in the lease containing the covenant for quiet enjoyment; and a distinction is also pointed out in that, in the present case, the lease was granted to the plaintiff and the assignment to the company was executed after the passing of the Act under which the company has done the acts complained of. In my judgment, if the lease had been granted to the plaintiff prior to the passing of the Act the principle of the cases to which I have referred would have been clearly applicable to the present case, although the assignment had been made subsequently to that date, but I have to consider the other question—viz., What is the effect of a covenant for quiet enjoyment contained in a lease granted after the passing of an Act of Parliament authorizing, but not requiring, the taking of the land demised? Lessor and lessee must both be deemed to know when they enter into the contract that the land may or may not be taken by the railway company and that the interest of either of them may be so taken without the interest of the other being also acquired. Lessor and lessee also know that their respective interests may be injuriously affected by the railway company in carrying out its statutory obligations and acting strictly within its statutory powers, and both parties know that, should their or either of their interests be injuriously affected, there are statutory provisions providing for compensation being paid. First, as between lessor and lessee, What is the true meaning of a covenant for quiet enjoyment in the terms of the covenant in the present case? Under such circumstances, do the parties mean and intend that the lessor is to be liable in the event of disturbance by the company in the legitimate exercise of its Parliamentary powers, or do they mean that, subject to such exercise of the statutory power, the covenant is to apply? I think that the true intent and meaning of the covenant is that the covenantor will be answerable for his own acts and for the acts of his assignees, but not that he will be answerable for the acts of the railway company in the exercise of its statutory powers, the company not being in the true sense his voluntary assignee at all, although he conveys to the company, and the company is not put to the actual exercise of its compulsory power. If, then, the lessor would not be liable, how can his assignee, the railway company, be liable in the absence of a fresh bargain on its part to be liable? It is reasonably clear that the company cannot be liable.

But, although I have expressed this view as to the liability of the lessor, it is not in my judgment necessary for the decision, because in the present case it is not the lessor but the railway company against whom relief is sought, and I am of opinion that, even if the plaintiff was entitled to sue the lessor upon his covenant, he is not entitled to sue the railway company, the lessor's compulsory assignee. I think that a railway company taking lands under statutory powers, and constructing works within such powers without negligence, is entitled to take the interest of any person having an interest in land without incurring liability in respect of any existing covenant entered into by the owner, whose interest the company acquires, so far as the enforcement of such covenant would impose a burden upon the company in derogation of its statutory rights and obligations. It is not necessary to say or decide that the covenant is gone for all purposes. Nor is it necessary to consider how far the acts done by the railway company, if amounting to a destruction of the subject-matter of the lease, might or might not

truth, as before pointed out, it was not accepted in any sense as a satisfactory account until at the earliest during the argument of the appeal motion, so that it would be impossible to give a direction on the new alternative. To the present time there has been no settled account. There is no evidence that the law of Mexico is in any material respect different from our own; so that if the suit had been prosecuted there, it would have been impossible to get an order for the payment of the balance before the 13th of November, 1897. This shows that there can properly be no question as to an earlier conversion. Independently of the cases cited as to conversion into English money of foreign currency, not only was the order of Kekewich, J., which is appealed against, quite right, but no order on the substituted alternative could now properly be made, and the only order ought to be that the appeal be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—The only question argued before us in this case has been as to what is the proper mode of taking the account ordered in an action brought in this country by a creditor to have an account taken of money payable abroad by the defendant in foreign currency—whether such account should be taken on the relative values of the English and foreign currencies as of the date of taking the account, or as of the dates when the debts became payable, or as of some other and what date or dates? It was not questioned on either side but that the total debt ordered to be paid after taking the account must be expressed in English currency, and that the amount in English currency must be arrived at by taking the real value in English currency of the foreign currency at the place where payable as a purchasable commodity—*i.e.*, in practice, according to the rate of exchange existing at the particular time between the currencies. The only question has been as to what that particular time was.

Now, I will first consider the question irrespective of the form of action. It seems clear that, in an action in whatever form in the English court for the recovery of a debt payable in foreign currency, the amount of the English judgment or order must be expressed in English currency, and that, unless the relative values of the respective currencies are fixed by statute or some authority binding the English courts, or by the agreement of the litigants, the amount of the English judgment or order must be based on the quantity of English sterling which one would have to pay here to obtain in the market the amount of the debt payable in foreign currency delivered at the appointed place of payment—*i.e.*, the amount payable according to the rate of exchange. *Scott* v. *Bevan* is an authority for this mode of computation. Also this mode of computation is in accordance with the rule applied on the dishonour of a bill of exchange payable in foreign currency in a foreign country: *Suse* v. *Pompe*. It seems plain that this mode of computing the value of foreign currency in English sterling and the converting the one currency into the other is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment. Now, if this is the general rule in an action for the recovery in English courts of sums payable abroad in foreign currency, I see no reason why a different rule should be applied in a case where the form of action is, as it is in this case, an action for an account. Suppose the account had been an account of the number of bushels of maize which the defendant had received in Mexico on account of the plaintiff, the amount payable by the defendant to the plaintiff would have to be fixed according to the value of the maize at the date when the defendant ought to have accounted for the maize in question according to the course of business between himself and his principal; and it seems to me that the Mexican dollar should be accounted for on the same footing. It may be that in the present case it might have been troublesome to ascertain the dates at which the various sums payable as commission in dollars became payable, but this would not in my judgment have been a sufficient reason for fixing the amount of the result of the account in English sterling according to the value of the dollars at the date of the completion of the taking of the account. This difficulty, however, does not arise in the present case, because the plaintiff is willing that the value shall be taken of the dollar as of the 31st of August, 1896, the date as of which the defendants in fact rendered their account, including all the sums now claimed by the plaintiff. [His lordship discussed the cases of *Cash* v. *Kennion* and *Cockerell* v. *Barber*, and Sedgwick on Damages (4th ed. 270) and Story's Conflict of Laws, s. 309, and continued:] With regard to this case I would observe that, although the case is a strong authority for treating the value of the foreign currency in English currency as a question of damages—the declaration of the plaintiff and the judgment of the court both so treating it—I am not sure that the allowance of the interest as from the date of the original debt down to the date of the payment into court in the English action is quite consistent with this view; but, be this how it may, there can be no doubt but that the court took as the measure of value 160 pounds Jamaica to 100 pounds English sterling, and, if this is so, I think it follows that the date for the application of the rate should have been the date of the Jamaica judgment, when the obligation sued on arose, and not the date of the English judgment.

I think that the order of Kekewich, J., ought to be amended by declaring that the plaintiff is entitled to have the amount of Mexican dollars found to be due by the account of the 31st of August, 1896, converted into English money sterling at the rate of exchange prevailing between the said currencies on that day. It seems to me that to hold otherwise would make the plaintiff's remedy for the recovery of what is due to him differ according to the form of procedure, and according as he brings his action in the Queen's Bench Division or in the Chancery Division.

Appeal dismissed.

Solicitors, *Angove & Bromwich; Jaques & Co.*, for *Samuel Wright & Co.*, Bradford.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 18.

In re HUGHES.
BRANDON *v.* HUGHES. (*a.*)

Married woman—Protection order—Power to contract debts—Appointment—Liability of appointed fund for debts—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 4—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1 (*a*), (*b*), (*c*)—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 21, 25, 26.

A married woman who has obtained a protection order under the Matrimonial Causes Act, 1857, *is to be*

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

regarded as, for the purpose of contracting, a feme sole. *Consequently, funds appointed by her by a will exercising a general power of appointment will become liable for a debt contracted by her after the protection order, but before the creation of the power of appointment, and before the passing of the Married Women's Property Act,* 1882.

Judgment of Kekewich, J., ante, p. 220, *affirmed.*

Appeal from a decision of Kekewich, J. (*ante*, p. 220), where the facts are sufficiently stated.

Swinfen Eady, Q.C., and *Joseph Tanner*, for Mrs. Walker's executor, who appealed, referred to section 1, sub-sections 2 and 4, and section 4 of the Married Women's Property Act, 1882; *In re Roper, Roper* v. *Doncaster*, 36 W. R. 750, 39 Ch. D. 482; sections 21, 25, and 26 of the Matrimonial Causes Act, 1857; section 1, (*a*), (*b*), and (*c*) of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63); *Cooke* v. *Fuller*, 26 Beav. 99; *Waite* v. *Morland*, 36 W. R. 484, 38 Ch. D. 135; and *Hill* v. *Cooper*, 41 W. R. 500, [1893] 2 Q. B. 85.

Warrington, Q.C., and *A. Dauney*, for Mr. Stogdon, were not called upon.

LINDLEY, M.R.—I think the judgment of the learned judge in the court below, or the order he has made, is quite correct. The order declares that the court is of opinion that the fund appointed by the will of Agnes Ann Walker otherwise Hughes, is assets for payment of the debts of the said testatrix, including the amount (if any) due under the indenture of the 6th of March, 1880. It appears to me that the learned judge was perfectly right there, because when you bear in mind that Mrs. Walker had on the 9th of February, 1880, obtained a protection order, and was therefore, under the provisions of sections 21, 25, and 26 of the Matrimonial Causes Act, 1857, in the position, as from that date, of a *feme sole*, capable of contracting debts and obligations, it is plain that this case is taken quite out of the principle applied by Kay, L.J., in *In re Roper, Roper* v. *Doncaster*. The *ratio decidendi* of that case was that a married woman had not "debts" in any accurate sense of that expression. We start, then, with the fact, that this lady was in a position of a *feme sole* for the purpose of contracting debts. It is plain that she did contract debts. [His lordship read section 4 of the Married Women's Property Act, 1882, and proceeded:] If she has debts and liabilities when she makes her appointment, why should not section 4 apply to the case? It would, I think, be putting far too narrow a construction on this section were we to adopt Mr. Swinfen Eady's suggestion, and to say that its provisions do not apply to debts and liabilities which the married woman already had, when the Act came into operation, although, at the same time, those provisions make the fund over which she has a general power of appointment liable for her debts in general. That would be far too narrow a construction to put on the Act of 1882.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

Appeal dismissed.

Solicitors, *G. H. & S. Brandon; J. C. Stogdon.*

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 10, 11.

In re PIERCY.

WHITWHAM *v.* PIERCY. (*a.*)

Will—Charitable gift—Administration of estate—Mixed fund—Pure and impure personalty—Discretion of trustees—Mortmain—9 Geo. 2, *c.* 36.

P. by his will directed his trustees to apply one-tenth of his estate over and above £110,000 "*to such charitable institutions and objects as my trustees may determine.*"

Held (*affirming* North, J.), *that the gift extended not only to the pure personal estate, but also to the impure personal estate and to the proceeds of sale of the real estate.*

Lewis *v.* Allenby, 18 *W. R.* 1127, *L. R.* 10 *Eq.* 668, *approved.*

The principle on which such gifts are construed by the court is correctly stated in Mayor and Aldermen of Faversham *v.* Ryder, 2 *W. R.* 573, 5 *De G. M. & G.* 350; University of London *v.* Yarrow, 5 *W. R.* 543, 1 *De G. & J.* 72; *and* Carter *v.* Green, 5 *W. R.* 856, 3 *K. & J.* 591.

Appeal of the defendants from a decision of North, J.

By his will, dated the 5th of December, 1883, Benjamin Piercy, the testator, directed his trustees to apply one-tenth of his estate over and above £110,000 "to such charitable institutions and objects as my trustees may determine."

The testator died on the 24th of March, 1888, and left considerable real estate and impure personalty.

In an action commenced by the trustees of his will the usual administration decree was made on the 21st of January, 1889. The estate had been partly realized and the trustees had funds in hand available for distribution under the above charitable gift.

On the 14th of December, 1896, the plaintiffs took out a summons in the action to have it determined what was the Attorney-General's interest under the above bequest in (1) the *corpus* of the testator's estate; and (2) the income accrued thereon and thereafter to accrue.

On the 27th of November, 1896, the Attorney-General took out a summons asking that no further payment be made under the order on further consideration of the 15th of January, 1896, out of the income of the estate of certain quarterly sums therein mentioned, except upon certain stated conditions.

The two summonses came on together for hearing before North, J., who, following *Lewis* v. *Allenby*, 18 W. R. 1127, L. R. 10 Eq. 668, held that the charitable bequest applied not only to pure personalty but also to impure personalty and proceeds of realty; that the power of selection or determination could not be properly exercised except in favour of such charitable institutions as were at the testator's death empowered by law to hold real estate or impure personalty, notwithstanding the statute 9 Geo. 2, c. 36.

The defendants, who were beneficiaries under the will, appealed.

Swinfen Eady, Q.C., and *Badcock*, for the appellants.—North, J., really followed *Lewis* v. *Allenby*. The distinction is that in the will a direction to marshal must be found, and the court never will marshal in the case of charities. In construing the will any question of pure or impure personalty must be ignored. Here there is no

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

indication in any shape or form in the will that any particular part of the estate is to go to charities, and it is quite clear that merely giving to the trustees a discretion does not get rid of the Mortmain Acts.

The following cases were referred to: *In re Clark*, *Husband* v. *Martin*, 33 W. R. 516; *Baker* v. *Sutton*, 1 Keen 224; *Johnston* v. *Swann*, 3 Madd. 457; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364; *In re Arnold*, *Ravenscroft* v. *Workman*, 36 W. R. 424, 37 Ch. D. 637; *Nightingale* v. *Goulburn*, 5 Hare 484; *In re Ovey*, *Broadbent* v. *Barrow*, 34 W. R. 100, 31 Ch. D. 113; *Attorney-General* v. *Stewart*, 2 Mer. 143; *Whicker* v. *Hume*, 6 W. R. 813, 7 H. L. Cas. 124.

Sir Richard Webster, *A.G.*, and *Ingle Joyce*, for the Attorney-General.—In *Johnston* v. *Swann* the main contention was, was there a charitable bequest or not? This is in effect a gift of one-tenth to such charitable institutions as can take; from 1845 down to the present time there is no authority to contravene the law as we maintain it to be. There is no ground for overruling *Lewis* v. *Allenby*, and unless the court does overrule it, it would be a bad precedent to upset a practice so long established.

They referred to *Grimmett* v. *Grimmett*, Amb. 210, and *Carter* v. *Green*, 5 W. R. 856, 3 K. & J. 591.

Cozens-Hardy, *Q.C.*, and *Frederic Thompson*, for the trustees.

Eady, *Q.C.*, replied.

Cur. adv. vult.

March 11.—LINDLEY, M.R.—This is an appeal from the decision of North, J., by which he declared that the gift in the will of one-tenth of the testator's estate over and above £110,000 to such charitable institutions and objects as his trustees might determine, applied and extended not only to the pure personal estate, but also to the impure personal estate and the proceeds of sale of the real estate of the testator. The appeal asks that that may be reversed and that it may be declared that the gift in the will applies, and extends only to the pure personal estate. That was the main controversy. The real question is clear enough—namely, whether this court is prepared to overrule the decision of Stuart, V.C., in the case of *Lewis* v. *Allenby*. I will read the passage in the will. The testator directs all his property, real and personal, to be converted into money, and then he directs his trustees to hold the moneys to arise from such conversion upon trust thereout in the first place to pay the expenses incidental to the execution of the preceding trust, and his funeral and testamentary expenses, and to apply one-tenth of his estate over and above £110,000 to such charitable institutions and objects as his trustees may determine, and at such time or times and in such manner as they may think fit, and to stand possessed of his residuary real and personal estate until conversion, and the surplus of the said moneys and all his estate after conversion thereof upon certain trusts. Now, what is the true test to apply to a disposition of that kind? It is said to infringe an Act which is commonly called the "Mortmain Act," but which is more properly described as the "Charitable Uses Act," of 9 Geo. 2, c. 36, to which I will refer shortly. We all know that that Act of Parliament affected the power of disposition, and was contrasted with the older Mortmain Acts which applied rather to the power to take and to hold land. The important sections in the Charitable Uses Act are the 1st and 3rd. Section 1, which I will read shortly, says that no lands nor any sum of money to be laid out in the purchase of lands shall be given or granted "in trust or for the benefit of any charitable uses whatsoever" unless it is by deed enrolled. Then section 3 says that all gifts and so on, and appointments which are contrary to that section shall be absolutely and to all intents and purposes null and void. Then section 4 introduces some exceptions. I have not got that section before me, but I think I am right when I say it excepts the two principal universities, and Eton, Winchester, and Westminster, and the colleges at the universities. Since the 9 Geo. 2, c. 36, there have been a great number of Acts of Parliament extending the exemptions. When the testator in the present case made this will there were a great many charities which were exempted from the operation of this statute of 9 Geo. 2.

Now, without going into the cases at present, and without considering the question of authority, I will state my own view of what I think is the true principle to be applied here. I cannot read this as a bequest to any charitable institution or object at all so far as the testator denominated it and pointed it out. It is like a power given to persons to appoint a fund. They can appoint the fund according to the will, to any charity or any charitable institution or object they think fit; and until that power is exercised one cannot say what the testator has done and what he has not done. If the trustees having this power, appoint to any institution, then, following out the analogy to which I am alluding, you read that into the will. If the trustees have appointed to a charity which cannot take, then that appointment must fail so far as the Act I have referred to requires. It may be good as to personal estate and bad as to the rest. If, on the other hand, they appoint to some charitable institution which is not hit by the statute, then read that into the will and it is perfectly good. If the question as to a disposition in a will or a devise or bequest to trustees with power to appoint were now to arise for the first time and had not been decided before, I should have thought on principle that the Charitable Uses Act did not hit it. I think you must see the result before you can determine that.

Now, if we look at the authorities I think that *Lewis* v. *Allenby* is a decision which goes that length and says that that is right. I do not myself quite follow the reasoning of Stuart, V.C., in *Lewis* v. *Allenby*. But we must remember that that case has been acted upon, and has been considered right from the time when it was pronounced almost until now. I find it referred to without any comment in the standard text-books to which we are accustomed to look. It is cited in all the editions of Lewin on Trusts and Jarman on Wills, and also in Theobald on Wills. Speaking from my own recollection I do not remember that *Lewis* v. *Allenby* has ever been seriously contested. It has presented difficulties, and that to my mind is because the reasoning of the Vice-Chancellor is open to some comment; but it has certainly been acquiesced in and followed. I think the judgment of Pearson, J., may be called in aid in the case of *In re Ovey*, *Broadbent* v. *Barrow*, if we want it, and also that of North, J., himself, in the case of *In re Seton Smith*, *Bright Smith* v. *The Attorney-General*, 73 L. T. Rep. 732, *note*, to which we were referred. But even apart from those authorities I think that the real principle applicable to the case is that upon which Lord Hardwicke proceeded in the case of *Grimmett* v. *Grimmett*, upon which the Court of Appeal proceeded in the case of *The Mayor and Aldermen of Faversham* v. *Ryder*, and Wood, V.C., in *Carter* v. *Green*. It strikes me as good sense and good law. Now, applying that principle to the present case, I come to the conclusion that there is nothing amiss with this gift to the trustees.

Now, it is said that this view is opposed to two cases which were not cited, unfortunately, before Stuart,

V.C., when he decided *Lewis* v. *Allenby*—namely, *Baker* v. *Sutton* and *Johnston* v. *Swann*, and unquestionably if you look at the orders then made, and what was done, those decisions are apparently opposed to the view taken by Stuart, V.C. But in neither of those cases was the precise point argued, and in neither of those cases does it appear what view the trustees took, whether they claimed the legacy and the right to exercise the power, or not. Of course it is quite possible that in both cases they may not have claimed the right at all, but left the court to deal with it. If that is the true view, and if that is the explanation, as it well may be, then they are not opposed to the view I am expressing. If they are, I am bound to say that on principle I think the decision in *Lewis* v. *Allenby* is right, although, as I said before, I do not quite follow the reasoning of the Vice-Chancellor in that case, because he seems to have construed the will as amounting to an exclusion of those institutions which could not take mixed personalty or the proceeds of the sale of realty. I do not think that that is so. I look upon it simply as an ordinary power of appointment which may be properly or improperly exercised, and until we know what the trustees do in the exercise of their power we cannot say that this disposition conferring the power is bad.

I think, therefore, that this appeal must be dismissed with costs.

RIGBY, L.J.—I am of the same opinion. I must say that I very much prefer to treat this case in the first instance as one of principle quite apart from authority. I will, however, say a few words about the authorities. Whatever may have been the idea of *Baker* v. *Sutton* and *Johnston* v. *Swann* at the time when the case of *Lewis* v. *Allenby* was decided—the law to my mind was clearly laid down on such a principle as to justify the order that was made in *Lewis* v. *Allenby* quite irrespective of any reasons that could have been given by the learned Vice-Chancellor or any criticism that has been passed upon it since. I think for my purpose I need only refer to one case. It is a case I mentioned during the argument, which was decided by the Court of Appeal, consisting of Lord Cranworth, L.C., and Knight-Bruce, and Turner, L.JJ. (*University of London* v. *Yarrow*, 5 W. R. 543, 1 De G. & J. 72); it sums up sufficiently the result of previous authority. The Court of Appeal, on an appeal from the Master of the Rolls, had to decide as to the validity of a bequest contained in the will of one Thomas Brown. The gift was for the purpose of founding, establishing, and upholding an animal sanitary institution within a mile of either Westminster, Southwark, or Dublin. The real difficulty was that it pointed to founding and establishing an institution near Westminster, Southwark, or, in the alternative, Dublin. Now, I am perfectly well aware that Lord Cranworth, who gave the leading judgment on that occasion, did express a doubt whether, if the choice had not been given for the founding of an institution near Dublin, he might not still have got over any difficulty. But that was not the matter upon which the case was decided. It was decided upon this point: that where objects were pointed out, some of which were illegal with an alternative which might be legal and would be legal, the power of selection given to the trustees, which might include, and did, I suppose, in that case include, the legal object, was quite sufficient to take it out of the statute. Very well. That goes very much further than the cases, which are numerous—only one or two of which were cited here—as to universities. It went to the question of whether the gift was valid, it being for certain purposes, some of which would be unlawful and others lawful. [His lordship read from the judgments of Lord Cranworth, L.C., and Knight-Bruce, L.J., and continued:]

Now, what does that decision involve? It seems to me to involve the whole question raised in the present case. Down to that time the principle was that if the testator had pointed out two objects, one lawful and the other unlawful, the power of the trustees to select the lawful one, rendered the charitable bequest good. Because it was a charitable bequest you could not say that the charitable bequest was void. I will not say anything more about what the result of the trustees' selection here may be. At present there is a power to the trustees to select objects which are perfectly within the Act. There is no doubt at all about the testator's intention that all this mixed fund should go to charities, and that intention can have effect perfectly well given to it by handing over the impure personalty to any one or more of the exempted charities. It would be impossible to hold after that decision (*University of London* v. *Yarrow*) and the broad extent of the reasoning of the judges that, even if there had never been such a case as *Lewis* v. *Allenby*, there is any fatal objection to the gift in the present case such as Mr. Swinfen Eady's clients ask us to hold.

There was a question raised about a subsequent part of North, J.'s, judgment, and I think I may say that, for the purpose of shortening the case, we asked the Attorney-General to submit to a modification of that, and I think that he was ready to go so far as to say that he would omit it if it were necessary. I have not consulted my colleagues on this point, but, for my own part, I think it would be better, in order that we should keep faith with counsel, to change that part of the order without saying that it is all wrong. I do not say that it is all wrong; but we did not allow it to be fully argued, and I think we might change it by putting it into a negative form, so that we might say that no gift of mixed personalty to any unexempted charity would operate as a gift to that charity—that is to say, as an effectual gift. That would remove the ambiguity which appears to exist, and then the state of things would be this: The trustees would know plainly, being parties to this, that they would be doing that which would frustrate as far as they could the testator's intention if they applied any part of this fund to unexempted charities. There may be a question whether they can, if they choose to do that, frustrate the testator's intention. They are trustees who have accepted the trusts of the will, and whose *primâ facie* duty, at any rate, is to carry out those trusts in a legal manner, if it can be done. I say nothing further than that. The other authorities, *Baker* v. *Sutton* and *Johnston* v. *Swann*, I take to have been overruled if and so far as they differ from *Lewis* v. *Allenby*.

We ought to have an express decision to the contrary before anything can be said to exist in the way of authority against *Lewis* v. *Allenby*. To the cases that have happened since I do not attach that importance that I might do in some cases. I think that *Lewis* v. *Allenby* was questioned by Kay, J., in the case of *In re Clark, Husband* v. *Martin*. But then I think that both he and Stuart, V.C., were dealing with questions which are not relevant here. I cannot see how in the particular case of *Lewis* v. *Allenby* the mere mention of the class of charities—hospitals—could assist one way or the other. All charities are divided into two categories for this purpose—those that can take notwithstanding the Act of Geo. 2, and those that cannot take. You get no nearer to the question when you say "hospitals"; for

they are not divisible into the two categories of some that can take and some that cannot; and I do not think that the presence of such a word assists at all or that the absence of it can in any way differentiate the case. In *In re Clark* there was a gift for a plain object—viz., for the poor in such manner as the trustees should think fit. I think it very likely that that was considered quite a sufficient circumstance to distinguish that case in principle from one such as we are now deciding.

VAUGHAN WILLIAMS, L.J.—I agree. I should add nothing at all if it were not that I myself think that we are not, in giving this decision, following *Lewis* v. *Allenby*, and as I take that view I think it right to say so. It seems to me that in *Lewis* v. *Allenby* it is tolerably clear that Stuart, V.C., meant to decide that a gift would not be outside the provisions contained in the first and third sections of 9 Geo. 2, c. 36, unless in a case where it included the gifts avoided by those sections. You might include gifts within those sections unless there were words excluding that which might be so included. It seems to me that, the learned Vice-Chancellor having decided that, proceeded to say that in his opinion he did find in *Lewis* v. *Allenby* something that excluded the object from the words of the bequest. The words were general enough to include a bequest within the avoiding scope of those sections. There was something which in his opinion was sufficient to exclude such matters. I entirely agree with what has been said by Rigby, L.J., that it is very difficult to see what it was that the learned Vice-Chancellor found which could operate as such an exclusion. But still, to my mind it is perfectly plain that he did mean to lay down the rule that you must have such words of exclusion. I want to point out also that when Kay, L.J., gave his decision in *In re Clark*, he clearly was right and understood the decision of Stuart, V.C. He proceeds to decide *In re Clark* itself upon the very ground that he cannot find in the bequest any sufficient words of exclusion. But he says: "Yet I cannot say that that class of charity"—that is, the class of charitable institutions which are exempted from the operation of this Act—"is sufficiently indicated as being amongst the objects intended to be benefited by the testatrix to enable me to read this as a gift of the impure personalty to charities authorized to hold property of that nature, and I have certainly no wish to extend the rules applicable to cases of this kind."

What we have really to decide is whether or not it is necessary that the gift to be outside this Act of Parliament should contain some words excluding legacies of the kind defined in sections 1 and 3 or some disjunctive words enabling you to treat the bequests as two alternative bequests. To my mind if you look at the authority which was cited before us of *Grimmett* v. *Grimmett*, it seems clear that Lord Hardwicke took a view in accordance with the view that I think Stuart, V.C., and Kay, J., took. Because he says, quoting his own decision in *Sorresby* v. *Hollins*, 9 Mod. 221: "If a devise is in the disjunctive and leaves the executors two methods to do a particular thing, one lawful and the other prohibited by law, can any court say, because one method is unlawful, that therefore the other is so too, and that the whole bequest is void." He seems to consider that the law which he is there laying down only applies to a case where you have got a disjunctive form of words such as he speaks of there. I agree entirely that it is very much better that we should not limit the doctrine there laid down in the way in which to my mind it has been limited both in *Grimmett* v. *Grimmett* itself and in *Lewis* v. *Allenby* and *In re Clark*, and tacitly as was done both in *Baker* v. *Sutton* and in *Johnston* v. *Swann*. Therefore I quite agree with what I understand to be our decision to-day, that it is sufficient to prevent a gift from being avoided by this statute—even though the gift is a gift under words sufficiently wide to include the cases which clearly fall within the sections—if the gift gives a discretion to trustees enabling them to select from the general class including some valid objects and some invalid such as are valid. It seems to me a much more reasonable and convenient doctrine to hold that in such a case the gift would be a good gift and outside the statute in respect of such purposes—the trustees in their discretion applying the gifts to them—as are valid and not within the exception. I only wish to add that I do not for myself express any opinion as to whether if the trustees in this particular case were to select institutions to benefit under this charitable gift which fall within the class which is not exempted from the operation of this statute, that that would be an exercise of their powers in such a sense as that they could not subsequently exercise the powers in respect of objects which were not covered by this section.

Appeal dismissed.

Solicitors, *Crowders & Vizard; Solicitor to the Treasury; Field, Roscoe, & Co.*, for *Evan Morris & Co.*, Wrexham.

High Court of Justice.

Chan. Div. North, J. } Nov. 30; Dec. 1.

PINET ET CIE. v. MAISON LOUIS PINET (LIMITED). (a.)

Trade-name—Change of name—Injunction restraining use of name altogether in connection with a particular trade.

A person taking the name of another in order to pass off and sell goods under the name of that other will be absolutely restrained by injunction from using that name in carrying on a business similar to that other's business.

Action.

Pinet et Cie. are well-known bootmakers carrying on business in Paris and in London, and selling boots and shoes which are known as "Pinet's boots and shoes." The defendant company was a company formed to take over the business of the "Maison Pinet" (Limited), which had gone into liquidation. The "Maison Pinet" (Limited) had been floated originally by one Dutch, a defendant in the action, for the purpose of taking over the business of boot and shoe makers which had been carried on by Dutch under the name of Pinet. Dutch, who had been a solicitor, had by deed enrolled in Chancery taken the name of Pinet in 1892, on beginning the business of a boot and shoe maker.

On the Maison Pinet commencing business an injunction was granted against them by the Court of Appeal at the suit of the present plaintiffs, restraining them from using the name of Pinet in connection with the sale or manufacture of boots and shoes without distinguishing their articles from those of the plaintiffs. At that time it was not known that Pinet was not the defendant Dutch's real name.

(a.) Reported by R. SILLEM, Esq., Barrister-at-Law.

The present applications were for injunctions in two actions, one commenced against the Maison Louis Pinet and its directors and Louis Pinet, and the other against the Maison Pinet (Limited) and its liquidators and the trustee for the Maison Louis Pinet.

Moulton, Q.C., Swinfen Eady, Q.C., and *Sebastian*, for the plaintiffs.—As the name Pinet has been taken for a fraudulent purpose its use will be absolutely prohibited: *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Reddaway* v. *Banham*, 44 W. R. 638, [1896] A. C. 199; *In re Brinsmead*, [1897] 1 Ch. 46.

Vernon Smith, Q.C., and *E. B. Cooper*, for the defendants.—The injunction ought not to be unlimited. We are willing to submit to an injunction with the words "without distinguishing the defendants' goods from those of the plaintiffs' manufacture." This is the usual form and was followed in the former action: see *Thompson* v. *Montgomery*, 37 W. R. 637, 41 Ch. D. 35.

NORTH, J. [After referring to the facts, saying that Louis Pinet had adopted that name in order to commit a fraud, and referring to the injunction granted in the former action, continued:] At that time it was asserted by Louis Pinet that Pinet was his real name and the contrary was apparently not known or suspected; and the case was dealt with on the footing that he was using his own name and could not be restrained from trading under it. No doubt a man may by law change his surname if he likes; he cannot be prevented from doing so, and an Act of Parliament is not necessary for the purpose; but if he wants to have the benefit arising from any such change, it must be an honest change. It must not be a change for the purpose of putting on the semblance of somebody else, and passing off his goods as the goods of that other person. It is quite clear to me in this case that the defendants cannot get any benefit from the fact that a short time since Louis Pinet took that name when it was not his own; they cannot have any advantage from that, any more than they could have had if he had never taken that name at all and they were now doing all that has been done, his name Dutch retained and nothing else substituted for it. It seems to me quite clearly a case in which the plaintiffs are entitled to an order against the defendants to restrain them from interfering with the thoroughly well-known trade of the plaintiffs by using the name Pinet. The injunction was granted by the Court of Appeal to restrain the old company from using the name without distinguishing and pointing out that they were not the plaintiffs' company. The fact that such an order has been granted has not deterred the new company from attempting to do the very same thing. Under these circumstances I think an injunction must be granted to restrain them from using the name "Pinet" at all, in connection, of course, with the manufacture or selling of boots and shoes. I do not go beyond that, or restrain them from using the name for any other purpose they think fit, and which is within their memorandum of association, but I restrain them from using the name "Pinet" at all in the manufacture of boots and shoes.

Solicitors, *Wilson, Bristows, & Carpmael; George Boyd Wickes.*

Chan. Div. Kekewich, J. } Feb. 16.

HUMMEL v. HUMMEL. (a.)

Appointment—Power—Exercise by will—Foreign unattested will—Invalid execution—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *ss.* 9, 10, 27—*Wills Act*, 1861 (*Lord Kingsdown's Act*) (24 & 25 *Vict. c.* 114), *s.* 1.

A foreign unattested will or testamentary instrument, though valid according to the law of the place where the testator was domiciled when the same was made, and admissible to probate in this country under section 1 *of the Wills Act*, 1861, *will not operate as a valid exercise of a testamentary power of appointment, since it does not fulfil the requirements of sections* 9 *and* 10 *of the Wills Act*, 1837.

D'Huart v. Harkness, 13 *W. R.* 513, 34 *Beav.* 324, *distinguished.*

In re Kirwan's Trusts, 32 *W. R.* 581, 25 *Ch. D.* 373, *followed.*

Action.

By his will dated the 8th of January, 1864, Edmund George Hummel, after appointing trustees and executors and making certain pecuniary bequests, gave his residuary estate to his trustees in trust for and to be equally divided among all his children who being sons should attain the age of twenty-one years or being daughters should attain that age or marry, and the children of any son dying under twenty-one and leaving issue. And the testator declared that if any of his children or of his grandchildren born in his lifetime should be daughters or a daughter, then the share to which such daughter should become entitled in the trust estate should be held by his trustees in trust to pay the income thereof to her for her separate use during her life and after her death upon the trusts therein contained in favour of her children, and in default of such children then in trust for such person or persons as she, whether married or not, should by her will or codicil appoint, and in default of such appointment, in trust for such person or persons as at the time of the failure of all the trusts thereinbefore contained concerning such share should be her next-of-kin according to the Statute of Distributions in case she had died intestate and unmarried, and if more than one such person in the shares directed by such statute.

The testator died on the 13th of April, 1871, leaving five children surviving him, all of whom attained the age of twenty-one. They were Louisa Ann Hummel, and the defendants Edmund Henry Hummel, Eliza Jane de Brandt, Marion Horton Clough, and Sarah Ellen Hummel. The value of the testator's residuary estate amounted to about £18,000.

In 1876 Louisa Ann Hummel married the defendant Franz Auton Greif, an Austrian subject, who, however, deserted her in 1888, and never subsequently lived with her. Louisa Ann Greif was residing in her own house at Nice, in France, at the time of her death, which occurred on the 24th of July, 1896. She left no children.

The only testamentary disposition by Louisa Ann Greif which could be discovered was contained in a document in her handwriting found in the house after her death. The document was set out in full in paragraph 10 of the statement of claim in this action and was as follows: "To my executors,—I leave Arthur Brandt in case of my death the sum of (£600) six hundred pounds. Louisa Ann Greif, Nice, June 26, 1896."

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

The defendant Arthur Brandt was the person referred to by the testatrix.

This action was brought by the present trustees of the will of the testator, Edmund George Hummel, against the persons who would have been the next-of-kin according to the Statute, of Louisa Ann Greif in case she had died intestate and unmarried, and also against the defendants Franz Auton Greif and Arthur Brandt for the determination (*inter alia*) of the question whether the paper writing set forth in paragraph 10 of the statement of claim was an exercise of the power of appointment given to Louisa Ann Grief by her father's will.

The statement of claim alleged that the paper writing constituted a valid will according to the law of France, but that the same had never been registered or otherwise dealt with in France as a will, nor had it been proved in England.

The defendant Sarah Ellen Hummel had taken out administration in France to Louisa Ann Greif's estate, and she was the only one of the defendants in this action who delivered a defence. She contended that the paper writing did not constitute a valid will according to the law either of France or Austria, and that whatever the domicil or *status* of the defendant Franz Auton Greif and his wife respectively since their marriage, there had been no exercise by the latter of her testamentary power of appointment under her father's will.

The action now came on for trial as a non-witness action, together with a summons by the plaintiffs for the determination of the question whether Louisa Ann Greif's share was distributable upon the assumption that she died without having exercised her power, and for certain inquiries.

T. L. Wilkinson, for the plaintiffs.—In *D'Huart* v. *Harkness*, 13 W. R. 513, 34 Beav. 324, Sir John Romilly held that a power of appointment had been well executed by the unattested will of an English lady married to a Frenchman and domiciled in France. The will was valid according to French law and had been admitted to probate in this country. But in the later case of *In re Kirwan's Trusts*, 32 W. R. 581, 25 Ch. D. 373, in which *D'Huart* v. *Harkness* was not referred to, Kay, J., held that a holograph will made in France, and unattested, was not a valid testamentary exercise of a power of appointment, on the ground that although it had been admitted to probate in England under the Wills Act, 1861, it did not fulfil the requirements of sections 9 and 10 of the Wills Act, 1837, which had not been repealed by the later Act. The same argument applies to this case, to which the later decision applies.

MacSwinney, for the defendant Edmund Henry Hummel.

Austen Cartmell, for the defendant Sarah Ellen Hummel.

Ingpen, for the defendant Arthur Brandt.—If this is not a valid exercise of the power through non-compliance with sections 9 and 10 of the Wills Act, 1837, then my client is entitled by virtue of section 27 of that Act, which provides that a bequest of personal estate shall operate as an execution of a general power of appointment.

KEKEWICH, J.—The difficulty in this case arises from two apparently conflicting decisions—namely, those of *D'Huart* v. *Harkness* by Sir J. Romilly, M.R., in 1865 and *In re Kirwan's Trusts* by Kay, J., in 1883, a case in which *D'Huart* v. *Harkness* was not cited. In *D'Huart* v. *Harkness* Sir J. Romilly, M.R., said this: "When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognized by the law of this country, but any will which is entitled to probate here. A power to appoint by will simply, may be executed by any will which according to the law of this country is valid, though it does not follow the forms of the statute."

The document submitted to my consideration is set out in paragraph 10 of the statement of claim. I will assume that it is, as stated in paragraph 12, a valid will according to the law of France, but it is not a will that could under the provisions of the Wills Act be proved in this country. The question is, Can it operate as an exercise of a general power of appointment by will? As to that the decision of Kay, J., in *In re Kirwan's Trusts* is conclusive that it cannot, even if it had been a will that could be proved in this country. Is that decision inconsistent with *D'Huart* v. *Harkness*, where Sir J. Romilly, M.R., decided that a power to appoint "by a will duly executed" is well exercised by a will good according to the law of the country of the testator's domicil, though ill-executed according to the law of England? That case, as already mentioned, was not referred to in *In re Kirwan's Trusts*, but the latter case is cited in a note on p. 308 of Williams on Executors (vol i., 9th ed.) as the authority for the proposition that in the case of a will which is only valid by reason of the Wills Act, 1861, sections 9 and 10 of the Wills Act, 1837, must be complied with. That appears to me to form the distinction between the two cases. The Wills Act, 1861—Lord Kingsdown's Act—provides in section 1 that every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place were such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicil of origin. Now, if the testamentary instrument in question here could be admitted to probate in this country under the statute just cited, it would still, according to the decision in *In re Kirwan's Trusts*, and in my judgment, be necessary in order that it might operate as a good execution of the power given to the testatrix, to consider whether it complies with the requirements of sections 9 and 10 of the Wills Act, 1837, which provide that no appointment by will in exercise of a power shall be valid unless attested by two or more witnesses. This document is not attested, and therefore in any case this testamentary instrument cannot operate as an execution of the power. It is said that the defendant Arthur Brandt can claim under section 27 of the Wills Act, 1837, which says that a general bequest shall include estates over which the testator has a general power of appointment; but that section cannot be read as an exception to section 10, unless the language to that effect is clear, and in my opinion it would not be right to treat section 27 as controlling section 10, which expressly says that "no appointment made by will in exercise of any power shall be valid unless the same be exercised in manner hereinbefore required," that is to say, attested by two or more witnesses.

There must, therefore, be a declaration that the paper writing referred to in paragraph 10 of the statement of claim is not a valid exercise of the power of appointment given to Louisa Ann Greif by

the testator's will, and the trustees of that will must divide the trust fund on the footing that there has been no exercise of the power by Madame Greif. The costs of all parties, as between solicitor and client, will be taxed, and paid out of Madame Greif's settled share under the will. There will be one order in the action and on the summons.

Solicitors, *A. F. Church; Travers Smith, Braithwaite, & Robinson; Deacon & Co.; Hughes & Bartlett.*

Chan. Div. } Romer, J. } April 1, 26.

EHRMANN v. BARTHOLOMEW. (a.)

Contract — Master and servant — Wine merchants' traveller—Negative stipulation against doing other business—Injunction.

The defendant, under the articles of agreement regulating his employment as traveller for the plaintiffs, a firm of wine merchants, had bound himself to devote the whole of his attention and time during the usual business hours to the business of the plaintiffs, and not directly or indirectly to employ himself in any other business or transact any business with any other person than the plaintiffs for a period of ten years. There was no provision enabling the defendant to determine his employment, but he assumed to do so by writing a letter giving notice of his intention to leave, and entered the service of a rival firm. The plaintiffs moved for an injunction to restrain him from thus engaging himself in any other business than that of the plaintiffs' under his contract with them.

Held, that the negative stipulations in the contract were unreasonable, and ought not to be enforced.

Motion.

The plaintiffs were a firm of London wine merchants. The defendant had been a traveller in their employment engaged to act as such for ten years by articles of agreement dated the 24th of August, 1897.

The present motion was brought by the plaintiffs to restrain the defendant from engaging or employing himself in any other business than that of plaintiffs' firm, and in particular from acting as traveller for Messrs. Marzell & Co., another firm of London wine merchants, and from soliciting orders from them during the term of the said agreement.

Clause 3 in the agreement was as follows: "The traveller shall diligently and continuously employ himself as traveller of the firm for the purpose of selling the firm's goods, and shall use his best endeavours to obtain new customers for the firm and to extend business, and shall devote the whole of his time during the usual business hours to the transaction of the business of the firm and shall not in any manner directly or indirectly engage or employ himself in any other business or transact any business with or for any person or persons other than the firm during the continuance of this agreement."

The only provision for determining the term of employment under the agreement was by notice given by the plaintiffs, and there was nothing in the provisions to enable the defendant to determine his employment thereunder. Notwithstanding this the defendant wrote a letter to the plaintiffs dated the 1st of March, 1898, in which he purported to resign his position as traveller to their firm. The plaintiffs in reply wrote to him refusing to accept his resignation and pointing out that under the terms of the agreement there was no power for the defendant to determine his employment. Having ascertained that the defendant had begun to work for a rival firm of wine merchants, the plaintiffs instituted the action in which the present motion was brought.

H. E. Wright, in support of the motion.

S. O. Buckmaster, for the traveller.

ROMER, J.—The serious question arises whether the court ought to enforce such a negative stipulation as is contained in this covenant. It would in terms prevent the defendant, at any rate during the usual business hours, from employing himself in any business other than that of the plaintiffs', and from transacting any business with or for any persons or person other than the plaintiffs, and this for a period of ten years from the 30th of August, 1897, or for so much of that period as the plaintiffs choose. And it is clear that in this clause the word "business" cannot be held limited by the context to a wine merchant's business, or in any similar way; so that the court, while unable to order the defendant to work for the plaintiffs, is asked indirectly to make him do so by otherwise compelling him to abstain wholly from business, at any rate during all usual business hours. In my opinion such a stipulation is unreasonable, and ought not to be enforced by the court. As the present Master of the Rolls stated in *Whitwood Chemical Co.* v. *Hardman*, 39 W. R. 433, [1891] 2 Ch. 416, cases where negative stipulations in contracts of service are enforced by the court ought not to be extended, and are to be regarded as anomalies which it would be very dangerous to extend. To enforce such a general negative stipulation as I find here would be, in my opinion, a dangerous extension, for here the stipulation extends to business of any kind, while the negative stipulations enforced in the prior cases, such as *Lumley* v. *Wagner*, 1 De G. M. & G. 604, were confined to special services. For these reasons I refuse the motion; but, looking at the conduct of the defendant, I do so without costs. Of course, by this order the plaintiffs will be in no wise prevented from enforcing another clause of the agreement which prohibits the defendant, after the determination of his employment, from supplying or soliciting the plaintiff's customers.

Solicitors, *W. H. Southern; Goren & Tapp.*

Chan. Div. } Byrne, J. } March 12, 19, 24.

ANDERSON v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.

MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO. v. ANDERSON. (a.)

Landlord and tenant—Covenant for quiet enjoyment—Reversion assigned to a railway company—Exercise of statutory powers — Damages — Lands Clauses Act, 1845, *s.* 68—*Railway Clauses Act*, 1845, *s.* 6.

A. was lessee of a house under a lease containing a covenant for quiet enjoyment. The reversion, subject to the lease, was acquired by agreement by a company empowered under a special Act to construct a railroad, and for that purpose to acquire certain lands, which included the demised house. The house was not, however, required for the actual construction of the railroad. The special Act was passed previously to the lease. In the construction of the railroad the company damaged, but did not destroy, the house, without being guilty of negligence.

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Held, that an action by A. against the company for damages for breach of the covenant for quiet enjoyment would not lie; and

Held, that, in an action by the company against A. for rent, the alleged breach of the covenant was no defence, and that the damage sustained by the house could not be set off against the demand for rent.

A railway company taking lands under statutory powers, and constructing works within such powers, is entitled to take the interest of any person having an interest in land without incurring liability in respect of any existing covenant entered into by the owner whose interest the company acquires, so far as the enforcement of such a covenant would impose a burden upon such company in derogation of its statutory rights and obligations.

Semble, *that such a covenant only covers the acts of the voluntary assignees of the original lessor.*

In the first of these actions the plaintiff claimed an injunction to restrain the defendant company from interfering with the support of a certain passage or otherwise with the peaceable enjoyment by the plaintiff of his right of user of such passage, and he claimed damages in respect of that matter as well as in respect of the injury done by the company in excavating the ground adjoining the plaintiff's premises, whereby, as he alleged, they had caused the walls and ceilings of his premises to crack. The plaintiff was the lessee and occupier of a house and buildings upon a piece of land in Hampstead, known as No. 1, Goldhurst-terrace, under a lease dated the 7th of April, 1894, and made between James Findlay of the one part, and the plaintiff Anderson of the other part. By this lease Findlay demised to the plaintiff the land, house, and premises in question with a right of footway in common with all other parties then entitled or thereafter to be entitled to a like right over the passage above mentioned which lay at the side of the premises, for a term of twenty-one years from the 25th of March, 1894, determinable at the option of the tenant at the end of seven or fourteen years, at a yearly rent rising from £180 to £250 and subject to the covenants and conditions contained in the lease. The lease contained a covenant on the part of the lessor that the lessee, paying the rent reserved and performing the covenants in the lease, might peaceably hold and enjoy the demised premises without any interruption by the lessor or any person claiming through him.

By the Manchester, Sheffield, and Lincolnshire Railway (Extension to London) Act, 1893, the defendant company were authorized to make and maintain a certain railway, and for that purpose were empowered to enter upon, take, and use certain lands mentioned in the Act. These lands included the property demised by the lease, but that property did not form any portion of the actual site of the railway as constructed. The company, however, acquired by agreement the reversionary interest of the plaintiff's lessor in the demised premises, and by an arrangement made in October, 1895, the lessor assigned the property to the company subject to the plaintiff's lease. The company proceeded with the construction of their railway in pursuance of its statutory powers, and in the course of such construction it to some extent injured the structure of the plaintiff's premises, but, as was admitted, without negligence on the company's part. The plaintiff claimed to be entitled to damages for such injury on the ground that the company, by taking an assignment of the reversion, had rendered itself liable under the covenant for quiet enjoyment.

The second action was brought by the company against Anderson for rent due under his lease, and in this action the defendant set up the covenant for quiet enjoyment as a defence, and counter-claimed for damages for its breach.

Witt, Q.C., and *A. Statham*, for the plaintiff Anderson.—The defendants are bound by the covenant for quiet enjoyment, and have broken it, and are answerable in damages. The case is not one of compensation under the Lands Clauses Act, 1845. The plaintiff is not claiming against the defendants as tort feasors, but as being bound by contract. The plaintiff may have no remedy under the Lands Clauses Act, 1845, or the Railway Clauses Act, 1845, but the defendants are estopped from denying their liability under the covenant: *Grosvenor Hotel Co.* v. *Hamilton*, 42 W. R. 626, [1894] 2 Q. B. 836. At any rate Anderson may set off the damage done, as against the rent demanded in the second action.

They also cited *In re East London Railway Co.*, 38 W. R. 312, 24 Q. B. D. 507; *Ricket* v. *Directors of Metropolitan Railway Co*, 15 W. R. 937, L. R. 2 H. L. 175.

Eve, Q.C., *Macnaghten*, and *L. A. Sampson*, for the defendant company.—The remedy of the plaintiff, if any, is the statutory one under the Lands Clauses Act, 1845, s. 68, or the Railways Clauses Act, 1845, s. 6: *Clark* v. *School Board for London*, 22 W. R. 354, L. R. 9 Ch. App. 120; *Kirby* v. *School Board for Harrogate*, [1896] 1 Ch. 437, 44 W. R. Dig. 144; *Baily* v. *De Crespigny*, 17 W. R. 494, L. R. 4 Q. B. 180. The defendants are acting under their statutory powers, and have shown no negligence, and have power to do all necessary things: *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409, 39 W. R. Dig. 140. The defendants are under no implied covenant to give support to the plaintiff's premises: *Colebeck* v. *Girdlers Co.*, 24 W. R. 577, 1 Q. B. D. 234; *Popplewell* v. *Hodkinson*, 17 W. R. 806, L. R. 4 Ex. 248. Moreover, the covenant was not intended to cover a case such as the present, and the action of the railway company in acquiring the land under their special Act was not foreseen or contemplated by the parties at the date of the lease: *Harrison, Ainslie & Co.* v. *Lord Muncaster*, 40 W. R. 102, [1891] 2 Q. B. 680; *Sparling* v. *Bantoft*, 40 W. R. 157, [1891] 2 Q. B. 384. Again, if the covenant was intended to apply to the present case it would be in derogation of the defendants' statutory duties, and void: *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623, 32 W. R. Dig. 112.

They also cited *Jenkins* v. *Jackson*, 37 W. R. 253, 40 Ch. D. 71; *Sanderson* v. *Mayor, &c., of Berwick-upon-Tweed*, 33 W. R. 67, 13 Q. B. D. 547.

Cur. adv. vult.

Mar. 24.—BYRNE, J. (after stating the facts).—The plaintiff does not dispute that but for the covenant for quiet enjoyment he would not be entitled to sue for damages in respect of the injury, but would be relegated to such remedy as he might have under section 6 of the Railway Clauses Act, 1845, and section 68 of the Lands Clauses Act, 1845; but he says that the company, having neglected to acquire his interest in the property, and having put themselves into the position of assignees of the reversion, are liable by reason of the existence of the covenant. Had the plaintiff's land been required for the actual construction of the railway, the question would not have arisen, because the railway company could not have constructed their works without acquiring the plaintiff's interest in the property. The land in which he had an interest is, however, land which the company was entitled to take compulsorily, and, although they have acquired the reversion by agreement, I do

not think that any distinction can be drawn on this ground, having regard to the authorities bearing on the matter. The precise point that I have to determine is, so far as I am aware, new, but there are authorities which it is necessary to consider in order to arrive at a proper conclusion.

In the case of *Kirby* v. *School Board for Harrogate* it was held, by the Court of Appeal affirming the decision of North, J., that when a School Board acquires land, whether by agreement or compulsion, for the purposes of the Elementary Education Act, 1870, and purchases with notice of a restrictive covenant to which the land is subject in the hands of the vendor, the covenantee cannot maintain an action against the School Board for breach of such covenant, and his only remedy is compensation under section 68 of the Lands Clauses Consolidation Act, 1845. In that case the vendor to the board of a plot of land had previously covenanted, on the conveyance of an adjoining plot, that no buildings (except bay windows and porches) should without consent be erected within thirty feet of the northern boundary, and that no noisome or offensive trade or calling should be carried on on the plot of land afterwards conveyed to the School Board. The principle applied in that case was that the remedy which might otherwise have existed against the School Board in respect of breach of covenant was destroyed by reason of the statute authorizing the construction of the works, and Kay, L.J., says: "Therefore it seems to me that, even if this were a railway company and they were executing works which would injuriously affect another landowner, section 68 would apply, and that other landowner would not be entitled to obtain an injunction, but would be bound to apply for compensation under this section 68." The decision in this case is in accordance with the decision in *Clarke* v. *School Board for London*, applying the principle which had previously been applied in the case of an easement, to the case of a right created by restrictive covenant. In the case of *Baily* v. *De Crespigny* it was determined that where the defendant, who had demised certain premises to the plaintiff for a long term of years, and had covenanted with the plaintiff that neither he the defendant, nor his heirs nor his assigns, should build on certain adjoining premises belonging to him, except as therein particularly mentioned, and where subsequently to the lease a railway company had acquired from the defendant this adjoining land under powers given them by Act of Parliament, the assignment from the defendant to the railway company being in completion of the compulsory purchase; and where the company had subsequently built the erections complained of which were reasonably required for the purposes of their undertaking, the defendant was discharged from his covenant by the subsequent Act of Parliament which compelled him to assign to the railway company, and so put it out of his power to perform the covenant; and Lord Hannen (then Mr. Justice Hannen), in delivering the judgment of the court, says: "The defendant when he contracted, used the general word 'assigns,' knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The legislature, by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make a entirely new contract for the parties."

In each of the cases to which I have referred the point now raised is not precisely involved, because what has happened is not that the covenantor has sold to the railway company adjoining land in respect of which he has entered into restrictive covenants, but that he has sold his reversion in the same land included in the lease containing the covenant for quiet enjoyment; and a distinction is also pointed out in that, in the present case, the lease was granted to the plaintiff and the assignment to the company was executed after the passing of the Act under which the company has done the acts complained of. In my judgment, if the lease had been granted to the plaintiff prior to the passing of the Act the principle of the cases to which I have referred would have been clearly applicable to the present case, although the assignment had been made subsequently to that date, but I have to consider the other question—viz., What is the effect of a covenant for quiet enjoyment contained in a lease granted after the passing of an Act of Parliament authorizing, but not requiring, the taking of the land demised? Lessor and lessee must both be deemed to know when they enter into the contract that the land may or may not be taken by the railway company and that the interest of either of them may be so taken without the interest of the other being also acquired. Lessor and lessee also know that their respective interests may be injuriously affected by the railway company in carrying out its statutory obligations and acting strictly within its statutory powers, and both parties know that, should their or either of their interests be injuriously affected, there are statutory provisions providing for compensation being paid. First, as between lessor and lessee, What is the true meaning of a covenant for quiet enjoyment in the terms of the covenant in the present case? Under such circumstances, do the parties mean and intend that the lessor is to be liable in the event of disturbance by the company in the legitimate exercise of its Parliamentary powers, or do they mean that, subject to such exercise of the statutory power, the covenant is to apply? I think that the true intent and meaning of the covenant is that the covenantor will be answerable for his own acts and for the acts of his assignees, but not that he will be answerable for the acts of the railway company in the exercise of its statutory powers, the company not being in the true sense his voluntary assignee at all, although he conveys to the company, and the company is not put to the actual exercise of its compulsory power. If, then, the lessor would not be liable, how can his assignee, the railway company, be liable in the absence of a fresh bargain on its part to be liable? It is reasonably clear that the company cannot be liable.

But, although I have expressed this view as to the liability of the lessor, it is not in my judgment necessary for the decision, because in the present case it is not the lessor but the railway company against whom relief is sought, and I am of opinion that, even if the plaintiff was entitled to sue the lessor upon his covenant, he is not entitled to sue the railway company, the lessor's compulsory assignee. I think that a railway company taking lands under statutory powers, and constructing works within such powers without negligence, is entitled to take the interest of any person having an interest in land without incurring liability in respect of any existing covenant entered into by the owner, whose interest the company acquires, so far as the enforcement of such covenant would impose a burden upon the company in derogation of its statutory rights and obligations. It is not necessary to say or decide that the covenant is gone for all purposes. Nor is it necessary to consider how far the acts done by the railway company, if amounting to a destruction of the subject-matter of the lease, might or might not

afford a good answer to an action for rent or in respect of other covenants of the lease. It has been urged on behalf of the plaintiff that it seems anomalous and unfair that the company can take the interest of a lessor with all such lessor's rights, and at the same time be free from the obligations imposed by the lease upon the lessor. The question can only arise in rare instances. If the land is really required for the purpose of the undertaking it is, of course, as necessary, if not more necessary, in most cases to take the interest of the lessee than that of the lessor, but it may happen that the interest of one or other of the parties interested in the land may be *bonâ fide* taken by the company before it discovers that it does not require the land. There has been a suggestion in the present case that the plaintiff took his lease with a view to the profit he might make upon the land being taken by the company. I am bound to say that I see no justification upon the evidence for the suggestion; on the other hand, the plaintiff has rather endeavoured to hold up the railway company as oppressive, declining to take his property from sinister motives. I have nothing to do with these matters, but have only to consider the legal position. I think the company has acted within its legal rights, and that the plaintiff must look to his statutory right to compensation for such remedy as he is entitled to. This involves the dismissal of the plaintiff's action so far as his claim in respect of injury done to the structure of his house is concerned, and it also disposes of the counter-claim in the second action, and both must be dismissed with costs, except as to the costs of the first action down to the time of the amendment, which I allowed at the trial; those costs, I consider, ought to be borne by the railway company.

Judgment for the defendant company.

Solicitors for plaintiff Anderson, *Ford, Lloyd, Bartlett, & Michelmore.*

Solicitors for defendant company, *Cunliffes & Davenport*, for *R. L. Monk*, Manchester.

Q. B. Div.
(Wills and Kennedy, JJ.) April 26, 27.

REG. *v.* COTHAM AND ANOTHER AND WEBB.
Ex parte SAME. (*a.*)

Justices—Licensing law—Appeal—Transfer of licence— Certiorari—Mandamus—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4, 14.

By section 4 *of* 9 *Geo.* 4, *c.* 61, *it is provided that at special transfer sessions "it shall be lawful for the justices there and then assembled, in the case and in the manner and for the time hereinafter directed, to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as they, the said justices, shall . . . deem fit and proper persons."*

A. for ten years had obtained an annual certificate for a licence to sell beer on certain premises. These premises, however, had been kept as a draper's shop during that time, and not as an inn, and A. had never sold beer therein, nor had he during that time been in occupation thereof. He applied at transfer sessions for a grant by way of transfer to B. of the licence or certificate. The justices granted the application.

Held, (1) *following* Reg. *v.* Sharman, ante, *p.* 367, *that a* certiorari *would not lie;* (2) *that the justices had not heard and determined the matter according to law, and that a* mandamus *ought to be granted against them. They had not merely misconstrued the statute, but had taken into consideration matters outside the ambit of their jurisdiction.*

In this case three rules *nisi* had been obtained. The first rule was for a writ of *certiorari* to quash a renewal of a licence; the second was for a writ of *certiorari* to quash the transfer of such licence; and the third was for a writ of *mandamus* to the justices of the Prescot Division of Lancashire to hear and determine the application for such transfer according to law.

On the 21st of December, 1897, the licensing justices for the aforesaid division granted to one Webb the transfer under section 14 of the Alehouse Act, 1828, of a licence granted to J. Wallace on the 25th of August, 1897, to sell by retail at a house in Church-street, Farnworth, Widnes, beer to be consumed on or off the premises. For ten years Wallace had annually obtained a certificate to hold such a licence in respect of this house, but during the whole of that period he had not resided therein, nor had beer or other intoxicating liquor been sold therein. The house had in fact been used for thirteen years as a draper's shop. It was alleged that the justices had no jurisdiction to grant this transfer.

Section 4 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), provides that special sessions shall be held, at which "it shall be lawful for the justices there and then assembled in the case and in the manner and for the time hereinafter directed, to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as they, the said justices, shall . . . deem fit and proper persons . . . ."

Section 14 gives the cases in which a transfer may be granted and, *inter alia*, provides for the case where a duly licensed person shall "remove from or yield up the possession of the house."

Mattinson, Q.C. (*Thomas Swift* with him), showed cause against the rules.—The ground of the objection in this case is that Wallace was not the real resident occupier of the licensed premises. That is admitted, but nevertheless the rule should be discharged on three grounds: Firstly, because there is no remedy applicable in this case by way of *certiorari*, *Reg.* v. *Sharman*, *ante*, p. 367, [1898] 1 Q. B. 578; secondly, because the applicant was not a person entitled in the discretion of the court to a writ of *certiorari;* and thirdly, because the objection in substance is entirely unfounded. The *mandamus* should also be discharged. It was asked for on the ground that the justices have decided wrongly. The rule does not show that they failed to do anything they were asked to do. They have heard and determined the case. If the licence is null and void the licensee can be proceeded against for selling without a licence.

Horace Avory (*R. M. Montgomery* with him), in support of the rule.—The licence granted to Wallace is null and void. Neither Wallace nor Webb was the real resident, holder, or occupier here. By 3 & 4 Vict. c. 61 the licensee must be the real resident, holder, and occupier of the premises. The original grant, therefore, being null and void, it follows that the transfer is invalid. Wallace is not a person within the meaning of section 4 of the Alehouse Act of 1828.

Counsel cited *Reg.* v. *King*, 36 W. R. 600, 20 Q. B. D. 430; *Reg.* v. *Bowman*, [1898] 1 Q. B. 663; *Reg.* v. *Justices of London*, 43 W. R. 287, [1895] 1 Q. B. 214.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

WILLS, J.—This case is perfectly free from difficulty as to one part of it, but the other part of it is not quite so clear. It is perfectly clear that the magistrates have given a decision which is absolutely unsupported by any Act of Parliament, or any power vested in them. There was an application to them for a transfer of a certificate under the Act of 1869 (32 & 33 Vict. c. 27), which is necessary in order to enable the occupant of the house to get his excise licence. Now, for all purposes the machinery and jurisdiction in the transfer of such certificates is by subsection 5 of section 4 of the Act of 1870 (33 & 34 Vict. c. 29) put upon exactly the same footing as the transfer of the full licence granted by the magistrates under the Act of 1828. Therefore we are referred to section 4 of the Act of 1828, and by that section the magistrates have power to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns as they should think fit.

Now, in the present case Webb was intending to keep an inn upon premises which had for some ten or twelve years before that, been licensed in the name of Wallace; but it was not an inn theretofore kept by any other person, because, although Wallace had got the licence, somebody had kept a draper's shop there; Wallace had nothing whatever to do with it. Therefore that essential part of the statute was not complied with; but it does not end there; the Act of Parliament here is confined to granting licences to persons intending to keep inns theretofore kept by other persons being about to remove from such inns. Wallace was not about to remove from the premises, let alone the inn, because he had never lived there. A more lamentable abuse of the Act of Parliament it is difficult to conceive. It is quite clear that it is wrong, and that the magistrates have acted without jurisdiction, and I confess that without having heard the matter argued, I myself should have thought, *primâ facie*, that this is well within the numerous class of cases in which *certiorari* has been granted. But my brother Wright, who has paid great attention to these matters, and my brother Darling, who sat with him in the Divisional Court, a short time ago decided in the case of *Reg.* v. *Sharman* that that was not so, and that these acts of the magistrates in granting licences cannot be questioned by *certiorari*. To that decision we are bound to conform so long as it remains law. Therefore we cannot in this instance, whatever one's own notion may be, entertain the question of *certiorari*, so that the application for a *certiorari* must be dismissed.

Then comes the question whether it is a case for a *mandamus* to compel the justices to hear and determine according to law. Now, of course it does not need authority to tell us that the distinction between an erroneous decision and a neglect or a failure to hear and determine according to law may be an exceedingly thin one, and that the cases upon the point are likely to run very fine.

But I take the leading principle, however difficult it may be to apply it, to be this, that if the magistrates have applied themselves to the section of the Act of Parliament, and to the application as it ought to be, and have no more than erroneously determined the question which arises under the Act before them, their decision cannot be reviewed by the process of *mandamus*, whether there be an appeal or not. There is either an appeal or there is not; if there is not, their decision is final; but if there is, appeal is the proper remedy. But certainly when it appears by direct evidence that they have taken into consideration matters which are absolutely outside the ambit of their jurisdiction and outside all the matters which by law ought to be taken into consideration in dealing with the subject, that is a hearing and determination not according to law. For instance, take the case of *Reg.* v. *Bowman*, that occurred the other day, when the magistrates went in the direction of putting up a licence to auction, and said nobody should have it who would not pay £1,000 for it. There we held, in accordance with the principle of many previous decisions, that they had taken into consideration matters which were entirely foreign to the subject-matter in question, and that therefore they had not heard and determined according to law.

When these things appear upon affidavit there is no difficulty about it. In the present case they do not appear upon affidavit; but if they are to be collected and to be demonstrated simply by a consideration of what has taken place—if they really are demonstrated by that, they are just as good a piece of evidence as any other. The difficulty is merely in arriving at the facts—it is one of evidence.

Now, when it appears, as it does here, that with the plain words of the statute before them, they have given the licence to a person who meant to keep an inn, but they have given it in respect of something which was not an inn theretofore kept by another person, and they have given it in respect of a change of status in these premises which had nothing to do with the person who had theretofore been licensed or kept the inn and been about to remove, it is plain that they cannot have decided according to law; that they must have taken into consideration some extraneous matters; they have not told us what they are, but they could not have decided upon the proper and legitimate considerations. It is not a question of misconstruction. No construction can possibly alter the plain words of this Act of Parliament, and no construction can make these premises into an inn theretofore kept by Wallace, and no construction can make Wallace, who had nothing to do with any removal from the place, into a person who is about to remove from such inn. It is not, therefore, a case of erroneous construction, in which case a *mandamus* ought to be refused; but it is, and must be, a case in which they have decided from some extraneous considerations, which are not within the Act of Parliament, and which indicate that they have so far departed from the Act of Parliament that their judgment cannot be said to have been confined to those things which by law they were entitled to take into consideration.

Under these circumstances I have no doubt myself that a *mandamus* is the proper remedy, and that the rule for the *mandamus* must be made absolute.

KENNEDY, J.—I am of the same opinion. On the face of the document in respect of which applications in the alternative for a *certiorari* or for a *mandamus* have been made, and which purports to be a grant by her Majesty's justices of the peace pursuant to section 4 of the Intoxicating Liquors Licensing Act, 1828, and the Acts amending the same, they licence John Webb and transfer to him the licence now held by Joseph Wallace, a beerhouse-keeper. Turning to the 4th section of the Intoxicating Liquors Licensing Act, 1828, it is expressly provided that the power which is called in more recent legislation "transferring," although the word "transfer" is not used in the Intoxicating Liquors Licensing Act, 1828, in any sense, shall be exercised by the justices only in certain cases. The jurisdiction is founded in the terms of that section itself upon there being a state of things in which a person holding a licence is about to remove from the inn in respect of which he has held a licence. That, as my brother has pointed out, in itself would be sufficient in this case to show that

the justices had to deal with a case in which it was not lawful for them according to the terms of the section to make the grant to the person who was proposing to be placed in the position of a previous holder, because there was nobody before them who was about to remove from an inn which had been previously held and used as such. We have not any affidavit from the justices, nor do the justices here appear by counsel. Nor in the affidavit which has been put in by Mr. Webb is there any sort of evidence before us which qualifies the statement in paragraph 5 of the affidavit of Mr. Williams, which shows that no beer, cider, or other ingredients have been sold on the premises for the last thirteen or fourteen years prior to the date of the application, and that Wallace had not resided in or occupied the premises for upwards of ten years.

For myself it would be quite sufficient to find that in the section under which the justices have purported to do what is complained of they had no jurisdiction at all; but further than that, as I read the section, not only is that required, but we are referred, for the right to make this transfer, as it is called by the section itself, to the case, and in the manner and for the time hereinafter directed. That refers us to the 14th section, and if you look at the 14th section, which may be considered in a sense to be a complement and an explanation of section 4, it gives a number of cases in which such a grant may be made, and the only one applicable to this case is a case in which a person being licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence. As he was neither occupying the house in any sense, nor using the house in any sense, he could not be said to remove from it, or yield up the possession of the house.

That being the state of the facts, and it not appearing on the face of the grant that it is under that section it is to my mind quite inexplicable, nor has any suggestion that I can follow been afforded to us in the careful argument of the learned counsel who appears here to show cause against the rule how that came to be made. On the face of the section Wallace was not the person whose case they could deal with under the section. It appears to have been pointed out to them what the facts were, and how they came to be persuaded to make it under the section I am at present wholly at a loss at conjecture.

Then comes the only real question—as to the remedy. With regard to the remedy by *certiorari* I say nothing, because my brother Wills has had to consider this in a previous case in which the court found itself confronted with a decision of the same tribunal which has held that *certiorari* is not applicable, and I should have to follow it in this case. It is quite sufficient that there has been that decision, and until a different view is taken by another tribunal we must follow that decision.

Then comes the question of remedy by *mandamus*. I think it is rather apparent from the cases that in these questions of licensing the court, while it always guards this special and peculiar right, has been at any rate rather more liberal in its construction in these licensing cases than in most other cases. The decision which I referred to of *Reg.* v. *De Rutzen*, 24 W. R. 343, 1 Q. B. D. 55, shows, both in the judgment itself and, I may add, in the interlocutory remarks of the great authority, Blackburn, J., that the hearing and determining according to law is the matter which has to be considered. Of course I am not saying for a moment that the mere misconstruction of a section—still less, of course, any view of facts—could be, if erroneously taken, set right by a *mandamus*. Certainly not. But where, as here, they have, upon facts which do not admit their jurisdiction, acted as they have, it seems to me that the justices have brought themselves within those remedial powers which are granted where they take matters into consideration which they ought not—if that was the reason that they did it—or where, as here, they have purported to act under a section which, on the admitted facts, was not the section which entitled them to make the order which they made, I should hold that the remedy by *mandamus* was the proper one.

WILLS, J.—I should say that I entirely agree with what my brother has said about section 14. I forgot to say it, because it seemed to me so abundantly clear that under section 4 alone this miscarriage had taken place, that it did not seem to me to be necessary for the court to touch that question; but I quite agree that section 14 is pointed at by section 4 to be taken into consideration, and, if so, the matter becomes still plainer.

Rule for certiorari *discharged; rule for* mandamus *made absolute.*

Solicitors for the applicant, *Lloyd-George, Roberts, & Co.*, for *Herbert Lewis & Davies*, Liverpool.

Solicitors for the respondent, *John Hand*, for *Edwin Berry*, Liverpool.

The justices were not represented.

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — May 9, 10.

In re RUSSIAN SPRATT'S PATENT (LIMITED). JOHNSON *v.* RUSSIAN SPRATT'S PATENT (LIMITED). (a.)

Company—Debentures—Charge on all "property"—Uncalled capital.

In a charge created by debentures issued by a limited company on all present and future property of the company, the word "property" does not include uncalled capital of the company.

Decision of Stirling, J., *affirmed.*

This was an appeal from a decision of Stirling, J., and involved the question whether debentures which charge present and future property of a company give a charge on the uncalled capital.

The facts were as follows: The company was incorporated in 1891 with a capital of £120,000 divided into 100,000 ordinary and 20,000 preference shares, all of £1 each. Shares of both classes had been issued, but the capital was not fully paid up. In 1892 the company issued 193 debentures of £10 each. These debentures charged with payment of principal and interest "the undertaking of the said company and all the property to which it now is or shall at any time hereafter become entitled, and all the estate, right, and title of the company in, to, and upon the said premises." The company subsequently borrowed further sums, which were secured, subject to the debentures, by a charge on all its property, the uncalled capital being expressly included. A debenture-holders' action was commenced in 1896 and a receiver

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

was duly appointed by an order dated the 14th of April, 1896.

On the 21st of April, 1896, a resolution was passed for the voluntary winding up of the company, and the receiver in the debenture-holders' action was appointed liquidator in the voluntary winding up. An order was made for the usual accounts and inquiries, and the master's certificate in March, 1897, found that the property charged in favour of the debenture-holders consisted of the particulars set forth in the second schedule thereto and did not include the uncalled capital. A summons was then taken out on behalf of the debenture-holders to vary the certificate by including the uncalled capital.

Stirling, J., was of opinion that he was bound by the decision of Chitty, L.J. (then Chitty, J.), in *In re The Streatham and General Estates Co. (Limited)*, 45 W. R. 105, [1897] 1 Ch. 15, and declined to vary the certificate.

Dunham, for the appellant.—Stirling, J., considered himself bound by the decision in *In re The Streatham and General Estates Co. (Limited)*, 45 W. R. 105, [1897] 1 Ch. 15, which was based on *Stanley's case*, 12 W. R. 894, 4 De G. J. & S. 407, and *In re Colonial Trusts Corporation*, 15 Ch. D. 465, 29 W. R. Dig. 40. Now, the last two cases were decided on the ground that uncalled capital is not the property of the company, because capital which is called up in a winding up is called up under a liability imposed by statute and not by the contract, and therefore never becomes property of the company at all. But the decision in *In re Pyle Works*, 38 W. R. 674, 44 Ch. D. 534, has altered the law, and since that decision capital called up in the winding up is the property of the company. *In re Pyle Works* was considered by the Privy Council in *Newton* v. *Anglo-Australian, &c., Co.*, 43 W. R. 401, [1895] A. C. 244. In the *Streatham case*, *In re Pyle Works* was not considered by Chitty, J., in his judgment. [LINDLEY, M.R., referred to *Howard* v. *Patent Ivory Manufacturing Co.*, 36 W. R. 801, 38 Ch. D. 156.] [*Hamilton* referred to *In re Sankey Brook Co.*, 18 W. R. 914, L. R. 10 Eq. 381, and *Bank of South Australia* v. *Abrahams*, 23 W. R. 668, L. R. 6 P. C. 265.] [*Lavington* referred to *Bower* v. *Foreign and Colonial Gas Co.*, W. N., 1877, p. 222.] All these cases proceed on the ground which is displaced by *In re Pyle Works*. They all deal with the memorandum and articles of association, and not with any charge. Uncalled capital has now been held to be property, and it may be so described. [LINDLEY, M.R., referred to *In re Phœnix Bessemer Steel Co.*, 44 L. J. Ch. 683, 23 W. R. Dig. 45.] The word "assets" has been held to include uncalled capital: *Page* v. *International Agency and Industrial Trust*, W. N., 1893, p. 32, 41 W. R. Dig. 31. [*Hamilton* referred to *In re Pyle Works, No. 2*, 39 W. R. 235, [1891] 1 Ch. 173.] I submit that the reasoning of all those cases is displaced by the *Pyle Works case*. They all decide, not that property does not include uncalled capital, but that uncalled capital cannot be mortgaged, because the powers which the directors are bound to exercise are thereby interfered with. The *Pyle Works case* decides that capital got in in the winding up is part of the capital of the company, and you cannot split up the capital and say that capital got in in the winding up is distinct from capital which was called up by the company while still in existence.

Webb v. *Whiffin*, L. R. 5 H. L. 711, 21 W. R. Dig. 241, was also referred to.

Hamilton, for the second mortgagees, and

Lavington, for the liquidator, were not called on to argue.

LINDLEY, M.R.—We have been considering this matter, and we have all come to the conclusion that although in a sense uncalled capital may be called property, yet it is a property of a very peculiar description. After all, it is not a debt; it is a right to make a call and create a debt, and it is rather stretching the meaning of the word "property" to make it include such a right as that.

And when we look at the decisions we see that for years past, and in all the text-books to which professional men have recourse, it has been considered that in this class of document—namely, debentures of limited companies, the word "property" will not include uncalled capital. We certainly are not prepared to depart from that line of decision.

Indeed, in this case I think we should be doing an injustice if we did, because the first debenture-holders here, if they took any advice at all, were probably told that the word "property" would not include uncalled capital, whereas the second debenture-holders, if they took advice, were probably told that they had got a charge on the uncalled capital safely enough, because it was expressly included in their charge; and we should be lending ourselves to something a little unfair if we put on the word "property" in the first debentures the interpretation that it included uncalled capital.

RIGBY, L.J.—Any other decision would do, in my opinion, great injustice, not only in this, but in many other cases; and I do not think we should depart from what has been held to be the meaning of the word "property" in these documents for years past.

COLLINS, L.J.—I am of the same opinion.

Appeal dismissed with costs.

Solicitors, *Snell, Sons, & Greenip; Wilson, Bristows, & Carpmael.*

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — April 20.

MANCHESTER BREWERY CO. (LIMITED) v. NORTH CHESHIRE AND MANCHESTER BREWERY CO. (LIMITED). (*a*.)

Company — Trade-name — Similarity — Name of new company incorporating name of existing company — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 20.

In 1888 *the M. Co. and the N. Co. were carrying on business as separate limited companies, and continued to do so until* 1897. *In the latter year the N. Co. sold its business to R., who converted it into a company under the registered title of the N. and M. Co. The M. Co. having brought an action against the N. and M. Co. claiming an injunction,*

Held, that the N. and M. Co. must be restrained from using a name which included the name of the M. Co., and so nearly resembled the same as to be calculated to deceive the public, or induce the belief that the business carried on by the defendant company was the same as the business carried on by the M. Co., or in any way connected therewith.

The registration of the name of a limited company which includes the name of a town or place gives no monopoly to that company of the particular name so as to prevent its use by any other limited company, provided such use is not calculated to deceive the public.

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

suggestion that occurs to every business man who knows anything at all about the formation and amalgamation of companies is that the two are amalgamated. If that is true can it be said that they do not fall within the second part of the 20th section, which says: "No company shall be registered under a name so nearly resembling the same as to be calculated to deceive"? It appears to me they are actually hit by those words. If you find any company—not taking part of the name of a subsisting company like the word "Manchester," or anything of that kind, but—taking the whole of the name of a subsisting company and combining it with the whole of the name of another subsisting company, it does deceive the public, or that part of the public who take any interest in both or either of the companies, into the supposition that the business of the one is carried on by the other, that each of the separate companies is being carried on by the other or larger company. I do not see the answer to that. Byrne, J., has addressed his mind to the amalgamation of these two companies, and has felt a difficulty about it, and, as I understand it, has come to the conclusion he did on the ground that there was no passing off of the beer made by the defendant company as the beer of the plaintiff company. That is one method of deceiving. But another method, which is just as likely to deceive as not, is this: That if you are carrying on business under the name of the North Cheshire and Manchester Brewery Co. (Limited), you are stating that you are those who are carrying on the business of the Manchester Brewery Co. (Limited) and that you cannot get the beer of that company except by coming to the larger company; in other words, you are representing, and misrepresenting too, that the Manchester Co. is not carrying on a separate business. To my mind it is calculated to deceive, and to deceive a great mass of people. Of course, when you are talking about shareholders and other persons applying for shares on the faith of a prospectus, the moment that they read the prospectus they see that which is indicated by the larger name is not true in fact—that is to say, those who have looked further than the name into the real facts find out there is no such amalgamation as that which the name alone suggests. How about people who do not know anything about the prospectus and do not look at the prospectus? How about a person who sees the name North Cheshire and Manchester Brewery Co. (Limited) over a public-house or something of that sort? Suppose he knows about the North Cheshire and Manchester companies, what is his idea? His idea would be that those two companies had combined together, and that the Manchester Brewery Co. had ceased to carry on business as a separate company. I think there is no answer to it. To my mind that is not met by any evidence or the arguments which have been suggested by the defence. It is true that in consequence of the dates—that is to say, the defendant company having started only on the 11th of October, 1897, and the writ being issued on the 22nd of October, 1897, and the trial coming or soon after—there is no evidence of actual deception; but there is evidence—and a good deal of evidence, to my mind—to show, not that people who knew nothing about it, but business people, would infer from the name of the North Cheshire and Manchester Brewery Co. that the Manchester Brewery Co.'s business was being carried on by the defendant company and not by the plaintiffs. That is calculated to deceive. I think, therefore, that this appeal ought to be allowed, and that there ought to be an injunction in substantially the terms asked for by the claim.

I do not wish to say anything which is calculated to lead to the supposition that the plaintiffs have a monopoly in the word "Manchester." "Manchester" may be used by brewery companies and other companies for all I know. But I do go the length of saying that a company which takes the whole of the plaintiff's name, and uses it in such a connection as this defendant company has used it, goes too far, and does that which is calculated to deceive. Whether they intended to do it or not, I do not know; I do not go into that. I rely on the mere fact that this particular combination of names, as they have got it, is going too far, and is not justified by law; and I go so far as to say I do not think it is justified by fair dealing. I think the appeal ought to be allowed, and an injunction granted in the terms prayed for, with costs here and below.

RIGBY, L.J.—I am of the same opinion. I also refrain from going into the question whether any intentional wrong was done here, though I cannot help seeing that there must have been a great deal of wilful blindness on the part of these directors, looking at the fact that they had throughout the time when the company was being promoted, and before it was incorporated, for their secretary a man who knew all about, at least sufficient about, the Manchester Brewery Co. It seems to me a strange thing that a board of intending directors who are floating a company should not take the trouble to make a single inquiry, and not even suggest amongst themselves a question as to whether there might not be another company with whose business they might possibly interfere. But, however, I will assume for the purpose of my judgment that they had no intention of doing that which was absolutely known to them to be wrong.

Now, it seems to me that where you have two companies carrying on business in districts which overlap, one called the North Cheshire Brewery Co. (Limited), and the other called the Manchester Brewery Co. (Limited), and there appears on the field a new company calling itself the North Cheshire and Manchester Brewery Co. (Limited), the assumption of that title would be understood by many people to mean that the two companies that formerly existed have become one and the same company, with the effect that the persons who arrive at that conclusion would suppose that the beer supplied by the new company was really beer which they had known of either as the North Cheshire or the Manchester Brewery Co.'s beer, or, in other words—and perhaps this is the more precise way of stating it—that the business being carried on under that title comprehends the business which formerly was carried on, not only by the North Cheshire, but by the Manchester Brewery Co. (Limited). We know perfectly well that within recent times this method of combining two businesses, and then of indicating the combination by taking the two titles, and making them into one composite title comprising the names of the two combined companies, has become perfectly common in all parts of the country. No doubt the same thing has taken place, as was mentioned in the course of the argument, in numerous cases of banking companies in London who have joined their businesses and set up one firm or incorporated name containing the elements of the title of the combined companies. Whether it is by misfortune or not, it appears that the defendant company have fallen into that error. They have taken the title of the North Cheshire and Manchester Brewery Co. (Limited). The plaintiffs are the Manchester Brewery Co. (Limited), so that in substance they have taken the identical title, and added to that the words "North Cheshire." I do not see any justification for that, knowing as we do the very general practice of indicating by that kind of title

the combination of the two in the carrying on of the business. I do not think it is important to go much into the evidence. I must say that I was so strongly impressed when the title was read out that I at once thought that the action must be a dispute between one of the amalgamated companies, or a company that must have been about to be amalgamated, as to the terms of the amalgamation. It certainly struck me instantly, and I have not been able to get rid of the impression. I was surprised when I found that there was no connection between the companies, because the very name seemed to be almost conclusive of a connection, and I looked, not so much for evidence of that fact, as for any explanation that could be given by the defendant company of the fact that they had got into their title practically the exact title of the plaintiff company. We have evidence as well, for what it is worth, to this effect, that half-a-dozen witnesses on seeing the title jumped to the conclusion—not a guess—and not an unreasonable conclusion, that the companies were connected, and that the first company was in some way swallowed up the second. True it is that such of them as read the prospectus found out, coupling it with the knowledge that they had, that there was no such combination, and, in fact, no connection at all; but it is not the less true that they arrived at that conclusion, and I think on not unreasonable grounds, until they got in the document before them something to show them that it was not correct. If that took place with regard to the witnesses who were not apparently below the level of intelligence, why should it not take place independently of any prospectus? Why should not a man who sees over a public-house door, or by an advertisement, "The North Cheshire and Manchester Brewery Co. (Limited)," giving, perhaps, addresses where the beer could be got, come to the same conclusion, and why should it be unreasonable for him to do so? As far as I am able to deal with such a matter, and with such evidence as we have, I think the conclusion is a natural and a reasonable one, and I do not find it necessary to have proved what under the circumstances of this case it would be almost impossible to prove even if it were true, that anyone had gone and asked for the defendants' beer believing it to be the beer of the plaintiff company. As far as we can make out they have not offered their beer as the beer of the plaintiff company. I am not blaming them. I do not think there was anything wrong or unfair about it; but, as they themselves say, almost immediately after their incorporation this question arose, and until this question was settled they prepared to carry on the business, as they were entitled to do, under the name of the North Cheshire Brewery Co. (Limited), and under that name only. I am not at all suggesting that they were wrong in that; but they at any rate made it practically impossible that the question should be put to the test, and I think it is fair to treat this as if the question had arisen before they had sold a single glass of beer under the newly-incorporated company, or, indeed, before the incorporation of the company; and it appears to me that if it had been before the incorporation of the company, before it was possible to test the mere fact of deception with any instances, the same conclusion would have been arrived at.

I wish to guard myself against being supposed to go so far as to say that there was any monopoly in the word "Manchester." If this had been put forward in such a way that people would not be deceived with the name "Manchester" in it, the conclusion would have been totally different. Again, I must protest against the method of dealing with these cases, which consists of taking a particular case and saying of that, as Mr. Cozens-Hardy suggested, that the first word is the important word. The first word may be the important one in some cases, but it may be the least important in others. I attach much more importance to the word "Manchester" used here in direct and inevitable connection with the rest of the words that make up the title of the plaintiffs than I should have done if they had been in any different position. "The Manchester Brewery Co. (Limited)" is to be read here by anyone who glances at the title, and if he was acquainted with the title of the plaintiff company I think it is a natural conclusion at which he would arrive that this new company was in some way connected with, and indeed carrying on the business of, the old company.

COLLINS, L.J.—I am of the same opinion upon the question of fact, and I do not think it necessary to add anything to the reasons already given.

Appeal allowed.

Solicitors, *Chester, Mayhew, Broome, & Griffiths*, for *Farrar & Co.*, Manchester; *Firth & Co.*, for *Godfrey, Rhodes, & Evans*, Halifax.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — March 11.

ATTORNEY-GENERAL v. MAYOR, &c., OF TYNEMOUTH. (a.)

Corporation—Municipal corporation—Application of borough fund—Costs of chief constable in opposing renewal of licence—Borough Funds Act, 1872 (35 & 36 *Vict. c.* 91), *s.* 2—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 140-143, 191; *Schedule V., Part II., clause* 5 (d).

The borough fund cannot be applied by a municipal corporation in paying the costs incurred by the chief constable as a litigant party in opposing at licensing or quarter sessions the renewal of publicans' licences.

Appeal from the judgment of the Divisional Court (Grantham and Wright, JJ.), on a special case stated in an action by the Attorney-General on the relation of the Newcastle Breweries (Limited) in which was claimed (1) a declaration that any agreement by the defendants to indemnify the chief constable of the borough against costs he might have, or might have had, to bear or pay in connection with licensing appeals from the borough justices to quarter sessions, and any payment of such costs by the defendants was *ultra vires* and void; and (2) an injunction restraining the defendants from making or acting on any such agreement or from making any such payment.

At the annual general licensing meeting held in August, 1895, the chief constable of the borough of Tynemouth raised objections to the renewals of certain public-house licences, and the justices refused to renew them.

The holders of the licences gave notice of appeal to quarter sessions, and on the 10th of October the watch committee of the borough refused to authorize the chief constable to act as respondent on the appeals, or to indemnify him against any costs.

On the 15th of October the council resolved "that the chief constable, who is the respondent in the

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

licensing appeals . . . be authorized to oppose such appeals, and that the council agree to indemnify him against any costs which he may have to bear or pay in connection with the appeals as such respondent."

On the hearing of the appeals the chief constable appeared by counsel and opposed the appeals, which were dismissed with costs.

The costs incurred by the chief constable exceeded the amount allowed on taxation by £132 5s.

On the 19th of November, at a meeting of the new watch committee, it was resolved that this sum should be paid.

The Divisional Court held that the resolution of the council was not sufficient, and that the sanction of the second watch committee could not override the resolution of the former watch committee. They therefore gave judgment for the plaintiffs.

The defendants appealed.

Asquith, Q.C., and *Macmorran, Q.C.*, for the defendants.

J. Lawson Walton, Q.C., and *T. W. Chitty*, for the plaintiff.

Cur. adv. vult.

March 11.—A. L. SMITH, L.J., read the following judgment: This is an action by the Attorney-General at the relation of the Newcastle Breweries (Limited) against the mayor, aldermen, and burgesses of the borough of Tynemouth, and the short but important question raised by the special case is whether the borough fund of the borough can be used by the town council for the purpose of opposing publicans seeking to obtain renewals of their licences.

The facts are these: In the month of August, 1895, the watch committee, as also the council of Tynemouth, authorized the chief constable of that borough to obtain legal assistance and attend the brewster sessions and object to the renewal of licences to certain publicans occupying houses in the borough. This he did successfully, and the defeated publicans appealed to quarter sessions. Whilst the appeals were pending, at a meeting of the watch committee of the borough held on the 10th of October, 1895, it was resolved that the council of the borough should not be asked to authorize the chief constable to act as respondent in the licensing appeals then about to take place at quarter sessions, and that he should not be indemnified against the costs thereof, and that no permission should be granted to him to take his witnesses there. Five days, however, after this resolution of the watch committee the council of the borough resolved the contrary, that the chief constable should oppose the appeals, and that the council would indemnify him against costs. Upon the 18th of October, 1895, the chief constable appeared at quarter sessions by counsel specially retained from London and with his witnesses, and opposed the appeals, and has thereby incurred costs to the amount of £132 5s. over and above what can be obtained upon taxation from the appellant publicans whom he defeated. So matters rested until the next month, by which time a new watch committee had come into office. This new watch committee, upon the 19th of November, 1895, made an order directing the payment of the above-mentioned costs which had been incurred before they came into office. It is intended to pay these costs out of the borough fund if it can be legally done, and the question is whether it can be. The borough fund of the borough of Tynemouth has no surplus.

These being the facts, I come to the four points raised—two under the Municipal Corporations Act, 1882, one under the Borough Funds Act, 1872, and one upon which the Queen's Bench Division decided. I will, before dealing with these points, state what must first be considered. Part IX. of the Act of 1882 comprises a group of sections which deal with the appointment of a watch committee and the powers they have over the police of the borough. It is headed "Police; Watch Committee; Constables." It will be seen that section 191 of this group has reference to the powers and duties of the watch committee in relation to the borough police, such as their appointment, supervision, dismissal, and making the force generally efficient. The watch committee have nothing whatever to do with the carrying out of the licensing laws in the borough. As regards the formation of the borough fund, section 139 provides what payments are to be made into it so as to constitute the fund; and section 144 provides for the making of a borough rate, should the borough fund be insufficient "for the purposes to which it is applicable under this Act or otherwise by law." Section 140 is the section which deals with the application of this fund when formed. By sub-section 1 of this section it is enacted that the borough fund shall be applicable to and charged with the several payments specified in Schedule V. Sub-section 2 of this section enacts that the payments specified in Part I. of Schedule V. may be made without order of the council; those specified in Part II. might not be made without such order. By sub-section 3 it is enacted that no other payment shall be made out of the borough fund except under the authority of Parliament, or by order of the council, or by order of the court of quarter sessions for the borough, or by order of a justice in pursuance of this Act, or in cases in which the court of quarter sessions for a county or a justice of the peace might make an order for the payment of money on the treasurer of the county. Section 141 enacts that an order of the council for payment of money out of the borough fund shall be signed by three members of the council and countersigned by the town clerk; and by sub-section 2 any such order may be removed into the Queen's Bench Division, and may be wholly or partly disallowed or confirmed with or without costs. Section 143 enacts that if the borough fund is more than sufficient for the purposes to which it is applicable under this Act or otherwise by law, the surplus thereof shall be applied under the directions of the council for the public benefit of the inhabitants and improvement of the borough. I will return to these sections hereafter, and I pass on to the 5th schedule to see what payments under it the borough fund is to be applied to and charged with. It is under this schedule that the first point is taken by the corporation, and it is said that it authorizes the payment of the costs in question out of the borough fund. It is headed "Payments out of the Borough Fund." Part I. authorizes the payment out of the borough fund without order of the council of the remuneration of the mayor, recorder, town clerk, and other officers appointed by the council, moneys certified to be due to the Treasury in respect of election expenses, and remuneration of assistant recorder. Part II. authorizes the payments to be made out of the borough fund, but upon the order of the council, for the following: (1) Expenses of overseers or town clerk in the enrolment of burgesses and holding municipal elections; (2) the expenses of town clerk in providing court for election petitions; (3) the expenses of providing, maintaining, and improving the corporation buildings, including justices' room; (4) fees payable to clerk of peace and to the borough coroner; (5) the payments to be made under this Act to or in respect of the borough police, including the following payments—namely: (*a*) Such salaries . . . as the watch committee [here come in in this schedule the watch

committee for the first time], with the approbation of the council, may direct; (*b*) such further sum as may be awarded by the watch committee, subject to the approbation of the council, to a borough constable for extraordinary diligence . . . or as compensation for wounds received by him in the performance of his duty, or as may be awarded by the watch committee, subject to the approbation of the council, as an allowance when disabled by bodily injury or worn out by length of service; (*c*) extraordinary expenses which a borough constable has incurred in apprehending offenders and executing the orders of a justice, . . . such expenses having been first examined and approved by that justice; (*d*) all other charges and expenses which the watch committee, subject to the approbation of the council, direct to be paid for the purposes of the borough constabulary force. The schedule is explicit as to what payments are to be made out of the borough fund. It was argued for the corporation that sub-clause (*d*) of this schedule authorized the payment of the costs incurred in opposing publicans seeking to obtain renewal of their licences out of the borough fund. In my judgment it is out of all reason to attempt to strain the words "in respect of the borough police," "for the purposes of the borough constabulary force," into covering the costs of the counsel and witnesses of a litigant chief constable acting hostilely at quarter sessions to an appellant publican in a licensing appeal. Such a proceeding is not in respect of the borough police nor for the purposes of the borough constabulary at all; it is for the purpose of opposing a publican obtaining a renewal of his licence and nothing else, which is no part of the duty of a police-constable, nor of the watch committee, nor of the council of a borough. A chief constable may well attend quarter sessions as a witness to give information if required, but it is no part of his duty to act as a litigant party thereat. I do not understand that the recent case of *Boulter* v. *Justices of Kent*, *ante*, p. 114, [1897] A. C. 556, has any bearing upon this case. Blackburn, J., in *Reg.* v. *Mayor, &c., of Liverpool*, 20 W. R. 389, 41 L. J. Q. B. 175, when dealing with section 82 of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), which is a similar section to clause 5 of Schedule V., held that the last clause therein, which was similar to sub-clause (*d*), was to be construed as referring to matters *ejusdem generis* with those previously mentioned, and was confined, and is to be confined, to acts affecting the constabulary force. In this I entirely agree, and I am clearly of opinion that no part of Schedule V., whether you take the words at the commencement or the end of clause 5, authorizes the payment of these costs out of the borough fund, and that this point does not avail the corporation.

I now come to the next point, which is taken by the corporation upon the Borough Funds Act, 1872 (35 & 36 Vict. c. 91). In the year 1871, in the case of *Reg.* v. *Mayor, &c., of Sheffield*, 19 W. R. 1159, L. R. 6 Q. B. 652, upon a rule calling upon the council of the borough to show cause why a writ of *certiorari* should not issue to bring up two orders of the council ordering payment of two sums out of the borough fund to be quashed, the Court of Queen's Bench held that under the provisions of the Municipal Corporations Act, 1835, the borough fund could not be charged with the costs and expenses incurred by the council in opposing before justices certain regulations proposed by a water company, which would impose onerous conditions upon the consumers, nor in opposing a Bill in Parliament subsequently promoted by the company which was detrimental to the interests of the inhabitants. It was sought by the corporation to justify the expenditure as being costs and expenses within the words of that Act, "All other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of the Act." It was, however, held by the court that unless the borough fund showed a surplus it could not be applied to the payment of these costs and expenses. It will be seen that these costs and expenses were incurred on behalf of the inhabitants of the borough, who were resisting onerous obligations being imposed upon them by a water company; and yet it was held that the borough fund could not be applied to these purposes under the terms of the Act. In the next year—in consequence, as it appears to me, of this decision—the Borough Funds Act, 1872, was passed to authorize the application of funds of municipal corporations and other governing bodies in certain cases. Section 2 enacts that when, in the judgment of a governing body, it is expedient for such governing body to promote or oppose any local or personal Bill or Bills in Parliament, or to prosecute or defend any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, it shall be lawful for such governing body to apply the borough fund to the payment of the costs and expenses attending the same; provided that none of the powers therein contained shall apply where the promotion of or opposition to a Bill by a governing body has been decided by a committee of either House of Parliament to be unreasonable or vexatious. In my judgment this section means the taking of some legal proceeding by or on behalf of the inhabitants against some person or persons in order to promote the interest of the inhabitants, or the defending of some legal proceedings brought against the corporation or the inhabitants by some person or persons in order to protect the interest of the inhabitants. The intervention of a police-constable as a respondent at quarter sessions in a licensing appeal is neither the one nor the other.

I now come to the point raised upon sections 140 to 143 of the Act of 1882. What Blackburn, J., said in *Reg.* v. *Mayor, &c., of Sheffield* of the Municipal Corporations Act, 1835, which was the precursor of the Act of 1882, is in my judgment applicable to the Act of 1882, which we are now considering. He said: "Before that Act (1835) municipal corporations were owners of estates, and they might spend the estates subject to very little control, and in point of fact there was great jobbery and great waste of the estates; and one very great object of the Municipal Corporations Act was to restrain the town council." It is argued that section 140, sub-section 3 (*b*), taken in conjunction with section 141, sub-section 2, authorizes a payment out of the borough fund whenever there is "an order of the council," subject only to the liability of the order being disallowed in whole or in part by the Queen's Bench Division. The words of sub-section 3, coupled with clause (*b*), which are relied upon, are these: "No other payment shall be made out of the borough fund, except by order of the council"; and it is said that these words mean that if there be an order of the council for the payment of money out of the borough fund that is sufficient to authorise a payment out of that fund subject only to an intervention by the Queen's Bench Division. It is clear to me this sub-section must have some limitation. It cannot mean to authorise any payment the council may order. That would be absurd. Then what is the limitation? It is said that the sole limitation is the control of the Queen's Bench Division given by section 141, sub-section 2. I do not read these sections so. Can it be said that section 140, sub-section 3 (*c*), "By order of the court of quarter sessions for the borough"; or (*d*) "by order of a

justice in pursuance of this Act," mean that any order of quarter sessions or of a justice directing payment out of the borough fund would authorize a payment out of the fund, even though they were orders for payment for purposes other than those authorized by the Act or otherwise by law. These last words "or otherwise by law" are new in the Act of 1882, and appear to have reference to the Borough Funds Act, 1872, for without them the provisions of the Act of 1872 would be excluded from the Act of 1882, if the words "authorized by this Act" stood alone. It cannot be said that as to these orders of quarter sessions or of justices section 141, sub-section 2, applies, for it obviously does not, and therefore there is no such limit as is suggested of the controlling power of the Queen's Bench Division applicable as to them. Then what is the limit as to the making of orders by the council, by quarter sessions, and by justices? I can find none other than that orders can only be made for those purposes for which the Act of 1882 and the Act of 1872 may be applied. I can in these Acts find no pretence for saying that the borough fund is to be applied in opposing publicans who are appellants at quarter sessions. I think that the true reading of section 140, coupled as it must be with sections 141, 142, and 143, is that, until the borough fund has discharged the several purposes for which by the Acts of 1882 and 1872 it is applicable, the borough fund cannot be resorted to by the council to pay thereout for matters outside those purposes; but should the borough fund be more than sufficient for the purposes to which by those Acts it is made applicable, then the surplus, if any, may be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough. This surplus is called by Lord Herschell, in *Mayor, &c., of Newcastle-upon-Tyne* v. *Attorney-General*, [1892] A. C. 568, 41 W. R. Dig. 150, a chance or accidental surplus. The above is my reading of the Act of 1882. We have nothing in this case to do with 7 Will. 4 and 1 Vict. c. 78, s. 44, an Act to amend the Municipal Corporations Act, 1835, in which, as was pointed out in *Reg.* v. *Prest*, 16 Q. B. 32, followed by *Reg.* v. *Mayor, &c., of Norwich*, 30 W. R. 752, a special discretion was given to the Court of Queen's Bench when determining whether there had been a misapplication of the borough fund. In my judgment section 141, sub-section 2, was inserted as to "an order of the council," not for the purpose of giving the council power to order payments out of the borough fund for the purposes not within the Act or otherwise authorized by law, but was inserted to give the Queen's Bench Division plenary power over every order of the council under whatever circumstances made, and that section 141 has not the effect now suggested—viz., to form the sole and only limitation to the power of the council making orders for payment of money out of the borough fund. In my judgment the sections are restraining and not enabling sections as regards the powers of the council. I do not wish to be understood that, if there were a surplus, these costs would come within the words "for the public benefit of the inhabitants and improvement of the borough," but this point I have not to decide in this case. For the reasons above I am of opinion that neither under Schedule V. nor under the Borough Funds Act, 1872, nor under sections 140-143 of the Act of 1882 can these costs be legally paid out of the borough fund.

I now come to the fourth and last point. The learned judges in the court below did not deal with the construction of the Municipal Corporations Act, 1882, nor with the Borough Funds Act, 1872, for this latter Act was not even mentioned to them. They determined the case upon the ground that the new watch committee had no jurisdiction to overrule what had been done by their predecessors in office, and make the order they did upon the 19th of November, 1895. I am not satisfied as to this, but as I determine the case adversely to the corporation upon the main points, although the learned judges in the court below decided it upon a different ground also adversely to the corporation, the judgment of the court below be affirmed, and the appeal, therefore, will be dismissed with costs.

CHITTY, L.J., read the following judgment: On the appeals to the court of quarter sessions from the refusal by the licensing justices to grant renewals of licences, the chief constable of the borough appeared by counsel as respondent, and obtained an order for payment of his costs by the appellants. On the taxation of costs as between the parties to the appeal his costs for fees paid to counsel, amounting to £132 5s., were disallowed. The question before us, which is one of some importance, is whether the borough fund can be lawfully applied in paying these disallowed costs. Put in a more general form, the question is whether the borough fund can lawfully be applied in indemnifying the chief constable against costs incurred by him as a litigant party appearing by counsel on an appeal to the quarter sessions.

It appears to be the practice, and it seems quite right and proper, that the chief constable should attend in person at the quarter sessions on the hearing of licensing appeals. He does so for the purpose of affording such information as the court may require. But it is clear that it forms no part of his duty as chief constable to appear by counsel is a litigant party on the appeal.

There appears to exist in this borough, as in many others, a difference of opinion on the policy of granting or refusing licences by way of renewal or otherwise. This is shown by the various and conflicting resolutions passed by the watch committee. Notably in October, 1895, the watch committee refused the chief constable's application for the indemnity, but in the following November, after the elections had taken place, their successors passed a resolution in favour of the payment of the disallowed costs. This court cannot enter into the consideration of any such question of policy or of the merits of either side in a controversy of this kind. The question is one of law, and must be decided without regard to the circumstance whether the chief constable appeared to support or oppose the publicans on the appeals.

The first point raised by the appellants turned on the powers and duties of the watch committee. They are to be found in section 190 and the succeeding sections, forming Part IX. of the Municipal Corporations Act, 1882, and in clause 5 of Part II. of Schedule V to the Act. These provisions have already been stated by the Lord Justice. The principal argument on this head was founded on clause 5 (*d*), where the words are "all other charges and expenses which the watch committee, subject to the approbation of the council, direct to be paid for the purposes of the borough constabulary force." The watch committee, as already stated, by their resolution of November, 1895, directed payment of the £132 5s., and the council had previously in October of the same year passed a resolution in favour of the indemnity, although they have not made a direct order for the payment. In my judgment sub-clause (*d*) does not authorize the payment. It must be construed in the usual way by considering the payments specially authorized, and confirming the payments under the general words to payments of the same class as those specifically mentioned. In my opinion

the proposed payment is not a payment of a charge or expense for the purposes of the constabulary force. To hold that it was would be an unjustifiable straining of the words.

The second point raised on behalf of the appellants appears not to have been mentioned in the Divisional Court. It was founded on clause (*b*) of sub-section 3 of section 140 of the Municipal Corporations Act, 1882. That section enacts that the borough fund shall be applicable to and charged with the several payments specified in Schedule V., and that the payments specified in Part I. of that schedule (consisting of the remuneration of the mayor, the recorder, and the salaries of the town clerk and other officers of the corporation) may be made without order of the council, but that those specified in Part II. may not be made without such order. The section then proceeds to enact that no other payment shall be made out of the borough fund except in the five cases specified, among which is clause (*b*), "by order of the council." Read by itself this clause would purport to confer on the council an unlimited power to order any payment they might think fit. But the context in the same section tends to show that it cannot be so read. Section 141 clearly confers on the Queen's Bench Division a power to check and control orders of the council for payment. Any such order may be removed by *certiorari* and may be wholly or partially disallowed or confirmed according to the judgment and discretion of the court. This controlling power extends to both sets of orders for payment—viz., to those under sub-section 2 as well as to those under sub-section 3 (*b*). Thus far we seem to arrive at the position that the council have a general power to make orders for payment without any express limitation, and that the Queen's Bench Division have a general discretionary power of disallowing the order without any express limitation, and without any express rule being laid down by the Legislature for the guidance of the court in the exercise of their controlling power. It is a judicial discretion to be exercised as all judicial discretions must be. But we cannot stop at this point; there remain for consideration the important provisions relating to the surplus of the borough fund. These are contained in section 143. Dealt with strictly and logically the surplus means that which remains after satisfying the previous provisions, including clause (*b*) in section 140. Section 143 is divided into two parts. The first is where "the borough fund is more than sufficient for the purposes to which it is applicable under this Act or otherwise by law." In that case "the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough." The second point is where the surplus arises from the rents and profits of the property of the municipal corporation and not from a borough rate, and where the borough is a sanitary district under the Public Health Act, 1875. In that case the corporation may apply the surplus in payment of any expenses incurred by them as such sanitary authority in improving the borough by drainage, enlargement of streets, or otherwise under the Public Health Act, 1875, or any Act thereby repealed. The provisions of section 143 are specific. Read reasonably, as they must be, they import that under the prior provisions of sections 140 and 141 the borough fund is not applicable to the specific purposes of section 143, and they place a limit on clause (*b*) and afford some guidance to the court in the exercise of their controlling power. No construction of these sections is permissible which results in striking out clause (*b*). Some effect must be given to it. It has some limits not defined by the Legislature. It appears to me that it is not the function of the court to attempt any precise definition where the Legislature has refrained from defining. Still some interpretation must be given, some limit is clearly imposed on clause (*b*). I find it less difficult to say what cannot be lawfully done under clause (*b*) than what can be done lawfully. The best interpretation that I can give, necessarily somewhat vague, is that, in construing clause (*b*) regard must be had to the general scope of the Act, to the purposes for which the borough fund as regulated by the Act is constituted, and to the legitimate functions of a municipal corporation. In this connection there are two material observations to be made. The borough fund is made up by bringing into it the income of the corporate property and of the fines mentioned in section 139, and money levied on the ratepayers under section 144. In the case of the newer corporations which possess but little corporate property the fund is substantially made up by the rates. The rate is leviable only in the case of the borough fund being "insufficient for purposes to which it is applicable under this Act or otherwise by law." The other observation is that the provisions of the Borough Funds Act, 1872, which enlarged the powers over the borough fund are preserved by section 140, sub-section 3, clause (*a*) of the Act of 1882. The group of sections 139 to 143 inclusive is not a mere re-enactment of section 92 of the repealed Act of 1835 and the intermediate amending Acts. The preamble of the Act of 1882 recites that the Act of 1835 having been from time to time much altered and added to by other Acts, it is expedient that all the Acts be reduced into one Act with some amendments. Section 92 allowed payments out of the borough fund "of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act." The stringency of this enactment found in the words "necessarily incurred" had been the subject of judicial decision. The stringency had been relaxed by a subsequent Act of Parliament. The words quoted are not repeated in the Act of 1882. To some extent they are repealed by clause (*b*).

Having now examined and discussed the Act of 1882, I state the conclusion at which I have arrived. In my judgment the borough fund cannot be lawfully applied in making the payment intended. It is contrary to the scope of the Act and the purposes for which the fund exists. It forms no part of the functions or duty of the municipal corporation as such to embark in litigation through the chief constable in licensing appeals of this kind. A decision in favour of the payment would be fraught with serious consequences to the ratepayers by whose contributions the fund is confessedly made up. If the payment were allowed, it would be difficult to escape from the conclusion that a similar payment would be permissible if the council supported, instead of opposing, the side of the publicans in such a controversy and litigation as that which has occurred at quarter sessions.

Our attention was called to *Attorney-General* v. *Corporation of Blackburn*, 57 L. T. Rep. 385, 36 W. R. Dig. 139. The case was heard on a motion day and no final decision was given on clause (*b*). The evidence did not show satisfactorily that the corporation threatened or intended to apply the borough fund in paying the expenses of celebrating Her Majesty's Jubilee in the borough. The resolution passed by the council was carefully framed. It purported to be for a payment by way of remuneration to the mayor for his expenses during the year including the proper celebration of the jubilee. Remuneration to the mayor is within the express authority of the Act. The resolution went on to state that no payment

should be made out of the borough fund except in so far as such payment was authorized by law. I was not then satisfied, nor am I now convinced, that such a payment would be contrary to law. But it is not necessary to the decision in this case to give a final opinion on the point, and I refrain from so doing.

I agree with the judgment of the Lord Justice on the Borough Funds Acts, 1872, and have nothing to add to what he has said.

The decision of the Divisional Court turned on the minor point, whether it was competent for the watch committee in November to reverse the resolution of its predecessors in office come to in the previous October. We have thought it right to decide the main and more important question. Seeing that the time for making the payment (if it could lawfully be made) had not arrived when the chief constable made his application for indemnity to the committee in October, I am not satisfied that the committee in November was precluded from directing the payment simply by reason of the resolution of October. But as we decide the main question, this point becomes immaterial, and I say no more about it.

I agree that the appeal must be dismissed.

COLLINS, L. J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Patersons, Snow, Bloxam, & Kinder*, for *Ranson, Nelson, & Mesnard*, Sunderland.

Solicitors for the defendants, *Sharpe, Parker, Pritchards, & Barham*, for *H. A. Adamson*, Tynemouth.

High Court of Justice.

Chan. Div. Stirling, J. — March 29, 30; April 30.

In re DU CANE AND NETTLEFOLD'S CONTRACT. (a.)

Settled land—Vendor and purchaser—Compound settlement—Trustees for the purposes of the Settled Land Act—Settled Land Act, 1882 (45 & 46 *Vict. c.* 13), *ss.* 2 (1) (5) (8), 3, 20, 38, 50 (3)—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 4.

Where land is subject to a settlement created by an instrument, and there are trustees of that instrument for the purposes of the Settled Land Acts, it is not as a general rule necessary that they should be appointed trustees of every subsequent deed which affects the interests under the original settlement so that it is no longer the only instrument under which the land stands limited to persons by way of succession.

The effect of section 50 (3) *of the Settled Land Act*, 1882, *is to impose on the tenant for life the obligation of obtaining the consent of his assignee for value whenever he exercises any power under the Act; but an assignment does not affect in any way the powers of trustees for the purposes of the Acts.*

The object of section 4 *of the Settled Land Act*, 1890, *is merely to exclude the operation of section* 50 (3) *of the Settled Land Act*, 1882, *in the case of assignments by way of family arrangement, and the instruments creating such assignments are not instruments creating the settlement for all the purposes of the Settled Land Acts.*

This was a summons taken out under the Vendor and Purchaser Act on behalf of the vendor, asking for a declaration that the requisitions and objections of the purchaser in respect of the hereditaments contracted to be sold, and particularly the fifth requisition, had been sufficiently answered by the vendor.

The contract was dated the 27th of July, 1897, and by it the purchaser agreed to purchase the property, the subject-matter of the sale, which was described as freehold, subject to certain particulars and conditions of sale, of which the material condition was numbered 9, and which ran thus: "The property sold is a small portion of the estates over which the vendor has the powers of a tenant for life since the death of the late tenant for life in 1889. In 1863 the whole of the estates then subject to the uses of the will of Peter du Cane were charged with a jointure and portions, and terms of years to secure the same; but in the year 1886, when the property was disentailed and resettled, a freehold estate in Essex, comprising over 5,000 acres, and having a gross annual value of over £3,800 after payment of all charges, except of jointures mentioned below of £1,300, was limited to trustees for a term of years upon trust to indemnify the property the subject of this sale, from the said jointure and portions, and this indemnity was extended in the following year to cover a further jointure then created. Of the incumbrances the jointures, amounting to £800 per annum, now only affect the property sold. The purchaser will have the benefit of the indemnity, and shall assume that it is a sufficient security, and shall make no requisition in respect of the said jointures created in 1863 and 1887 respectively, and shall not require the property sold to be discharged or further indemnified from or against the same, or the terms created in 1863 to be surrendered."

Under that contract the usual proceedings were followed.

An abstract was delivered, and the title which was disclosed may be shortly stated in the following way: Immediately prior to the execution of a certain disentailing assurance made in September, 1885, the estate stood limited under the will of P. du Cane to the use of the late Sir Charles du Cane for life, with remainder to his eldest son, the present vendor, in tail, subject to a jointure of £500 in favour of Lady du Cane and portions for the other children. It appeared from the abstract that the jointure was still in existence, but that the portions had been paid off. By the disentailing assurance of 1885 the property was limited to such uses as Sir C. du Cane and Mr. du Cane should jointly by deed appoint, and in default of appointment to the same uses as existed before. By deed of the 22nd of April, 1886, Sir C. du Cane and the vendor, in exercise of the joint power of appointment reserved by the disentailing assurance, irrevocably appointed to such uses as they should jointly by deed appoint with remainder to the use of Sir C. du Cane for life (by way of restoration and confirmation of his former life estate under the said will), with remainder to the use of the vendor for life, with remainder to the use of his first and other sons in tail male, with remainders over, and trustees were by that deed expressly appointed of the settlement thereby made for the purposes of the Settled Land Act, 1882. By deed dated the 23rd of March, 1887, Sir Charles and the vendor, in exercise of the joint power contained in the settlements of 1886, irrevocably appointed that the estates, after the death of Sir Charles, should enure to uses to secure to Lady du Cane, if she survived him, the yearly rentcharge of £300 in addition to the £500 above mentioned. This second jointure was referred to in the condition above set out. Subject thereto the property was to enure to the use of trustees during the life of the vendor upon certain trusts for the benefit

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

of the vendor and his wife and children and other members of his family, and it was declared that the appointment thereby made was made subject and without prejudice to all uses and estates having priority under the said deed of 1886 over the estate for life thereby given to the vendor and to all powers attached to such uses and estates, and to any exercise thereof, and subject and without prejudice to the joint powers of appointment given to Sir Charles and the vendor by the same deed, and without prejudice to the powers which, but for that deed, would under the Settled Land Acts, have been exercisable by him as if that deed had not been executed. There were certain other dealings under the joint power of appointment which need not be set out in detail. It is sufficient to state generally that by means of these dealings, one of which was carried out by the deed of the 11th of August, 1887, which is mentioned below, some further charges were created on the property which had been paid off and did not affect the question. Sir Charles du Cane died on the 24th of February, 1889.

In these circumstances requisitions were made on the title, the only material one for the purposes of this case being No. 5, which was mentioned particularly in the summons and ran thus: Trustees for the purposes of the Settled Land Acts must be appointed either of the compound settlement constituted by the deeds of the 22nd of April, 1886, and the 23rd of March, 1887, and the 11th of August, 1887, or of the compound settlement constituted by these deeds and Mr. du Cane's will and the deed of the 2nd of June, 1863, and the two deeds of the 8th of September, 1885 (see *In re Tibbits' Settled Estates, ante*, p. 3, [1897] W. N. 68; *In re Meade's Settled Estates*, [1897] 1 Ir. Rep. 121, 45 W. R. Dig. 141. Have trustees of either of these compound settlements been appointed, and if so what are their names? The reply to this was: The vendor is tenant for life under the abstracted settlement of the 22nd of April, 1886, and Major du Cane and Mr. Tyndale, are the trustees thereof for the purposes of the Settled Land Acts, and no further appointment is required. They will as such trustees concur in the conveyance to the purchaser for the purpose of acknowledging the receipt of the consideration money. That was followed by a reply by the purchaser who insisted on the requisition, and that was again answered by the vendor that no further appointment was necessary.

Butcher, Q.C., and *Spencer Butler*, for the summons.—The deed is an assignment of the interest of the tenant for life by way of family arrangement, and falls within the meaning of section 4 of the Act of 1890. In order to see whether such an assignment as is referred to in section 4 is one which requires trustees of the assignment to be appointed, section 50 of the Act of 1882 is in point. Our submission is that section 4 does not make the assignment part of the the compound settlement, so that trustees of the assignment have to be appointed before the tenant for life can deal with the property. Section 4 says that the assignment is to be deemed part of the settlement, but it does not alter the origin of the settlement, and the powers of the tenant for life remain the same. Here you have a tenant for life and trustees of a settlement. The tenant for life is the proper person to convey, and you only want trustees of the settlement under which he is tenant for life. *In re Tibbits' Settled Estates, ante*, p. 3, [1897] 2 Ch. 149, is an apparent authority to the contrary, but it does not affect this case any more than it did *Keck and Hart's Contract, ante* p. 389, [1897] 1 Ch. 617. If the vendor does not think it necessary to have trustees appointed of this assignment, the purchaser cannot compel him to do so. Section 4 is framed with the object of enabling the tenant for life to dispense with the concurrence of all persons claiming under an assignment by way of family arrangement without their consent. Section 20 of the Act of 1882 enables him to convey free from all charges created under powers conferred by the instrument creating the settlement, except assignments of his life interest; but to suppose that section 4 merely removes one restriction in order to impose another is to stultify the objects of the section. If, by executing an assignment of this sort, the tenant for life rendered it impossible to convey without consent, section 50 would practically be nullified. The doctrine of a compound settlement was only resorted to in *Bruce v. Ailesbury*, 41 W. R. 318, [1892] A. C. 356, to enable the vendor to get rid of a prior charge, and this is shown by the order made in that action in May, 1893, that the trustees of the original settlement should convey the property.*

They also referred to the definition of settlement in section 2 of the Settled Land Act, 1882, and to *In re Knowles*, 33 W. R. 364, 27 Ch. D. 707, and *In re Meade's Settled Estates*, [1897] 1 Ir. Rep. 121, 45 W. R. Dig. 141.

Buckley, Q.C., and *Clausen*.—Our first contention is that before the deed of 1863 there existed as settlement the will and the deed of 1863. We concede as regards the deed of 1863 that condition 9 covers it. The other two contentions arise on the deeds of the 23rd of March and 11th of August, 1887. As to these we shall rely both on section 4 of the Act of 1890, and on what the effect of these dealings would have been apart from that section. Now, according to the decision *In re Wright's Trustees and Marshall*, 33 W. R. 304, 28 Ch. D. 93, after the execution of the deed of April, 1886, Sir Charles du Cane was still tenant for life under the will. The death of Sir Charles makes no difference, because to ascertain what the settlement is you must go back to a previous time, the time when the settlement took effect: see section 2 (2) (4) of the Act of 1882. The vendor was there-

* BRUCE *v.* AILESBURY.

Upon a summons in this matter, dated the 2nd of May, 1893, asking (among other things) that the persons appointed trustees by an order dated the 4th of March, 1893, be not made parties to the conveyance and mortgage respectively therein mentioned, and be not entitled to receive or apply or direct the application of the purchase-moneys or any part thereof or any securities for the same respectively. It appearing that since such appointment as aforesaid the Dowager Marchioness of Ailesbury had died, and that after payment into court of the sums hereinafter mentioned it was intended to make an application under the Conveyancing Act, 1881, s. 5, for an order declaring the settled estates to be free from the jointure rent-charge of £3,000 charged upon the said settled estates in favour of Lady E. M. Riddell, and the applicant and the respondents by their counsel consenting to this order; it was ordered that Lord Iveagh be at liberty, in pursuance of the said section of the Conveyancing Act, to make the payments into court as directed in the schedule thereto. And it was ordered that upon such payment into court G. R. Laurener and E. M. H. Riddell, as trustees appointed by the said order of the 4th of March, 1893, and the order of the 23rd of April, 1893, respectively, were to abstain from acting further as trustees and from taking any part in the conveyance of the Savernake Estate, or the receipt of the purchase-money thereof or the security for such part of the said purchase-money as should remain unpaid. And it was declared that Lord F. Bruce and G. B. Laurener, as trustees

fore tenant for life under a settlement compounded of the will and the deed of 1886, and the nature of that settlement cannot be varied by anything which happened subsequently. We submit that Sir Charles could not have sold under the will without having regard to the joint power of appointment contained in the deed of 1886, and if that is true as regards the settlement compounded of the will and the disentailing deed of 1886 it applies still more strongly to the settlement under which the vendor is now selling. Then as to the effect of section 4 of the Act of 1890 as regards the deeds of the 23rd of March and 11th of August, 1887. The deed of the 23rd of March was not under a power in the settlement as was the case in *Keck and Hart's Contract*, but was a creation of a new power. Secondly, it was an assignment of the vendor's life interest; and thirdly, it created in the vendor a power of jointuring like that already possessed by Sir Charles du Cane. Now, if a tenant for life assigns by way of family arrangement, there may come into existence new *cestui que trusts*. By section 4 of the Act of 1890 an assignee of this kind is a person against whom a tenant for life may sell, but the instrument is to be one of the instruments creating the settlement: as to which see section 2 (1) of Act of 1882. Our submission is that the tenant for life can by way of family arrangement give an interest to a person to whom the trustees owe no duty at all. [STIRLING, J.—They must owe a duty if they have notice.] What we have to see is whether the trustees have become trustees of the instrument of assignment by way of family arrangement for the purposes of the Settled Land Acts. An assignee under such an instrument as this is not in as good a position as an assignee for value, but he is protected to this extent, that the deed becomes one of the instruments creating the settlement, and the trustees must answer the definition in section 2 (8) of the Act of 1882. You have to see what are the instruments which create the settlement. Whenever you have an instrument which takes effect not under the powers of the original settlement but by way of altering the settlement, such a deed must form a part of the settlement. *In re Tibbits* is in our favour. [STIRLING, J.—The real question is, Are the powers conferred on the trustees by the settlement destroyed?] The deed of March, 1887, altered the original settlement, and we may say that that deed constituted a compound settlement and that trustees of that compound settlement ought to be appointed apart from the Act of 1890.

Butcher, Q.C., in reply.—I submit that it would be contrary to the Act to say that you must compound every deed which creates new *cestui que trusts*. [STIRLING, J.—The only difficulty which I feel is as to the deed of 1887, because that deed does modify the original settlement.] I submit that *In re Knowles* is a complete answer to the argument that you may have an assignment which creates a new *cestui que trust*. The words of section 4 of the Act of 1890 are "to be deemed to be" one of the instruments creating the settlement. I submit that you must have regard to the scope of the section. The object of the section is to prevent the interference of persons who were assignees for value to some extent—that is, under an instrument by way of family arrangement. In order to enable the tenant for life to override the interests arising under such an assignment the instrument creating the assignment is to be deemed one of the instruments constituting the settlement. It would be a forced construction to say that it is to be deemed an instrument creating the settlement for all purposes. The real question is whether section 4 is to be deemed to destroy completely the powers of the trustees. I submit that it is not. If you adopt the argument of the other side you must read the word settlement in two different ways. I also submit that these deeds of March and August, 1887, do not limit the land by way of succession: Wolstenholme's Conveyancing and Settled Land Acts, 7th ed., p. 289.

Cur. adv. vult.

April 30.—STIRLING, J., after stating the facts, continued: The question which has been argued before me is whether the requisition has been sufficiently answered. By the contract the vendor contracted to sell the fee simple subject only to the jointures created by the indentures of 1863 and 1887 as to which the purchaser bound himself to make no requisition; and he purports to sell under the Settled Land Acts as tenant for life under the indenture of the 22nd of April, 1886. The objection raised by the purchaser is not that the vendor is unable to exercise the powers of a tenant for life under the Settled Land Acts, but that there are no proper trustees in existence to accept the notices required by the Act and to receive the purchase-money and give receipts for the same. The question I have to decide is whether it is necessary that such trustees should be appointed, and in this respect it appears to me that the case differs from those cited by the advisers of the purchaser in their requisition—namely, *In re Tibbits' Settled Estates* and *In re Meade's Settled Estates*, where the question was, as I conceive, simply this, whether a reasonable case had been made out for the exercise of the jurisdiction conferred on the court by section 38 of the Settled Land Act, 1882, for the appointment of trustees for the purposes of the Act. Now, in order that the vendor may make out his title there must in the first place be a settlement.

A settlement is defined by section 2, sub-section 1, of the Act of 1882. [His lordship read the material part of the section, and continued:] I observe on that that it is quite plain from the Act that one instrument may constitute a settlement, although it is to be admitted that several instruments may under the same definition, in parts which I have not read,

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of the indenture of settlement of the 16th of July, 1885, and not the said G. B. Laurener and E. M. H. Riddell, as trustees appointed by the said orders respectively of the 4th of March, 1893, and the 25th of April, 1893, would be entitled on completion to receive and to have the control of so much of the purchase-moneys arising out of the sale of the Savernake Estate as should not be paid into court or be retained by the purchaser in pursuance of the agreement (for mortgage) of the 23rd of January, 1891, and that the estates to be comprised in the mortgage of £500,000 referred to in such argument may, on completion, be conveyed to the said Lord F. Bruce and G. B. Laurener as trustees of the said indenture of settlement of the 16th of July, 1885, and not to the said E. M. H. Riddell and G. B. Laurener as trustees appointed by the said orders of the 4th of March and 25th of April, 1893, respectively, subject to redemption on payment of the sum of £500,000 and the interest thereof. And it was ordered that the said Lord F. Bruce and G. B. Laurener, as trustees of the said indenture of settlement of the 16th of July, 1885, be retained or made parties to the indentures of conveyance and mortgage to be executed in pursuance of the said agreements of the 23rd of January, 1891, respectively, and be permitted to peruse and approve the drafts of the said indentures accordingly, and that the said G. B. Laurener and E. M. R. Riddell as trustees appointed by the said orders of the 4th of March, 1893, and 25th of April, 1893, respectively, be not made parties to either of the said indentures, &c.

also constitute a settlement. Now then, is the deed of the 22nd of April, 1886, as the vendor alleges it to be, a settlement under which he can sell? Does that fall within the definition of the Act? The first limitations under that deed are to such uses as Sir Charles and the vendor jointly appoint. By the exercise of that power subsequent limitations might have been displaced. But that power, so far as material here to be stated, they did not see fit to exercise, and it is now spent, and may be left out of consideration. Subject to that, the next limitation is to the use of Sir Charles du Cane in restoration of his life estate under the will of Mr. P. du Cane. The case of *In re Wright's Trustees* shows that by this means an effectual restoration of the old life estate was effected, but that life estate is now come to an end. Then comes a series of limitations which did not exist prior to the execution of that deed, being in favour of the vendor for life, with remainder to his first and other sons in tail male with remainders over. It appears to me, therefore, that under that deed an estate or interest in the land, which was either the fee simple itself, or at all events the remainder expectant on the termination of the life estate of Sir C. du Cane, became on the execution of the deed limited in favour of the vendor and others by way of succession. Consequently, when executed, it satisfied the requirements of the Act of 1882, section 2 (1). Now, the deed of the 23rd of April, 1897, was executed under the joint power reserved to Sir Charles and the vendor, and it was admitted in argument on the authority of *In re Wright's Trusts* that the effect was not only to reserve to the vendor the powers conferred under the settlement of the 22nd of April, 1886, by the Settled Land Acts, but at the same time to effect an assignment of that life estate by way of family arrangement within the meaning of section 4 of the Act of 1890. This being so, it is not disputed that he is tenant for life within the meaning of the Act of 1882, section 2 (5). He can, therefore, sell under section 3, and under section 20 convey the settled land for all the estate and interest which was the subject of that settlement. That estate at the time of the settlement was reversionary—that is to say, it was not the fee, but it was the reversion to the fee. But if it was reversionary, then it has fallen into possession, and all estates and charges having priority to the settlement except the two jointures which are specially provided for by the contract have been got rid of. So far there is no difficulty. The Act, however, requires that the purchase-money shall, if not paid into court, be paid under section 22 to the trustees of the settlement, to whom also by section 45 notice of the intended sale is to be given. These trustees are defined by section 2 (8) as the persons, if any, who are for the time being under a settlement trustees with power of sale of settled land, or with power of consent to, or approval of, the exercise of such a power of sale; or if under a settlement there are no such trustees, then the persons, if any, for the time being who are by the settlement declared to be trustees thereof for the purposes of this Act.

As I have said, by the deed of the 22nd of April, 1886, persons therein named are declared trustees for the purposes of the Acts, and these will concur in the deed of sale and give receipt. The objection by the purchaser is that these persons are not trustees who can accept notice and give receipts for the purpose of the present sale, it being contended that they are only trustees for the purposes of the settlement created by the deed of the 22nd of April, 1886, whereas the two deeds (or one at least) of the 23rd of March and 11th of August, 1887, must be regarded as being together with the deed of the 22nd of April, 1886, a resettlement, and other trustees are therefore necessary.

Now, then, the broad question I have to consider is whether new trustees must be appointed whenever a deed has been executed affecting the interests created by the original settlement so that that settlement is no longer the only instrument by which the land stands limited to persons in succession? As a general rule, in my opinion this question must be answered in the negative. Let me begin by considering simple cases. Suppose by a settlement dated the 1st of January in any year real estate is settled on A. for life with remainder to B. in fee simple. By the settlement A.'s trustees have power to sell or are expressly nominated trustees for the purposes of the Acts. Suppose that, further, on the 1st of February B. conveys his remainder in fee to C. in fee simple. C. retains a life interest and conveys his remainder to D. in fee. Are the powers of the trustees enumerated in the January instrument affected by the alteration? I cannot see that they are. The estate still remains limited, if not under, at all events by virtue of that deed of January to persons by way of succession. Then section 38 of the Act of 1882 may, and as I think does, in a proper case enable the court to appoint trustees of the other instruments. Yet I can find nothing in the Act of 1882 which deprives the trustees for the purposes of the Act in the January instrument, of the power of receiving and giving receipts for the purchase-money.

This view is supported by the case of *In re Knowles*. It may be observed that, had the court in that case held otherwise, it would have caused great practical difficulty. The tenant for life knows nothing of the dealings of the remaindermen with their interests, and has no means of discovering what they are. In many cases it would be almost impossible to ascertain what those dealings were, and consequently to obtain an appointment of trustees of the settlement made up of other instruments and the original settlement, when dealings other than those by the tenant for life had been effected. This last difficulty does not arise when the new interest is brought into existence by the tenant for life himself. Suppose, for example, that a tenant for life has charged portions under a power contained in the settlement in favour of younger children. It may be taken that he knows the contents of deeds or instruments executed by himself, but section 20 (2) of the Act of 1882 appears to show that he may sell free from these portions if they are not actually raised.

There is nothing in the Act to show that the framers of it contemplated that by such a charge of portions the persons who are trustees either with powers of sale or expressly named to be trustees for the purposes of the Acts are to be deprived of the powers of receiving and giving receipts for the purchase-money, and that resort must be had to the powers conferred on the court by section 38 before the sale can be completed. Nor do I see any reason in the nature of things why that should be so held. In fact I so decided in the case of *In re Keck and Hart's Contract* with reference to the exercise of a power of jointuring, and on further consideration I adhere to that decision. If the act which gives a right to a new interest be an alienation by the tenant for life, then the special provisions of section 50 of the Act of 1882 come into consideration. Under that section the powers conferred by the Act remain in the tenant for life, but so as not to prejudice an assignee for value who cannot be affected without his consent. The result is that upon a sale by a tenant for life who has alienated for value, the purchaser may ask for evidence as to the consent of the assignee. These provisions are with the view of

benefiting the assignee, and might, as I conceive, be waived by himself, and if the instrument of assignment contains a consent by the assignee beforehand all the powers under the Act of 1882 of the tenant for life who is exercising them would remain.

It appears to me that the instrument of 1887 with which I have dealt contains this consent on behalf of the trustees in favour of whom the assignment is made. But the important point here to remember is that, whether this be so or not, there does not seem to be anything in the Act of 1882 to show that the powers of trustees for the purposes of the Acts are in any way affected, or contemplated to be affected, by that assignment. The effect of the section, as I have said, is simply to impose on the vendor, the tenant for life, the duty of obtaining the consent of his assignees. But now, by the Act of 1890, the provisions of the Act of 1882 have been somewhat modified. [His lordship read section 4 of that Act, and continued:] The first remark I have to make on that is that it applies only to the limited class of assignments being assignments or charges made in consideration of marriage, or as part of, or by way of, family arrangement. So that, as regards an assignment for value either out-and-out or by way of securing money advanced, the law as I have stated it remains, so that in those cases the powers of the trustees still remain unaffected, and the obligation remains on the part of the tenant for life to procure the assent of an assignee for value. But no doubt that creates a real difficulty in the present case. There is a change made by the Act as regards assignments being part of, or by way of, family arrangement, under which category the present deed of March, 1887, is to be regarded as coming. But if that section is to be read as providing that under a settlement such an instrument of assignment is to be deemed one of the instruments creating the settlement for all purposes according to the contention on behalf of the purchaser, then it does seem to me to be a necessary consequence that trustees should be appointed of the settlement made by the original settlement and that additional instrument. But the question which I have to consider is, Is it necessary to give that wide view to the language of this section? The contention on the part of the vendor is that it is limited to purposes excluding the operation of section 50 of the Act of 1882, and that is borne out by the concluding words of the section. [His lordship read the section from the words "is to be deemed," and continued:] It is not a positive enactment that this assignment shall be, but only that it shall be deemed to be one of the instruments. It seems to me that the language of the Act is satisfied by the limited construction placed on it by the vendor, and that it does not require me to hold that this section does make any assignment to which it refers an instrument for all the purposes of the Act. I found myself, in coming to a conclusion on the last words of the section which I have read and considered, and also upon the consideration that that appears to me to be the difficulty intended to be met by the section as a whole, and the only difficulty so far as I can see. I cannot see that for any other purposes connected with the Acts the section was called for. I cannot say that everything for the purposes of the Act is to be read into it. On these grounds I think the vendor is in the right, and that the declaration asked for by the summons should be made. The costs ought to follow the event.

Solicitors, *Nicholl, Manisty, & Co.; E. Bromley.*

Q. B. Div.
(Wills and Kennedy, JJ.) May 18.

ORCHARD v. BUSH. (a.)

Innkeeper—Liability for property of guest—Temporary refreshment.

Where a person uses an inn, either temporarily or otherwise, for the purpose of receiving such refreshment or accommodation as the innkeeper offers, the relation of landlord and guest exists between the parties, so as to make the landlord liable for the loss of the guest's property during his stay in the inn.

Appeal from a decision of the county court judge of Liverpool.

The action was brought to recover damages for the loss of an overcoat.

The defendant was the proprietor of a hotel at Liverpool.

The plaintiff carried on business in Liverpool, but his residence was outside the town, and he was in the habit of travelling daily by train between his home and his place of business in Liverpool.

On the day in question the plaintiff left his office and set out to walk to the railway station with the intention of travelling by train to his residence. On his way to the station he entered the defendant's hotel for the purpose of dining. The dining-room in the hotel was used as a restaurant by a large number of persons other than those actually staying in the hotel. The plaintiff went into this dining-room, hung up his overcoat upon a peg in the room, and was served with dinner. At the conclusion of his meal the plaintiff found that his coat had disappeared.

The county court judge held that the relation of landlord and guest existed between the defendant and the plaintiff, and gave judgment for the plaintiff for the amount claimed.

The defendant appealed.

Montague Lush, for the defendant.—There was no evidence that the relation of landlord and guest existed between the defendant and the plaintiff. That relation only exists when a person goes to an inn as a wayfarer or traveller; it does not arise in the case of a person using an inn for the merely temporary purpose of obtaining refreshment.

He referred to *Strauss* v. *County Hotel Co.*, 32 W. R. 170, 12 Q. B. D. 27; *Reg.* v. *Rymer*, 25 W. R. 415, 2 Q. B. D. 136; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11, 39 W. R. Dig. 94; *Lamond* v. *Richard*, 45 W. R. 289, [1897] 1 Q. B. 541; *Burgess* v. *Clements*, 4 M. & Sel. 306; *Thompson* v. *Lacy*, 3 B. & Ald. 283; *Dawson* v. *Chamney*, 5 Q. B. 164.

Horridge, for the plaintiff.—There was evidence to justify the finding of the county court judge. The case is concluded by *Bennett* v. *Mellor*, 5 T. R. 273, where the plaintiff having come to an inn on business sat down and was served with liquor, and it was held that the relation of landlord and guest existed.

He also referred to *Yorke* v. *Grindstone*, Salk. 388, 2 *York* v. *Greenaugh*, Ld. Raym. 866, and *Richmond* v. *Smith*, 8 B. & C. 9.

Montague Lush replied.

WILLS, J.—I am of opinion that this appeal must be dismissed. The only question is whether there is any evidence that the plaintiff was a guest at the defendant's hotel. I fail to understand in what sense he was not a guest. Even if one were to adopt the narrow view as to the meaning of the word "guest"

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

put forward by Mr. Lush, who contends that a guest must be a wayfarer or a traveller, I think that there is evidence that the plaintiff was a guest within that restricted definition. The plaintiff was walking from his office to the railway station, *en route* for his home, and on his way he called at the defendant's hotel and was served with such refreshment as he wanted. If he had been riding in the country and had stopped at an inn for refreshment he would have been a wayfarer. Why, then, should it be said that he was not a wayfarer in the circumstances of this case? But I am not disposed to take that narrow view of the meaning of the word "guest." I think a guest is one who uses an inn, either temporarily or for a longer period, for the purpose of receiving such refreshment or accommodation as the innkeeper offers. If the person stopped the night at the inn there would be no question that he was a guest. Can it make any difference that the person who is using the inn does not want to remain there all night? I think not, for an innkeeper holds himself out as willing to give temporary accommodation to those who require it.

From the point of view of the authorities there does not appear to be much to be said in favour of the proposition that a guest must be a wayfarer or a traveller. In the old days no doubt guests were more usually wayfarers, but the liability of an innkeeper arises whenever he receives a person into his inn *causa hospitandi* or *hospicii*, and I think that he so receives a person, and the liability of an innkeeper attaches, although the person only uses the inn for purpose of temporary refreshment. The case of *Bennett* v. *Mellor*, 5 T. R. 273, was a stronger case than the present, for there the plaintiff went to an inn for a purpose wholly unconnected with the use of an inn as such, and then sat down in the public room and took some refreshment. He was nevertheless held to be a guest and to be entitled to the privileges of a guest. It seems to me that the use made by the plaintiff of the defendant's hotel was much more that of a guest than was the case in *Bennett* v. *Mellor*.

I say nothing as to what my decision would have been if the restaurant had not formed part of the hotel. The room where the plaintiff dined, in addition to being a restaurant, was used as part of the hotel, and as a hotel is used, and there is abundant evidence that refreshment was supplied by the defendant as innkeeper to the plaintiff as guest.

KENNEDY, J.—I agree. I think that there was abundant evidence that the place where the plaintiff's coat was lost was an inn. I take the definition of an inn given by Best, J., in *Thompson* v. *Lacy*, 3 B. & Ald. 283: "An inn is a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided." In that case the place in question was called The Globe Tavern and Coffee House. Bed and provisions were supplied there, but it was not frequented by stage coaches, and there were no stables. In the same case Bayley, J., referring to the liabilities of an innkeeper, gives as his view of the law "that he is bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided, and that he is liable for their goods if lost or stolen; and on the other hand, that he has a lien on the goods of his guests for the payment of his bill."

In the present case the defendant unquestionably held himself out to receive all travellers and sojourners. He provided beds for those who wished to sleep at the inn, and food for those who merely came there to dine. That being so, the liability of an innkeeper attaches. It is said that in the particular room where the coat was lost there were persons who came there for the sole purpose of obtaining food, and who were not stopping in the hotel. How can that circumstance affect the question? The rights of the persons using the room cannot vary according as they are stopping in the hotel or are there for temporary refreshment. Where there is a restaurant, which is physically separated from the hotel, as in *Strauss* v. *County Hotel Co.*, or which is carried on as a separate establishment as in *Reg.* v. *Rymer*, the case is different, for there the restaurant is not carried on as part of the hotel, but as an entirely separate business.

I agree that the plaintiff was a traveller, if it is necessary to decide that point; but in my opinion if a person is received into an inn for the purpose of obtaining the accommodation which the proprietor holds out to the public, that person goes to the inn as a guest and is given the protection which the law affords in such a case.

Appeal dismissed.

Solicitor for the appellant, *Richard White*, for *Neale*, Liverpool.

Solicitors for respondent, *Tibbits & Co.*

Q. B. Div.
(Wills and Kennedy, JJ.) May 2.

REG. v. BIRD AND OTHERS.
Ex parte NEEDES. (a.)

Licensing law—Appeal against confirmation of new licence—Rules of quarter sessions—Ultra vires—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 37, 43.

By section 43 *of the Licensing Act*, 1872, "*Any person who appears before the licensing justices and opposes the grant of a new licence, and no other person, may appear and oppose the confirmation of such grant by the confirming authority.*" *The same section requires the quarter sessions to make rules "as to the proceedings to be adopted for confirmation of new licences" in their county.*

A rule made by quarter sessions under this section required every person intending to oppose the confirmation of a provisional licence to give certain notices of his intention, as a condition precedent to his being heard in opposition to the confirmation.

Held, that the rule was ultra vires *as imposing a condition on the statutory right of a person who had opposed before the licensing justices to be heard in opposition to the confirmation.*

Rule *nisi* for a *mandamus* to the confirming committee of the justices of the county of London to hold an adjourned sessions and hear and determine the application of V. Guidotti, pursuant to section 43 of the Licensing Act, 1872, that a provisional grant of a victualler's licence for certain premises might be confirmed, and to hear the objections of the appellant thereto.

On the 25th of March, 1898, Guidotti's application was heard by the licensing justices of the St. Margaret's Division, Westminster. The appellant appeared and opposed, and the provisional licence was granted.

Rule 30 of the Standing Orders of the London Quarter Sessions provides that "Every person (subject as hereinafter provided) intending to oppose the confirmation of any such provisional licence or certificate before the county licensing committee shall within seven days after the grant of such provisional

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

licence or certificate, give notice to the applicant and to the clerk of the peace by registered letter of his intention to oppose the confirmation of such provisional licence or certificate."

This notice was not given by the appellant. A notice of opposition was, however, after the 16th of April, tendered at the Sessions House and was refused, the application having then been entered in the unopposed list. On the 17th of April notice that Needes intended to oppose, and that he would apply for leave to be heard in opposition, was served by registered post on Guidotti. On the 27th of April, the day fixed for the hearing of the application for confirmation, the application of the appellant to be heard in opposition was refused, and the licence was confirmed. The appellant then obtained this rule.

Section 37 of the Licensing Act, 1872, enacts that "the justices in quarter sessions shall make such regulations with respect to the meetings of any such committee" (viz., the county licensing committee) "and the transaction of business thereat as they may think fit." Section 43 is as follows: "Any person who appears before the licensing justices and opposes the grant of a new licence, and no other person, may appear and oppose the confirmation of such grant by the confirming authority in counties and boroughs" (viz., in counties, the county licensing committee); "and the confirming authority may award such costs as they shall deem just to the party who shall succeed in the proceedings before them. In a county the justices in quarter sessions assembled . . . shall make rules as to the proceedings to be adopted for confirmation of new licences and the costs to be incurred in any such proceedings and the person by whom such costs are to be paid.

Scrutton showed cause against the rule.—Rule 30 of the Standing Orders is within the powers given to the quarter sessions by section 43 of the Act. It is reasonable and necessary that proper notice of opposition should be required, otherwise the applicant for confirmation must always be ready at the hearing with all his witnesses in order to prove his case on the assumption that his application is to be opposed.

Candy, Q.C., and *Peter Grain*, in support of the rule.—Rule 30 is *ultra vires;* it admits of no adjournment in order to enable proper notice to be given; it is absolute in its terms and purports to abridge the right to be heard in opposition, which is given by section 43 of the statute. They cited *Rex* v. *Lambeth*, 3 Dow. & Ry. 340; *Rex* v. *The Justices of Norfolk*, 5 B. & Ad. 990; *Rex* v. *The Justices of Staffordshire*, 4 A. & E. 842; *Reg.* v. *The Justices of Surrey*, 18 L. J. M. C. 175; *Reg.* v. *Pawlett*, L. R. 3 Q. B. 491.

WILLS, J.—*Primâ facie* nothing can be more reasonable and proper than that the quarter sessions should make a rule by which the condition could be enforced that notice of opposition to the confirmation of a grant of a licence should be given in due time. But does such a rule come within the powers given by the statute to make regulations for the transaction of the business of the licensing committee? [His lordship read the provisions of sections 37 and 43 of the Licensing Act, 1872, which are above set out.] I think that the latter power must include a power to make rules (not inconsistent with the Act of Parliament) dealing with the opposition as well as with the confirmation; for the opposition is part of the proceedings for confirmation. But that still leaves the real difficulty untouched. The Act of Parliament gives power, in so many words, to a person who has opposed at the first application to appear and be heard at the further application for confirmation of the provisional licence. I think that the power to make rules, however widely expressed, cannot be intended to override the express power given by the same section to appear and oppose. Here the sessions have made rules, several of which appear to be *ultra vires*, though we are now only dealing with one of them.

Rule 34 expresses neatly the effect of the rules: it provides that "any person who has appeared before the licensing justices and opposed a grant of a new licence and who has complied with these rules, and no other person, may appear before the county licensing committee." That imposes a condition beyond what is imposed by the Act, and is *ultra vires*. I think that it would be within the power of the quarter sessions to provide that a person who has not given proper notice of his intention to oppose the confirmation of the licence should pay the costs of any adjournment which might be necessary or any other costs occasioned by the want of such notice. Such a rule would have my judicial sympathy; but they have gone beyond their powers by imposing a condition of appeal which is not in the Act of Parliament. Rule 31, again, as to which there has been no argument in the present case, requires a person opposing the confirmation to find a surety for the costs of the opposition; it is clear that there is no power to impose such a condition as that.

The cases which have been cited have no real bearing upon this case; they merely illustrate a principle too clear to require the support of any authority—namely, that where a power is given by an Act of Parliament no regulation made to give effect to that power can in any way abridge it.

I have come to the conclusion that this rule as to notice goes beyond the powers of the quarter sessions. The *mandamus* must go.

KENNEDY, J.—I am of the same opinion. The justices have had to deal with an application for the confirmation of this licence, and they refused to hear the appellant in opposition because they felt themselves bound by certain rules of the quarter sessions, with which the appellant had not conformed. What was his position? He had satisfied the only express requirement of section 43; he had appeared before the committee and opposed the grant of the provisional licence; and he had therefore entitled himself to appear and oppose the confirmation. He had not complied with rule 30 of the standing orders of the quarter sessions; he had not given the notice required by that rule to be given within seven days after the grant of the provisional licence. The question is, Is that rule a valid rule under section 43 of the Act? To make an absolute rule barring a person from being heard unless he gives a certain notice, when that person is by the Act itself given a right to be heard, is to go beyond the powers to make rules as to proceedings.

If the rule had merely been that if no notice of opposition were given the application for confirmation would be put into the unopposed list and so heard unless an application were made to transfer it to the opposed list on good cause shown and upon payment of the costs occasioned by the transfer, that would have been a reasonable provision. But here the rule is unqualified; it requires, for instance, that the name and address of the person desiring to be heard should be inserted in the notice so that if his address were by accident omitted the justices would be obliged to refuse to hear him. I agree with the remarks of my brother Wills as to the other rules to which he has referred; but this case depends upon rule 30; that rule is *ultra vires*, and the *mandamus* must go.

Rule absolute.

Solicitor for the appellant, *Percy Gates.*

Solicitor for the respondent, *Francis Rudall.*

House of Lords.

From C. A. (England). April 28.

"THE ENGINEER." (a.)

Insurance — Marine insurance — Collision clause — Exemption of underwriters—Proviso—Construction.

A collision clause in a policy of insurance upon a ship stipulated that no liability was to attach to the underwriters in respect of "any sum which the assured may become liable to pay, or shall pay, for removal of obstructions under statutory powers, . . . consequent on such collision . . ."

Held, that the underwriters were exempt from liability, whether by way of damages or otherwise, for the removal of obstructions consequent on collision.

The North Britain, 42 *W. R.* 243, [1894] *P.* 77, *approved.*

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) affirming that of Bruce, J. Formal judgment was given in favour of the respondent, the case being in fact an appeal against a decision of the Court of Appeal in *The North Britain*, 42 W. R. 243, [1894] P. 77 (Lindley, A. L. Smith, and Davey, L.JJ.). The agreed statement of facts was as follows:

(1) On the 14th of June, 1895, the plaintiffs (appellants), as owners of the steamship *Engineer*, effected with the defendant (the respondent) (*inter alios*) a policy of insurance subscribed by the defendant in the sum of £100 on the hull and machinery of the steamship *Engineer*, valued at £8,500, for twelve months from noon on the 14th of June, 1895, to noon on the 15th of June, 1896.

(2) Attached to the said policy were certain clauses known as institute clauses, the material one, with proviso attached, being as follows: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay, by way of damages, to any other person or persons any sum or sums not exceeding, in respect of any such collision, the value of the ship hereby insured, we, the assurers, will severally pay the assured such proportion of three-fourths of such sum or sums so paid as our respective subscriptions hereto bear to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability with the consent in writing of two-thirds of the subscribers to this policy in amount, we will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur or be compelled to pay; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels shall become limited by law, claims under this clause shall be settled on the principle of cross liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision. Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay, for removal of obstructions under statutory powers for injury to harbours, wharves, piers, stages, and similar structures consequent on such collision or in respect of the cargo or engagements of the insured vessel or for loss of life or personal injury."

(3) On the 19th of April, 1896, whilst the said policy was in full force and effect, the steamship *Engineer* came into collision with the steamship *Harraton* near the entrance to the River Tees, and by reason of the said collision *The Engineer* was considerably damaged, and *The Harraton* sank and became a constructive total loss.

(4) The place at which *The Harraton* sank was within the limits of the jurisdiction of the Tees Conservancy Commissioners, who thereupon, under their statutory powers in that behalf, took the necessary steps to remove the obstruction caused by the wreck of *The Harraton*—in the first place by lighting and watching such wreck, and subsequently by dispersing and removing it so as to put the approaches to the river into a safe and proper condition. The total of the charges and expenses incurred by the said commissioners amounted to the sum of £1,346.

(5) An action was begun in the Admiralty Division by the owners of the steamship *Harraton* against the plaintiffs in the present action the owners of the steamship *Engineer*, and a counterclaim was entered on behalf of the owners of *The Engineer*; but by agreement between the parties in the said collision action both ships were deemed to have been in fault, and the damages suffered by both parties to the suit respectively, as assessed by the Registrar of the Admiralty Division, assisted by merchants, were duly paid by each to the other.

(6) The plaintiffs, as owners of the steamship *Engineer*, properly paid to the owners of the steamship *Harraton* under the said agreement £673, being a moiety of the said £1,346, for removing the obstruction caused by the wreck as being a loss or damage sustained by the owners of the steamship *Harraton* incidental to and arising out of the said collision; and thereafter the plaintiffs sought to recover the moiety aforesaid from their underwriters (including the defendant), but the underwriters declined to pay any part thereof, alleging that they were expressly excepted from liability in respect of the said sum by the terms of the proviso set out in paragraph 2 of the statement of facts.

The question for the determination of the court was whether the defendant was liable under the said policy to pay to the plaintiffs such proportion of three-fourths of the sum of £673 in paragraph 6 hereof mentioned as the defendant's subscription bore to the value of the ship.

The Court of Appeal held that the defendant was not liable.

Cohen, Q.C., and *Carver, Q.C.*, for the appellants.

Joseph Walton, Q.C., and *Scrutton*, for the respondent, were not heard.

EARL OF HALSBURY, L.C.—I certainly am not desirous of hearing this discussion prolonged, because for some time I have arrived at a very clear conclusion in my own mind, and I confess I adopt the paraphrase of this contract which Davey, L.J., in the case of *The North Britain*, put upon it. He says the clause means something of this kind: "I will reimburse you, the injuring vessel, the bill which you have to pay the injured vessel for damages; but, mind, I am not to be called upon to pay, directly or indirectly, for the removal of obstructions under statutory powers." That I believe to be a very proper reading of the language which was actually used by the parties. I agree with what Davey, L.J., appears to

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

have said in respect to the mode in which the contract should be construed. In looking at a document between business men, I do not think it is well to look at technical rules of construction. I think it is well to look at the whole document, to look at the subject-matter with which the parties are dealing; and then to take the words in their natural and ordinary meaning and construe the document in that way. I have come to the conclusion that what the underwriters did mean to exclude in their contract of liability, was any payment of money for the removal of obstructions to navigation. These damages or this money payable, whichever it is to be called, comes practically within the description. It was a payment actually made by reason of the removal of an obstruction. Therefore, applying the test I have suggested to the contract, I cannot doubt that that was what the underwriters intended to exempt from the contract into which they entered.

Under those circumstances I think that the case (*The North Britain*) which is supposed to have governed the case now before your lordships does govern it. It think that case was rightly decided, and I therefore move your lordships that this appeal be dismissed with costs.

Lord MACNAGHTEN, Lord MORRIS, and Lord JAMES OF HEREFORD concurred.

Appeal dismissed.

Solicitors for appellants, *Holman, Birdwood, & Co.*

Solicitors for respondent, *Waltons, Johnson, Bubb, & Whatton.*

Court of Appeal.

From Q. B. Div. (A. L. Smith and Vaughan Williams, L.JJ.) — May 26.

Ex parte ELLIS. (*a.*)

Bill of sale—Goods seized to protect security—Relief against seizure—Order as to giving up bill of sale—Jurisdiction—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.

The grantee of a bill of sale seized the goods upon default in payment of one of the instalments of interest. The warrant authorizing the bailiff to seize directed him to take and hold possession for the amount of interest in arrear. Upon a summons by the grantor for relief under section 7 of the Bills of Sale Act, 1882, *the judge at chambers ordered that the grantee should give up the bill of sale upon the grantor paying the principal sum with the interest then in arrear.*

Held, that, as the grantee had seized merely for the purpose of protecting his security, and not for the purpose of realizing it, the judge had no jurisdiction to order him to give up the bill of sale.

Ex parte Wickens, ante, *p.* 385, [1898] 1 *Q. B.* 543, *distinguished.*

Appeal from an order of a judge at chambers.

On the 8th of October, 1897, Ellis gave a bill of sale over his furniture to one Shuckburgh, to secure the repayment of an advance of £30, and interest thereon at the rate of 60 per cent. per annum; and the grantor covenanted to pay the grantor the principal sum of £30 on the 8th of October, 1899, and in the meantime the sum of £1 10s. on the 8th of each month for interest. One of the monthly payments of interest having fallen into arrear the grantee by his bailiff seized the furniture, the warrant which authorized the seizure directing the bailiff to take and hold possession for £1 10s. Upon a summons taken out by the grantor under section 7 of the Bills of Sale Act, 1882, Darling, J., ordered the grantee to release the goods, and that the bill of sale should be handed over to the grantor, he paying to the grantee the sum of £31 10s., and the costs of the application.

The grantee appealed.

Crump, Q.C., and *W. de B. Herbert* (*Lewis Thomas* with them), for the grantee.—The learned judge had no jurisdiction to order the bill of sale to be given up. The grantee did not take possession for the purpose of realizing his security, but for the sole purpose of maintaining and protecting it. In *Ex parte Wickens, ante*, p. 385, [1898] 1 Q. B. 543, the grantee seized for the purpose of realizing the security, and the court held that that gave the grantor the right to redeem. That is not the case here.

Herbert Chitty, for the grantor.—The grantee seized for the purpose of realizing his security. If a grantee of a bill of sale seizes and sells, he cannot sell for the interest alone; he must sell to realize the whole debt and interest. The power of sale must be exercised once for all. The grantee cannot seize and sell for one month's interest and then seize and sell again upon a further default. If he takes steps to realize part of his security he is attempting to realize his security within the decision in *Ex parte Wickens*. The grantee here seized for the purpose of selling the goods for the interest in arrear, and therefore was attempting to realize the security; and the judge had jurisdiction to make the order he did.

A. L. SMITH, L.J.—This appeal must be allowed. Reading the bill of sale and the Act together there is power given to the grantee to seize whenever any of the payments contracted to be made fall into arrear. In this case a month's interest, £1 10s., fell into arrear. Thereupon, in order to maintain his security so as to get payment of the £1 10s. the grantee put a man in possession. He did not put the man in to sell or realize anything under the bill of sale. In these circumstances the question is whether the judge at chambers had jurisdiction under section 7 of the Bills of Sale Act, 1882, to order the bill of sale to be given up. It is clear that he had jurisdiction to order the grantee to withdraw, upon payment by the grantor of the sum due for interest and costs, and the bill of sale would then continue running. but the judge ordered the bill of sale to be given up. In my opinion he had no jurisdiction to do so. In *Ex parte Wickens* this court decided that when a bill of sale holder takes possession, not for the purpose of maintaining his security, but for the purpose of realizing it, the judge at chambers can order the bill of sale to be given up. But that is only so where the grantee enters for the purpose of selling and realizing his security. It does not apply where the grantee enters merely for the purpose of maintaining his security. If the law were otherwise a great hardship would be inflicted upon the grantee. He would have taken a contract for the payment of interest at the rate of 60 per cent. per annum for a fixed period, and yet he would not be able during that period to take possession for the purpose of maintaining his security for the interest without at the same time vacating his security. On the other

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

hand, if the grantee enters for the purpose of realizing the security, there is no hardship in giving the grantor the right to redeem, and so vacating the security. The appeal must therefore be allowed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. I am not so familiar with the decision in *Ex parte Wickens* as my brother is, for he was a party to that decision. I find that the question of fact which was raised and disposed of in that case was whether or not the bill of sale holder had entered for the purpose of realizing his security, and the court came to the conclusion as a matter of fact that he had entered for that purpose. The court then decided that, as the mortgagee had entered for the purpose of realizing his security, the mortgagor was entitled to redeem upon payment of the principal sum, with interest to date and costs, and on payment of that sum to have the security vacated. Whether or not the mortgagor would have had that right if the mortgagee had entered merely for the purpose of protecting his security it was not necessary to decide in that case. I see that Chitty, L.J., said that "it may be a question whether, upon a demand for the production of the last receipt for rent, and upon failure without reasonable excuse to comply with that demand, and an entry into possession in consequence, the grantee may not maintain that he entered for the purpose of protecting his security. But I have no hesitation in saying that the seizure in this case was for the purpose of realizing the security—in other words, for the purpose of enforcing payment." I gather from that language that, according to that learned judge's view, if the entry had been merely for the purpose of protecting the security the equitable doctrine as to the right to redeem would not have applied. I draw the same inference from the judgments of the other Lords Justices. In these circumstances it seems to me that, the entry here having been made merely for the purpose of protecting the security, and not for the purpose of realizing it, this order should not have been made.

Appeal allowed.

Solicitors for grantee. *Ford & Ford.*

Solicitors for grantor, *Pritchard, Englefield, & Co.*, for *J. P. Court*, Liverpool.

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — May 5, 6, 19.

In re DE NICOLS.
DE NICOLS *v.* CURLIER. (*a.*)

Domicil—Husband and wife—Mutual rights as to unsettled movables—Matrimonial domicil—Change of domicil.

The rights of married persons in each other's unsettled movable property are governed by the law of their domicil, even if that be a domicil different from the matrimonial domicil, and acquired after the marriage.

So held (reversing the decision of Kekewich, J., ante, *p.* 326), *on the authority of* Lashley *v.* Hog, 4 *Paton's Sc. App. Cas.* 581.

Appeal from a decision of Kekewich, J. (*ante*, p. 326, where the facts are sufficiently stated).

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

Dicey, Q.C., and *F. Whinney*, for the daughter and her children, who appealed, referred to *Lashley* v. *Hog*, 4 Paton's Sc. App. Cas. 581, 1 Burge Col. & For. Law, Part I., c. 7, s. 8, pp. 623-5, Robertson's Law of Succession, Appendix III., p. 414; *In re Lett's Trusts, Ex parte Lett*, 7 L. R. Ir. 132, 29 W. R. Dig. 75; Story's Conflict of Laws, 7th ed., ss. 171, 186, 187; Fraser on Husband and Wife, vol. 2, p. 1325; *Ewing* v. *Orr Ewing*, 10 App. Cas. 453, 499, 34 W. R. Dig. 89; *Bell* v. *Kennedy*, 6 Ct. Sess. Cas., 3rd Ser. 69; *Hall* v. *Hall*, [1853] 16 Ct. Sess. Cas., 2nd series, 1057; *In re Marsland*, 34 W. R. 540; *In re Craignish, Craignish* v. *Hewitt*, [1892] 3 Ch. 180, 41 W. R. Dig. 71; *Saul* v. *His Creditors*, 16 Amer. Dec. 212; Wharton's Conflict of Laws, 2nd ed., s. 196; Westlake's Private International Law, s. 36, 3rd ed., p. 68; Savigny's Private International Law (trans. by Guthrie, 2nd ed.), p. 293; Dicey on Conflict of Laws, p. 657, and the American cases there cited, especially *Wadsworth* v. *Henderson*, 16 Fed. Rep. 447; Married Women's Property Act, 1882, s. 1; the Code Napoleon, ss. 1421, 1422; *Foubert* v. *Turst*, 1 Bro. Parl. Cas. 129, Finch's Prec. in Chan., 208, *State* v. *Barrow*, 65 Amer. Dec. 109; and *Murphy* v. *Murphy*, 12 Amer. Dec. 475.

Elgood and *Maugham*, for the executors and trustees of the will, submitted the question to the court.

[RIGBY, L.J., referred to *Concha* v. *Concha*, 35 W. R. 477, 11 App. Cas. 541. COLLINS, L.J., referred to Phillimore's International Law, 3rd ed., vol. 4, p. 352.]

Renshaw, Q.C., and *Ingle Joyce*, for Mrs. de Nicols, referred to *Bonati* v. *Welsch*, 10 Smith's N. Y. Rep. 157; Wharton's International Law, s. 195; *Boyer's case*, Dalloz Jurisprudence Générale (1854), p. 62; Van Zyl's Judicial Prac. of S. Africa, p. 438; *Black* v. *Black's Executors*, 3 Juta's S. African Rep. 200; Bar's Private International Law (translated by Gillespie, 2nd ed.), pp. 413, 414 (note 38), 804; Dicey on Conflict of Laws, pp. 648 (rule 171), 650; Westlake's Private International Law, 3rd ed., p. 74.

Dicey, Q.C., replied.

Cur. adv. vult.

May 19.—LINDLEY, M.R., read the judgment of the court as follows: This is an appeal from the decision of Kekewich, J. The question raised by this appeal turns upon whether the decision of the House of Lords in the case of *Lashley* v. *Hog* applies to it or not. Kekewich, J., has treated that decision as not applicable to the present case, and he has decided that a change of domicil has not affected the rights acquired by two French people in each other's unsettled movable property by their marriage in France. In order to appreciate *Lashley* v. *Hog*, and its true bearing on the case before us, it is necessary to understand how at the date of that decision the law of Scotland stood as regards the effect of marriage on the movable property of the wife. By the Scotch law, on the marriage of two persons domiciled in Scotland the existing and after-acquired movable property of both husband and wife was regarded as a common fund (*communio bonorum*) divisible in certain shares on the death of either of them. But the whole of this so-called common fund was at the disposal of the husband during the marriage, and was liable to the payment of his debts. During the marriage neither his wife nor his children had any right to any part of it. But the law applicable to this so-called *communio bonorum* did not depend in any way on whether any of the movable property

which constituted it came from the wife or not. The proportion, if any, in which she contributed to it was of no importance. The whole was the husband's property, and his inability to dispose of the whole of it by will, and the rights to it which arose on the death of himself or his wife, in no way depended on the amount of her contribution, if any, to the common stock. Assuming a *communio bonorum* to exist, the right of the wife and children to it on his death, or, in other words, the distribution of the *communio bonorum* on the death of the husband, would on general principles of law be determined by the Scotch Law of Succession to the movable property of married men or widowers. So the persons to take the wife's share, if any, of the *communio* on her death would be decided by the Law of Succession as applied to her share. But when the question is, as it was in *Lashley* v. *Hog*, whether on the wife's death in her husband's lifetime any part of his property became hers, or became payable to persons claiming through her as if it were her property, it is very difficult to understand upon what principle recourse is had to the Law of Succession. Apart from authority we should have thought that the matrimonial law of the place where the parties were domiciled when they married, and not the law of the domicil of the husband on the wife's death, would have been the law to apply to such a question as that.

We pass now to *Lashley* v. *Hog*, which is reported also in the appendix to Robertson's Law of Succession (No. III.), p. 414. Many questions were raised and decided on that appeal, but the only one which concerns us on the present occasion is the effect of the change of domicil on the rights of married persons to their respective unsettled movable properties. Mr. and Mrs. Hog, both of whom were English, married in England. Her unsettled movable property, existing and after-acquired, became his, and she had no right to his movable property except what she might acquire under the Statute of Distributions if he died intestate. Mr. and Mrs. Hog had several children, and went to Scotland and became domiciled there, and they both died there. His wife predeceased him. One of their daughters married a Mr. Lashley. Mr. Hog had amassed a large fortune, and he left a will making provisions for his children. Mrs. Lashley, however, refused to take anything under her father's will, and insisted on her rights under the Scotch law. Those rights were, as she insisted: (1). A share of what her mother became entitled to in the *communio bonorum* when she died; (2) A share of her father's property at the time of his death. She succeeded in establishing her right to a share of her father's estate in a previous litigation (4 Pat. 583). Owing to circumstances not mentioned here she got the whole *legitim* (see p. 609). Her claim to her share of what her mother became entitled to when she died remained to be decided, and that was one of the questions before the House of Lords in *Lashley* v. *Hog*. The House of Lords decided in her favour, reversing the decision of the Scotch Court on this point. The judgment of Lord Eldon is extremely long, dealing with various matters which do not bear on the question we have to consider. We have all studied that judgment with great care in order to ascertain the real grounds on which his decision on this point was based. The case was argued for the appellant, Mrs. Lashley, on the ground that, her father being a domiciled Scotchman when his wife died, the distribution of property on the dissolution of the marriage must be regulated by the law of the place of the domicil of the married pair at that time. The previous decision in favour of Mrs. Lashley's claim to *legitim*—*i.e.*, her share of her father's estate on his death—was relied upon, and it was urged that no distinction could be made between a wife's share and a child's share. The argument for the respondent was to the effect that the destination of the movable property of married persons on the dissolution of the marriage depended on the law of the place where they were domiciled when they married; and that the death of the wife in the lifetime of her husband did not deprive him of what became his on his marriage. These were shortly the two views presented to the House of Lords for decision. The House adopted the view presented by the appellant, and held that on the dissolution of the marriage by the death of the wife a portion of the husband's property became divisible amongst those persons who would have become entitled to it by the law of Scotland if the husband and wife had been domiciled in Scotland when they married. The claim of the daughter to her share of her father's movable property on his death is intelligible enough. It is a mere illustration of the well-settled rule that the law of a person's domicil regulates the succession to his movable property. But the claim of the daughter to what became divisible on her mother's death cannot be explained on any such principle; for, although when that share became divisible the mother was dead, yet the father was not; and it was a part of his property which the daughter claimed and was held entitled to. The decision in her favour necessarily involves the view that the change of domicil affected the matrimonial rights of the husband and wife, and this was plainly what both Lord Eldon and Lord Rosslyn meant to decide, and what the House of Lords did decide (see 4 Paton 611-619). Lord Eldon said distinctly (p. 617) that it was best to hold that the wife's rights shifted with the domicil of her husband, and that was the basis of the judgment. It is plain that he was much influenced by the difficulty of making any distinction between the rights of a wife who survived her husband and the rights of those who claimed her share if she died in his lifetime (p. 615). Lord Rosslyn concurred in Lord Eldon's judgment, and repudiated the idea that marriage imported any implied contract which a subsequent change of domicil could not affect.

It is impossible to escape from the conclusion that the change of domicil was held to have altered the respective rights of both husband and wife with respect to their unsettled movable properties. She acquired and he lost rights by the change even during his life. This decision is binding on us. It is true that there are several material differences between the Scotch and French matrimonial laws of property, the wife having more extensive rights under the law of France than she has under the law of Scotland. But these differences do not warrant us in holding that the law of the matrimonial domicil can prevail after such domicil has been changed. It is not altogether satisfactory to hold that a change of domicil cannot affect an express contract embodying the law of the matrimonial domicil; but that a change of domicil does affect the application of that law if not embodied in an express contract. But after all there is some practical convenience in holding that a change of domicil changes the rights of husband and wife as regards their respective unsettled movable properties, just as it changes their rights to obtain judicial decrees for separation and divorce, and their testamentary powers. In America and in Scotland this view has prevailed; although on the continent it has been repudiated as opposed to sound legal principle. After *Lashley* v. *Hog* we do not consider the question open to judicial review in this country. We cannot regard the decision as based only on the law of

Scotland. It decided a most important principle of private international law. If anything turns on it, there is no doubt that in this case the lady acquiesced in the change of domicil. The appeal, therefore, must be allowed, and the declaration made by Kekewich must be altered accordingly. The costs of the appeal will be costs in the summons.

Appeal allowed.

Solicitors, *Tyrrell Lewis, Lewis, & Broadbent; Hicks, Arnold, & Mozley.*

High Court of Justice.

Chan. Div. North, J. — March 18, 19, 25.

ATTORNEY-GENERAL *v.* MAYOR OF SWANSEA. (*a.*)

Corporation—Municipal corporation—Borough Funds Act, 1872 (35 *&* 36 *Vict. c.* 91)—*Bill in Parliament opposed—Gasworks Clauses Act,* 1871 (34 *&* 35 *Vict. c.* 41).

A municipal corporation is not entitled to oppose a Bill promoted by a gas company in Parliament without first complying with the requirements of section 4 *of the Municipal Corporations (Borough Funds) Act,* 1872, *when the Bill leaves untouched the power of the corporation to have fixed by arbitration under section* 24 *of the Gasworks Clauses Act,* 1871, *the price of the gas used by the corporation.*

Attorney-General *v.* Mayor of Brecon, 10 *Ch. D.* 204, 27 *W. R. Dig.* 137, *discussed.*

Motion.

This was an application by the Swansea Gas Co. as relators to restrain the Corporation of Swansea from applying the borough funds and rates in payment of the costs or expenses of opposing in Parliament a Bill promoted by the gas company without having first complied with the provisions of the Municipal Corporations (Borough Funds) Act, 1872.

The gas company was incorporated in 1861, and by a provisional order obtained by the company in 1888 a maximum charge of 3s. 6d. per 1,000 cubic feet was fixed as being chargeable by the company to private consumers, and the dividend payable by the company was limited to a fixed per cent.

By virtue of section 24 of the Gasworks Clauses Act, 1871, the gas company were under obligation to supply the corporation as the local authority with gas for the public lamps in their district at a price to be settled by agreement, "and in case of difference by arbitration, regard being had to the circumstances of the case and the prices charged to private consumers in the district" (section 24).

The Bill as promoted by the company did away with the maximum charge payable by a private consumer and the fixed dividend, and substituted a sliding scale, by which as the dividends of the company increased the price of gas was to decrease, and as the price of gas above the standard charge increased, the dividend should decrease.

Since this motion had been opened the Bill had come before a Committee of the House of Lords, and the corporation were represented by counsel, but in the result only some minor alterations were made in the Bill, and the bulk of the corporation's contentions were rejected.

Swinfen Eady, Q.C., Macmorran, Q.C., and *E. Knowles Corrie,* for the motion.—As the corporation have not complied with the provisions of the Borough Funds Act, 1872, s. 4, they are not entitled to spend the rates on opposing this Bill: *Reg.* v. *Mayor of Sheffield,* 19 W. R. 1159, L. R. 6 Q. B. 652; *Attorney-General* v. *Mayor of Brecon,* 10 Ch. D. 204.

Vernon Smith, Q.C., and *R. J. Parker,* for the defendants.—The Bill affects the price of the gas used by the corporation, and as such affects the ratepayers, and the corporation are entitled to oppose the Bill so as to protect the latter. The case falls within the principle of *Attorney-General* v. *Mayor of Brecon* and *Reg.* v. *Mayor of Sheffield.*

Swinfen Eady, Q.C., in reply.

NORTH, J.—In this case the relators who have put the Attorney-General in motion are the Swansea Gas Co. and the defendants are the corporation.

The gas company brought a Bill into Parliament for the purpose of making certain alterations in the law, and the corporation presented a petition against that Bill raising ten or a dozen grounds of objection to it. A good many of the grounds of objection have been disposed of. They have all been dealt with, in fact, because since the matter was before me last week it has been before the committee, and all these various points have been disposed of, mostly against the corporation. I do not think the decision of the committee is conclusive against the corporation in every sense, because taking one clause as an instance, the corporation desired to have a saving clause inserted. The promoters objected to it because they said there was nothing to save; the Act as it stood did not interfere with the powers or privileges of the corporation. The committee heard the arguments and decided against the insertion of any such clause. Of course that might have been because they decided there was nothing to call for it, or that on the merits of the matter it was better left out. But though it would have been open to counsel to raise the point before me that the opposition was well-founded, although the committee had decided against the claim—although I agree that such argument, if there had been any foundation for it, might very properly have been introduced here, no such point has been made on any of these various matters except one.

The one objection made now is this—that the corporation had a right to oppose because there was a provision in the Bill that interfered with, or might interfere with, the sum they would have to pay in respect of the supply of gas by the plaintiff company, the relators, to them and to the other inhabitants of the town. The rights of a corporation to oppose a Bill in Parliament out of the borough funds under the Municipal Corporations Act was the subject of considerable discussion in the case of *Reg.* v. *The Mayor of Sheffield,* which has been referred to. In that case the learned judges of the Court of Queen's Bench came to the conclusion that certain steps which were taken by the corporation, however meritorious and proper in themselves, were not of such a character that the corporation were justified in paying the expenses of those proceedings out of the borough fund, and the following year, no doubt in consequence of that decision, an enabling Act was passed —viz., the Borough Funds Act of 1872. [The learned judge then read sections 2 and 4 of that Act, and continued:] Now these necessary preliminaries or formalities provided for by that section have not been complied with in any way. If they had been, no doubt the corporation might have stood in a very different position in opposing this Bill in Parliament. But none of these have been had recourse to, and the corporation do not get any

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

benefit from that Act. [The learned judge then read section 8, and continued:] Nothing turns on the Act itself. There is a saving clause preserving any rights the corporation had in fact, but it does not give them any new right.

Now, when we come to consider the various grounds which were put forward as justifying the opposition by the corporation to this Bill, the only one that has been urged before me is that the effect of the Bill was to alter certainly or possibly the amount which the corporation might have to pay in respect of their gas. Is that a matter with respect to which the words of the saving clause of section 8 have any application? I do not think they have. I think that the case of *Reg.* v. *Mayor of Sheffield* is a very strong authority. It is a case which led to a change in the law, but a change which, as I said, has not been utilized on this occasion. But I wish to refer more particularly to the decision of the late Master of the Rolls in *Attorney-General* v. *Mayor of Brecon*. I should say before doing so that the question of payment is merely this: According to the law as it now stands the corporation have to pay for all gas supplied to them for the lighting of the streets and their own buildings and so on, and a mode of payment is fixed by section 24 of the Gasworks Clauses Act, 1871. [The learned jndge referred to that section, and continued:] Now, it was proposed by the Bill as brought forward that there should be an alteration in the mode of charging for gas. It was proposed to introduce what is called a sliding scale, by which instead of there being a fixed maximum amount payable by way of dividend it might be increased in a certain ratio having regard to a diminution in the price to be charged to customers. That did not affect the corporation at all under the section I have just referred to except, of course, that in any arbitration to fix the amount to be paid the price which private consumers were charged was to be taken into consideration. Then is the right of the corporation to have the gas at the old rate one which is interfered with or taken away by the Act? I think it clearly is not. That right to have the price fixed by arbitration is not touched in any way; in my opinion there was no right attacked which has operation given to it by either the old law existing prior to the passing of the 1872 Act or saved by section 8 of that Act.

That matter was gone into very fully before the Master of the Rolls in *Attorney-General* v. *Mayor of Brecon*. The view he took was that independently of section 92 of the Municipal Corporations Act, 1835, a corporation that was attacked had a right to defend itself, and he went into various points dealing with their position and saying in what way such right of defence existed. First of all he refers to the possibility of some attempt being made actually to destroy the corporation itself. He pointed out that this was a thing they would be perfectly justified in resisting. Then there was another way in which it might have been attacked. There might be an attempt to revoke its charter. That, again, he points out, is a matter, of course, they must have a right to resist. Then he says, "What is the principle upon which corporations should be allowed to defend themselves? There are decisions which go expressly to defending their property from attack and defending their existence from attack; Does not the principle go further? The existence of a municipal corporation is not merely for the purpose of affixing a seal, but for the purpose of the government of the town, and therefore if their duties and rights of government are interfered with their existence is to that extent interfered with, though it is not the actual existence of the corporation. It is the existence of their corporate powers which in fact goes to make up the entire existence of a corporation, and it appears to me that a corporation has the right to defend its powers when attacked upon the same principle that it has the right to defend its actual existence from attack." Then, after some remarks upon the particular topics which were the subject of decision in that case, he says: "Is it to be supposed that an individual or a company can present a Bill to Parliament for taking away those privileges and duties of the corporation and that the corporation shall have no power of defending itself, shall have no right to expend the money necessary for defending its privileges and duties as a corporation? It appears to me that the mere statement of the question shows that there is no valid distinction between the right of property, which, after all, is only held by the corporation as trustee for public purposes, and the powers and privileges forming a larger and possibly a smaller share of the government of the town which are conferred on the corporation, and with which it is sought to interfere. As I said before, it seems to me that on principle you must imply a right in the corporation to defend itself from such an attack." A little further on he says: "The right of the corporation to defend itself from attack of this kind extends not merely to property, not merely to the existence of the corporation in the smallest sense—that is, to the continued existence of the corporation as such, but to its existence also in the larger sense—that is, to the existence of the corporation with all its rights and privileges; and that an attack on a substantial portion of its privileges, rights, and duties is as much within the purview of the authorities as an attack on its property or its mere existence." Then again he says some pages further on: "It seems to me, therefore, looking at the authorities, that whether we take the one view or the other, whether we consider that under the words expenses necessarily incurred, or similar words used in the Act, this incidental expenditure is included, or whether we consider that the general law as to the rights of trustees defending their property and privileges remain unaffected; in either way, if there is an attack by proposed private legislation on the rights, privileges, and duties of a corporation, that corporation is entitled to defend itself before Parliament." Then he referred to the Borough Funds Act, but said very little about it, because it was entirely outside the case he had to deal with. Then he says: "I now come to the circumstances of the case, and I must say I think it a very strong case, and quite distinguishable from all the cases to which I have been referred, because in this case the corporation had a special series of powers and duties which were much interfered with by the Bill in question." Then he devoted some pages to dealing with those specific and special matters and details which I need not read, and I will only refer to a passage near the end of the judgment, in which he says: "I think I have said enough to show that this is the kind of active interference with the corporation itself, and with its rights, duties, and property, which entirely puts the case out of the class of cases which I have been considering. It really comes much closer to the other class of cases—namely, where an action is brought against the corporation to recover from it a part of its property or to deprive it of a part of its privileges."

Now, do the powers of the corporation, as fully as they are set out and defined there, include the power to oppose a Bill because it contemplates an alteration in the rate to be charged for gas—the existing law which is not proposed even to be interfered with by the Bill being that the price to be paid by the corporation is a subject-matter for arbitration. It seems to me that it would be ridiculous to say that

a Bill proposing to alter the scale, but leaving the right to settlement by arbitration untouched, would be an attack on a substantial portion of the privileges, rights, or duties of the Corporation of Swansea. Under the circumstances I am of opinion that the expenditure of the borough fund in opposition to the Bill is not justified.

Solicitors, *R. W. Cooper & Sons; Sharpe, Parkers, & Co.*

Chan. Div. Stirling, J. } April 27, 28; May 4.

ASTBURY *v.* ASTBURY. (*a.*)

Limitations, Statute of—Mortgage of land—Arrears of interest—Acknowledgment by one of the two executors and devisees in trust of the mortgagor—3 & 4 Will. 4, c. 27, s. 42.

The defendants A. and N. were the executors and devisees in trust of S., who died in 1887 *having in* 1885 *mortgaged certain land belonging to her to the plaintiff. On the* 19*th of May,* 1897, *the defendant A., without the consent of the defendant N., executed an acknowledgment admitting that the whole of the principal moneys and interest secured by the mortgage were then due and owing to the plaintiff.*

Held, that such acknowledgment could not be treated as the valid act of both trustees with reference to the land vested in them; that it did not prevent the operation of the statute; and that six years' arrears of interest only could be recovered.

This was a foreclosure action in which the question arose as to what arrears of interest the plaintiff, as equitable mortgagee, was entitled to recover.

The plaintiff was the equitable mortgagee by deposit of title-deeds relating to certain land which belonged to a certain Martha Shenton, now deceased, and the deposit was made by way of mortgage to secure £500 and interest at 5 per cent. Martha Shenton died on the 26th of November, 1887, having made her will by which she appointed the defendants her executors, and devised to them her real estate upon certain trusts under which infants were now interested.

A question arose after her death as to the validity of this deposit, but it was established in proceedings brought in this court, and by an order dated the 13th of May, 1897, it was declared that the said title-deeds were, on the 16th of March, 1885, deposited by her with the present plaintiff to secure the repayment of £500 and interest, and that such sum and interest thereon to the 16th of March, 1897, was still due and owing to the plaintiff on her security. Then on the 26th of July, 1897, this summons was taken out by the plaintiff asking for foreclosure.

On the 19th of May, 1897, Samuel Astbury, the brother of the plaintiff, one of the defendants, and an executor and trustee of the said will, executed a document in writing by which, describing himself as executor of Martha Shenton, and also devisee of the real estate, he acknowledged that on the 16th of March, 1885, the said deeds were deposited, and he further admitted that the whole sum, and also interest thereon to the 16th of March, 1897, were then due and owing from the estate of Martha Shenton to Sarah Astbury, the plaintiff, in respect of the principal sum and interest secured by the deposit of deeds.

The order for foreclosure which was made was in common form, not directed against the executors by way of seeking recovery of the debt due by the testatrix out of her personal estate, but to have an account taken and for equitable relief by way of foreclosure.

The question was raised in chambers, upon a summons by the defendant Newry, whether the above acknowledgment was effectual, the second defendant, Mr. Newry, claiming the benefit of the Statutes of Limitation, and the summons was adjourned into court.

Austen-Cartmell, for the summons.—*Primâ facie* only six years' interest are recoverable in a foreclosure suit: *Hunter* v. *Nockolds*, 1 Mac. & G. 640; *Sinclair* v. *Jackson*, 1 W. R. 400, 17 Beav. 405. Assuming that one trustee can give an acknowledgment so as to bind the land, he cannot do so with the express dissent of his co-trustee: *Midgley* v. *Midgley*, 41 W. R. 659, [1893] 3 Ch. 282. S. Astbury cannot say he was agent of himself and his co-trustee: *Bolding* v. *Lane*, 11 W. R. 386, 1 De G. J. & S. 122; *Chinnery* v. *Evans*, 13 W. R. 20, 11 H. L. Cas. 115. Both trustees must concur: *In re Fitzmaurice*, 15 Ir. Ch. Rep. 445; *Lord St. John* v. *Boughton*, 9 Sim. 219. The case of *In re Macdonald*, 45 W. R. 628, [1897] 2 Ch. 181, was decided on Lord Tenterden's Act, and does not affect the question.

Micklem, for the mortgagee.—The mortgagee is entitled to the arrears in full: *In re Rownson*, 33 W. R. 604, 29 Ch. D. 358. *In re Macdonald* covers this case. This acknowledgment binds the estate, even if it does not bind the co-executor: *Midgley* v. *Midgley*; *Smith* v. *Evans*, 28 Beav. 59, 8 W. R. Ch. Dig. 43; *In re Hollingshead*, 36 W. R. 660, 37 Ch. D. 651. [STIRLING, J., referred to *Lepard* v. *Vernon*, 2 Ves. & B. 51.] *In re Ingham*, 41 W. R. 235, [1893] 1 Ch. 352. S. Astbury and Newry are distinct persons within the meaning of the section. *Lord St. John* v. *Boughton* is an express authority, and was followed in *Toft* v. *Stephenson*, 1 De G. M. & G. 28. *Roddam* v. *Morley*, 4 W. R. 347, 5 W. R. 510, 2 K. & J. 336, 1 De G. & J. 1, shows that an acknowledgment by one party liable binds all: *Pears* v. *Laing*, 19 W. R. 653, L. R. 12 Eq. 41.

Austen-Cartmell, in reply, referred to *Steward* v. *England*, 44 W. R. 119, [1895] 2 Ch. 820; *Richards* v. *Younge*, 19 W. R. 612, L. R. 6 Ch. App. 478.

STIRLING, J. (after stating the facts), said: Now, the statute with which I have to deal is 3 & 4 Will. 4, c. 27, s. 42, which provides, reading it with reference to this particular matter, that "no arrears of interest in respect of any sum of money charged upon any land, or any damages in respect of any such arrears of interest shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent."

I may observe here that this enactment, differing in this respect from section 40, deals with principal, and that no mention is made of part payment, so that it would seem that part payment or an instalment of interest would not prevent the operation of the statute as to the balance. For the purposes of the present judgment I assume, but without deciding it, that one executor may pay a statute-barred debt notwithstanding the dissent of the other, and also that one executor can give a valid acknowlegment notwithstanding the like dissent. These powers, if they exist, must depend upon the legal right which one executor has to dispose of his testator's estate so as to

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

bind the others. No such right exists in the case of trustees. All trustees must concur in the exercise of the powers conferred on them with reference to the trust estate.

Although, therefore, the acknowledgement of the 19th of May, 1897, may have been effectual on the part of Samuel Astbury in his capacity of executor with reference to the personal estate of the deceased, I think it cannot be regarded as a valid act on the part of both trustees with reference to the estate. I ought to mention that not only did Mr. Newry not concur in the acknowledgment, but that his concurrence was not asked, and from what took place at the conclusion of the trial leading to the order of the 10th of May, 1897, it may well be that Samuel Astbury, the co-executor, was perfectly aware that he was not likely to concur in any such acknowledgment. In these circumstances the question is whether the acknowledgment, being assumed to be effectual as to personality, is also effectual so as to prevent the operation of the statute as to the land? On this particular point the only decision referred to in argument was that of Lord Westbury in *Bolding* v. *Lane*, in which he decided that an acknowledgment by a mortgagor of more than six years' arrears of interest due on first mortgage does not prevent a subsequent mortgagee from relying on the Statute of Limitations. In giving judgment the Lord Chancellor said: "In his reasons for this decision the Vice-Chancellor apparently holds that the words in the 42nd section—viz., 'the person by whom the same was payable,' mean the person who was liable at law to pay the interest under the contract—that is, the mortgagor or his representative, and accordingly he considers the second mortgagee as not included within those words." After some discussion he continues: "In truth these words of the statute, far from having the limited construction of the Vice-Chancellor, appear to have been selected as a description capable of including not only every person liable to be sued at law, but every person who, having an interest in the land, ought to be charged, or might be properly sued as a defendant in a suit in equity brought to enforce payment of the principal and interest out of such land. If this be so, it follows as a necessary consequence that it was not the intention, nor is it the effect, of the section to give to the mortgagor or other person who is 'by law compellable to pay the interest' a statutory power to deprive by his acknowledgment given to a prior incumbrancer the subsequent incumbrancers of the benefit of the statute, which would be monstrously unjust, but to make a plain and simple rule that no person having a charge on lands shall recover more than six years' interest on such charge against any other person having an interest in the lands without an acknowledgment in writing signed by such person or by some former owner from whom the interest is derived."

Now, if that be taken literally as an interpretation of the statute, then an acknowledgment by an executor does not fall within it. But it may be that, having regard to some decisions which I am about to mention, the words of the Lord Chancellor are to be taken with some qualification.

However that may be the decision which has never been reversed is binding on me, and it seems to me to support the view that an acknowledgment made by an executor is not effectual to keep alive a debt against a devisee of real estate, for if an acknowledgment by a mortgagor who has an interest in land does not prevent the mortgagor claiming the benefit of the statute why should an acknowledgment by an executor who has no such interest be more effectual. This seems to me to be in accordance with the decisions with reference to payment on various Statutes of Limitation. For example, in *Chinnery* v. *Evans* it was held in the House of Lords that payment of interest on a mortgage comprising several estates by a receiver appointed in a mortgagees action for the rents of one of those estates operates under section 40 of the statute I have now to consider, to keep alive the mortgage debt against the others.

It was held in *Roddam* v. *Morley* that payment by a tenant for life of interest on a specialty of his testator in which the heirs were bound was sufficient under 3 & 4 Will. 4, c. 42 to keep alive the debt as against the remaindermen.

A similar decision is *In re Hollingshead* in respect of payment of interest on a simple contract debt, the statute applicable being 21 Jac. 1, c. 16.

It will be observed, however, that in all these cases the position or interest of the person who made the payment was such that he might fairly be held to represent the other persons interested in the land.

On the other hand it was held by Turner, L.J., in *Fordham* v. *Wallis*, 1 W. R. 118, 10 Hare 217, that payment of interest on a debt of a testator by executors who were also devisees in trust of the real estate, though it kept the debt alive against the personal estate had not the same effect against the real estate, the relative statute being that of James 1. The Vice-Chancellor, however, followed the case of *Putnam* v. *Bates*, 3 Russ. 188, and on p. 228 he says: "The case rests upon the decisions in *Atkins* v. *Tredgold*, 2 B. & C. 23, and *Slater* v. *Lawson*, 1 B. & Ad. 396, and the principle of these cases was this—that one party was not to be bound by the admissions of another, except in cases of continuing joint contract. This principle is surely founded in justice. Apart from purely legal considerations, it cannot, I think, be doubted that it ought not to be in the power of any person by his admission to revive a right against another which, but for that admission, would have been wholly extinguished, as was the case in *Channell* v. *Ditchburn*, 5 M. & W. 494. But then it is said that this principle ought not to have been applied to cases such as *Putnam* v. *Bates* and the present case, and that the liability of the real estate was so connected with the liability of the personal estate as to preclude the application of the principle; but I think that what we have to consider in these cases is, the act of the person and not the position of the estate; for the existence or non-existence of the demand depends upon the act of the person and not upon the relative liability of the property. I adopt, therefore, the principle of *Putnam* v. *Bates*."

Then he went on to consider the various grounds of distinction, and deals (at p. 230) with the fact that the executors were also trustees of the real estate: "It is then said that as to the fee of these estates, or, at all events, the life interest in them, the plaintiff's debt has been kept alive by the payments of interest made by the executors, these executors being also trustees of the life estate. But although the executors and trustees are the same persons, they fill wholly different characters, and it is, therefore, I think, necessary upon this point to examine the character in which the payments were made. Looking at the evidence with that view, I feel no doubt that these payments were made by the executors in their character of executors and in that character only, and I am of opinion, therefore, that the real estate is not affected by those payments."

It was also held by the late Lord Chelmsford, L.C., in *Coope* v. *Cresswell*, 15 W. R. 242, L. R. 2 Ch. App. 112, reversing the decision of Kindersley, V.C., that payment of interest on a specialty debt by executors of the debtor was insufficient under 3 & 4 Will. 4, c.

42, s. 5, to keep the debt alive against devisees of the real estate.

Being of opinion that the acknowledgment of the 19th of May, 1897, cannot be treated as the valid act of both trustees with reference to the land vested in them in trust, I also think that even if it is effectual so as to give rise to rights against the personal estate, it cannot prevent the operation of the statute against the real estate. Consequently, only six years' arrears of interest are recoverable in the present action.

Solicitors, *Pritchard, Englefield, & Co.*, for *Bygott*, Sandbach; *Flux, Leadbitter, & Co.*, for *Garnett*, Crewe.

Q. B. Div.
(Wright and Channell, JJ.) April 28, 29.

In re THE ROYAL COLLEGE OF SURGEONS. (*a.*)

Inland revenue—Income tax—Bodies corporate or unincorporate—Exemption—Property appropriated for promotion of science—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *s.* 11 (3).

By section 11 *of the Customs and Inland Revenue Act*, 1885, *a duty of 5 per cent. is imposed upon the annual value, income, or profits of all property, real and personal, belonging to or vested in any body corporate or unincorporate during the year of assessment, after deducting the costs and expenses of the management of such property, subject to the exemption from duty in sub-section* 3 *in the case of "property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."*

The Royal College of Surgeons was established by Royal Charter in the year 1800 *as a body corporate for the promotion of the art and science of surgery and the encouragement of the study thereof. It is also the custodian, at its own expense, of the Hunterian Collection, which is national property. The college consists of general offices, an examination hall, a library, a museum which contains the above collection, and the conservator's official residence.*

For some time past the purposes of the college had been mainly the examination of persons for certificates of proficiency in surgery, and the largest source of income and the surplus of expenditure had arisen from such examinations.

Held, that the general offices, the examination hall, and the library were liable to be assessed under the above section; but that the museum and the conservator's official residence came within the exception provided by sub-section 3.

In this case the Royal College of Surgeons petitioned to be discharged from an assessment made under the Customs and Inland Revenue Act, 1885, on the ground that the college is an institution the income whereof is legally appropriated and applied for the promotion of education and science.

The petition showed as follows:

1. That by the Customs and Inland Revenue Act, 1885, it is enacted that there shall be levied and paid to her Majesty, in respect of all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending on the 5th day of April, 1885, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of £5 per centum upon the annual value, income, or profits of such property accrued to such body corporate, or unincorporate in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration and costs, charges, and expenses properly incurred in the management of such property, subject to exemption from such duty in favour of property of the description following, that is to say—

Property which, or the income or profits whereof, shall be legally appropriated and applied for the benefit of the public at large;

Property which, or the income or profits whereof, shall be legally appropriated and applied for the promotion of education, literature, science, or the fine arts.

2. That the petitioners are a body corporate established by Royal Charter in the year 1800.

3. That the objects of the petitioner's incorporation as specified in the said Royal Charter are the benefit of the commonweal of this kingdom by the promotion of the art and science of surgery, and the due promotion and encouragement of the study and practice of the said art and science of surgery.

4. That further powers and privileges have from time to time been conferred upon the petitioners by subsequent Royal Charters, the object with which such further powers and privileges were granted being in the said Royal Charters expressed to be more effectually to promote and encourage the study and practice of the said art and science of surgery.

5. That by the said charter divers obligations and duties are imposed upon the petitioners' corporation for the benefit of the public at large and the promotion and encouragement of the said art and science of surgery.

6. That the petitioners are, under terms imposed by Government, the custodians at their own expense of the "Hunterian Collection," which is national property.

7. That on the 24th day of June, 1894, the annual value or income which had accrued to the petitioners during the yearly period ending on that date from real property belonging to or vested in them during such yearly period was £7,200. The total value of the petitioners' invested personal estate at the same date was £187,195 17s. 11d., and the income or profits thereof accrued to the petitioners during the said yearly period was £5,833 5s. 7d.

8. The whole of such property, real and personal, or the income or profits thereof was legally appropriated and applied for the benefit of the public at large or for the promotion of science, literature, or education.

9. That the petitioners were called upon by the Commissioners of the Inland Revenue to deliver an account in accordance with section 17 of the Customs and Inland Revenue Act, 1883, and did deliver such account, thereby claiming that all their property real and personal was entitled to exemption from assessment or duty, and alternately that divers portions thereof were entitled to such exemption as by the said account more particularly appears.

10. The petitioners were notwithstanding assessed by the said commissioners at £3,161, and required to pay as duty thereon the sum of £158 1s.

11. That the petitioners were compelled to pay the said sum of £158 1s., and have paid the same.

12. The sum of £3,161 includes the following which the petitioners had alternately claimed to be entitled to exemption. The sum of £300, being the annual value of that part of the library of the petitioners, situate within the premises Nos. 40, 41, and 42, Lincoln's-inn-fields. The sum of £250, being the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

annual value of the official residence of the conservator of the petitioner's museum, which contains among other things the said Hunterian Collection. Such residence has, through other portions of the college premises, internal access to the said museum. The sum of £200, being the annual value of premises No. 39, Lincoln's-inn-fields, being another portion of the petitioners' said library.

13. Apart from their claim to total exemption the petitioners submit that in any event the above property is entitled to exemption from duty being property which, or the income or profits whereof, is legally appropriated and applied for the benefit of the public at large or for the promotion of science, literature, or education.

The petitioners therefore prayed that the said assessment should be discharged by reason of the same being assessed upon property entitled to exemption from duty, or that the amount of the assessment any duty be reduced to such sum as the court may order, and that the respondents should be ordered to repay them the said sum of £158 1s., or the sum by which such duty should be reduced.

Sir Edward Clarke, Q.C. (*J. R. Paget* with him), for the petitioners.

Sir Richard Webster, A.G. (*Danckwerts* with him), for the Crown.

During the course of the arguments the following cases were cited: *Society of Writers to the Signet* v. *Commissioners of Inland Revenue*, 2 Tax. Cas. 257; *Tailors of Glasgow* v. *Commissioners of Inland Revenue*, 24 Sc. L. Rep. 516; *In re Bootham Ward Strays*, 40 W. R. 632, [1892] 2 Q. B. 152; *Linen and Woollen Drapers Case*, 58 L. T. Rep. 949, 36 W. R. Dig. 9; *Commissioners of Inland Revenue* v. *Forrest*, 39 W. R. 33, 15 App. Cas. 334.

WRIGHT, J.—In this case the section of the Act of 1885 provides for an exemption from taxation on "Property which, or the income or profits whereof, shall be legally appropriated and applied for the promotion of science." Those are the material words in this case.

Now, two classes of cases may occur in relation to this matter; first of all, it is possible that there may be an institution or foundation of all the property and income of which it may be said that it is within the exemption on the ground that as a whole the property is held solely or mainly for the purposes of science. I introduce that word "mainly" from the language of Lord Watson in the case of the *Institution of Civil Engineers*, 39 W. R. 33, 15 App. Cas. 334. Where the property as a whole is held solely or mainly on trust for the purpose of science it seems to me to be established by that case that it is not essential that there should be any specific conveyance of property as a whole or any declaration of trust, affecting it as a whole, for any particular purpose if in substance it can be gathered that the objects are mainly the promotion of science. I think that is not this case. It seems to me that on the cases which have been cited to us, and on a consideration of the original and subsequent charters which have been granted to the Royal College of Surgeons, and having regard to other matters to which I will advert presently, it cannot be said that at the present time the property of the college is property the income whereof is legally appropriated and applied for the purposes of science. No doubt in the original charter the Crown recognizes and intends that the objects of the corporation shall be scientific, and, I should say, mainly scientific at that time. The actual objects are to be gathered, however, not only from the original charter, but also from the subsequent charters and from the bye-laws which have been made under the authority of those charters, and which show that at the present day, at any rate, and for a long time past, the purposes of the college have been, to my mind, mainly the examination of persons for certificates of proficiency in surgery. If we look at the balance-sheet it appears that by far the largest source of income and surplus of expenditure arises from the examinations. It seems to me that the evidence fails to show that the substantial or main object of the existence of the college as a whole is now the promotion of science as distinguished from this business of examinations.

I think we are bound by the cases which have been cited to us to hold that, in so far as its real purpose of existence is the examination of candidates of this kind, we ought not to regard it as existing for a scientific purpose. Therefore, on the whole I think it cannot be held that the college is exempt. That was the kind of case that was presented to the House of Lords in the case of the Institution of Civil Engineers. There it was held that, as a whole, the objects of the society were scientific. In that case it was not necessary to go into the question with regard to the particular parts of its property. So much for one class of cases. Another class of cases is where you get something short of science being the main object of the institution, and where you find that the purposes of the foundation are, as a whole, either non-scientific or of a mixed character, as it seems to me is the case in this instance. Then, apparently, it follows that each parcel of property must be considered, and the inquiry must be whether that parcel of property is appropriated to science as its main purpose or not. When I say "appropriated," I mean appropriated in the same sense in which I spoke before—not by conveyance expressed to be particularly for that purpose, or by a declaration of trust specifically for that purpose; but appropriated in the way indicated by the language of Lord Watson in the House of Lords, where, after referring to the decision upon another Act of Parliament, he says: "The provisions of sub-section 3 dispense with the necessity for any of the enumerated purposes being exclusive, it being sufficient that the property of the institution is in the main devoted to one or other of them; and the exemption is made to depend upon the appropriation and application of such property or its income, without reference to the sources from which it is acquired." Then he goes on to cite the Lord President in the Scotch case of the Writers to the Signet, in which the Lord President said: "I apprehend that the meaning of this clause of exemption is that the property or income shall be, if not exclusively, yet certainly in the main and as its chief object, devoted to the promotion of education, literature, science," and so forth. Then he observes: "The principle thus enunciated was re-referred to, and appears to have been unanimously accepted both in the Divisional Court and in the Court of Appeal." Then later on, at p. 350, he says the enactments appear to him to "indicate the intention of the Legislature to exempt every society whose corporate endeavours are mainly directed, whether successfully or no, to the extension of the bounds of science." It seems to me that the same doctrine which he there applies to the consideration of the case of the Institution of Civil Engineers as a whole must be applied, so far as it can be applied, to the consideration of the particular classes with which we have to deal in this case.

Now, here the matters in dispute are these. The museum, although not conceded in theory, is for the purposes of to-day conceded to be a property which

is legally appropriated and applied for the purposes of science, and, although it is not conceded for the future, it seems to me quite clear that it ought to be held that this Hunterian Museum is property legally appropriated and applied for the purposes of science. It was built to a very large extent on its present site out of moneys specifically voted by Parliament for that purpose, and I apprehend it would be quite incompetent for the college to deal with the Hunterian Museum in any other way than as a museum of that kind.

The other matters which are in question are, first of all, the general offices, representing, I think, an annual value of about £700. Now, it seems to me, as regards those offices, they are not now legally appropriated or applied for the purposes of science as their main object. I think they are appropriated and applied mainly for the purpose of the examination business of the college.

As regards the examination hall, and the property connected with that, it seems to me even more clearly that those have not impressed upon them in any way the marks of being applied for the purposes of science in such a way as to be within the section. They are used for the purpose of examination, and for other purposes.

I ought to have said, as regards the general offices, that it might have been, to my mind, argued with a possibility of success that some portion of the offices ought to be regarded as applied to such scientific purposes as the original charter contemplated, and as may still be carried out by the college, but I cannot see that it is possible for us to hold that any portion of them is at the present moment applied to that purpose, and therefore I cannot make any exception on that ground.

Then the third piece of property which we have to consider is the library. That, it seems to me, is very difficult to form any opinion about. It is very much on the line distinguishing the two things, but upon the whole I have come to the conclusion that it is not shown that the library is applied for the purposes of science as its main object. In the Scotch case of the Writers to the Signet, which is hardly distinguishable upon that point, it seems to me the same view was taken, and I am not able to distinguish it.

As regards the conservator's house I have very great doubt again. I think that that ought to be treated as exempt. It seems to me that the words "legally appropriated and applied" are not to be confined to a case where one particular part is marked out by one particular deed as devoted to the purposes of science. Here it seems to me that the purpose of the conservator's house is quite within the purposes of the college, and if that is the case then the house ought to be regarded as legally appropriated for that purpose if, in fact, it is so appropriated, even although some other portion of their premises might just as well have been appropriated for that purpose. I cannot see that the words of the section require that there should be an unchangeable appropriation of a particular parcel of land. It seems to me to be enough if there is an appropriation for any specific purpose of any particular portion for the time being, although it might be competent to the college to assign a different portion for that purpose.

I think that disposes of all the points we have to consider.

CHANNELL, J.—I am of the same opinion. We have to remember in this case the particular Act that the case arises under because, although with regard to the cases that have been quoted to us some of them are on this Act, still others are on Acts which are similar, but for some purposes different; in particular, both in the Act relating to the income tax and the Act relating to exemption from rating, the exemption depends upon the character of the society. In this Act the exemption depends upon the particular property. The property of corporations generally is charged, and then there is an exemption, not in favour of particular corporations, but in favour of particular property of any corporation. Consequently in this case it is only necessary for us to consider the constitution and objects of the corporation for the purposes of seeing whether or not all or any of the property of that corporation is legally appropriated to purposes coming within these exemptions. Now, that has rather an important bearing upon some portions of the case. It seems to me that for that purpose what we have got to look at is to see what the society at the time when the question arises in fact lawfully does according to its charters or statutes which govern it. I do not think that the objects, and certainly not the motives, which people have in joining it have much to do with the matter, and I do not think that the object of the Crown in constituting the body, as declared by the preamble of the charter, is at all necessarily conclusive. It appears by the preamble of both charters that the object of the Crown as recited was not to found a body for the promotion of science only, but a body which was authorized by its constitution partly directly to promote science and partly to give benefit to individuals who become members of it. Such a society as that would come within the preamble because it would promote science, and in fact, speaking generally, it is the best way to carry out a particular object to give individuals a special interest in having it carried out. Consequently, a society which had the double object, a society which gave benefit to its members and a society which also directly promoted science, would come within the object as declared by the preamble, and it could not be said that the preamble made the giving benefits to the members *ultra vires*. Further, this society has been, to a certain extent, altered from time to time, because not only have there been various supplementary charters, but there have been Acts of Parliament affecting it and imposing duties upon it. The result appears to me to be that it has become a society which both benefits individuals and promotes science. I am bound to take it, I think, that the admission of members for the purpose of practising their profession is a matter which must be treated as a benefit to individuals.

I think that seems to follow from what is said in the House of Lords in the case of the Institution of Civil Engineers, as to the body being a portal through which the profession may be entered. Therefore I think one must take it that this is a society having a double object; that it cannot be said of it that all its property is necessarily legally appropriated for the purposes of science; but you have to consider the property it has got, and whether any particular property is within the exemption.

That being my view of the case, I do not want to repeat at any length what my learned brother has said, because I entirely agree with him as to the portions of the property which may be considered to come within the exemption and those which do not. Assuming that the part relating to examinations may be considered to be for the individual benefit of the persons, with a view to enabling persons to get benefit by the future practice of their profession, it follows that the examination halls cannot be exempt; and I think it follows that the general offices, as to which it is obvious that the larger portion of the business done would relate to these examinations, would not be exempt either.

Speaking generally, all one could say about the

first items is that there is nothing at all to show that the society are entitled to any exemption in respect of their general property other than has been allowed in this assessment.

The only other two items which it is necessary to deal with separately are the library and the conservator's house. As to the library, I agree with what is said in the case of the Writers to the Signet, which is rather strong on the subject. Further, I consider that the members of the society undoubtedly have special privileges in the library. It is quite true that either by the liberality of the society, or by the obligation, if there is one, the general public can get into it pretty easily, and get a certain use of the library, but the members have the use of it. That being so, I do not think that that can be considered to be appropriated to the purposes of science. To a considerable extent, at all events, it is kept up for the benefit of the members of the society.

Then comes the conservator's house. Speaking for myself, I think that ought to be treated as part of the museum. So far as the house is concerned, it is true there would be no breach of trust in letting that house to somebody else and putting the conservator somewhere else, or giving the conservator an additional salary in consequence; but it seems to me that, just as it would be a breach of trust for the society to give up their museum, or that part of it, at any rate, so it seems to me they might remove it to another position. That, it seems to me, does not prevent the place where the museum is now being considered to be legally appropriated to the purposes of science; therefore I think the place where the conservator lives, who is kept simply and solely for the purpose of the museum, may be considered as legally appropriated to the purposes of science, just as the site of the museum is.

Upon that ground, and upon that ground only, it seems to me that we should allow that exemption, which is the only one that can be allowed.

Solicitors for the petitioners, *Wilde, Moore, & Wigston.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Q. B. Div.
(Wills and Kennedy, JJ.) April 25.

CUCKFIELD DISTRICT COUNCIL *v.* GORING. (*a.*)

Local government—Highway—Bridge repairable ratione tenuræ—*Recovery of expenses incurred by district council in effecting repairs—Local Government Act,* 1894 (56 *&* 57 *Vict. c.* 73), *s.* 25, *sub-section* 2.

By section 25, *sub-section* 2, *of the Local Government Act,* 1894, *it is provided that, where a highway repairable* ratione tenuræ *is not repaired by the person liable to repair when requested to do so by the district council, that body may place the highway in proper repair and recover from the person liable to repair such highway the necessary expenses of so doing.*

Held, that the remedy provided by this sub-section is confined to the occupier of the land so chargeable, and does not impose any liability on the owner of the land who is not the occupier thereof to refund to the district council the expenses incurred by the latter in effecting such repair.

This was an appeal by the defendant from the judgment of his Honour Judge Martineau, sitting at the county court of Worthing, in Sussex.

The action was brought under section 25, sub-section 2, of the Local Government Act, 1894, to recover the sum of £7, the amount of expenses incurred by the Cuckfield District Council in repairing two foot-bridges.

The defendant was the owner, but not the occupier, of two farms through which a stream flowed. Public footpaths passed through the lands forming these farms, and the said footpaths were carried over the stream by two foot-bridges, which had fallen into disrepair.

The defendant was served with notice to repair these bridges, and failing to do so the plaintiffs effected the necessary repairs, and sought to recover from the defendant the necessary expenses incurred by them in so doing.

The learned county court judge held that there was an obligation *ratione tenuræ* to repair these bridges, and that the Local Government Act, 1894, applied, and that the defendant was the person liable to repair, and that the plaintiffs were entitled, under sub-section 2 of section 25 of that Act, to recover from him the necessary expenses incurred by them in repairing the said bridges.

From this decision the defendant now appealed, on the ground that no action lay against him under the Local Government Act, 1894, as he was the owner of the said lands but not the occupier thereof.

By section 25, sub-section 2, of that Act, it is provided that "Where a highway repairable *ratione tenuræ* appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair the same fails when requested to do so by the district council to place it in proper repair, the district council may place the highway in proper repair and recover from the person liable to repair the highway the necessary expenses of so doing."

R. E. Moore appeared for the appellant.—The person liable to repair under the provision in the Local Government Act, 1894, is the occupier and not the owner: *Reg.* v. *Barker*, 25 Q. B. D. 213, 38 W. R. Dig. 85. If there is a liability to repair *ratione tenuræ* the obligation rests upon the occupier: *Baker* v. *Greenhill*, 3 Q. B. 148.

Dickens, Q.C. (*Boxall* with him), appeared for the respondents.—Although proceedings under the Act can only be taken against the occupier of the lands liable *ratione tenuræ*, nevertheless the owner is the person who is ultimately liable, because if the occupier is fined he is entitled to be reimbursed by the owner, who, according to the *dictum* of Lord Denman, C.J., in *Baker* v. *Greenhill*, is the person who ought to have repaired. The owner cannot escape that liability: *Reg.* v. *Bucknell*, 7 Mod. 55.

WILLS, J.—I fail to understand the argument for the respondents in this case, and I feel no doubt whatever on the question that is before us.

At the passing of the Local Government Act, 1894, and for a long time before, it was well-established law that the occupier of lands, liable *ratione tenuræ* for the repair of the highways, was the only person who was liable to fulfil that obligation, and that the owner of such lands, not being the occupier, was not so liable. For, as in the case of *Reg.* v. *Barker*, Lord Coleridge, C.J., said that this proposition had long been established "from the date of Rolle's Abridgment to the present time, the *placitum* (B. 2) which lays down the law, both in the affirmative and the negative, that you must indict the occupier and cannot indict the owner has been unquestioned" (Tit.

(*a*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Chimin. B. 2, p. 390). There no mention was made of highways repairable *ratione tenuræ*, but it has been recognized in later decisions that it was intended to apply. Therefore it is clear that this obligation attaches only to the occupier of such lands, and that the owner cannot be called upon to fulfil the obligation.

As to the question whether the occupier has a right of action to be reimbursed by the owner in respect of the sums expended by him in performing such obligation, that is a question merely between those two persons and is a matter with which the public has no concern.

It was argued on behalf of the respondents, upon the strength of the mere expression in *Baker* v. *Greenhill*, that the owner was the person who ought to have repaired, that there was a liability on the part of the owner to repair as distinguished from his liability to reimburse the occupier. All the authorities, however, have repudiated such a liability and I am quite unable to accept such a suggestion.

Sub-section 2, of section 25, appears to me merely to provide a new and less cumbersome method of getting repairs effected and paid for than that which had been hitherto available. It is impossible to suppose from the mere casual expression, "the owner who ought to have repaired," in *Baker* v. *Greenhill*, and to which I have already referred, that in face of the long chain of decisions to the contrary, it was ever intended that, when the Act speaks of "the person liable to repair," a new liability should be created and a new remedy afforded against the owner instead of the occupier. In my opinion that would be a most forced and strained construction. I think there was no intention to create a new liability but only to provide a simpler remedy against the occupier. In my opinion, therefore, these proceedings have been misconceived, and the judgment of learned judge below must be reversed and the appeal allowed.

KENNEDY, J.—I am entirely of the same opinion.

Appeal allowed.

Solicitor for the apppellant, *J. C. Buckwell*, Brighton.

Solicitor for the respondents, *C. H. Waugh*, for *E. Waugh*, Hayward's Heath.

Q. B. Div.
(Grantham and Kennedy, JJ.) April 23.

BLENKINSOP *v.* OGDEN & CO. (*a.*)

Factory—Fencing machinery—Liability of occupier—Person injured by his own negligence—Factory and Workshop Act, 1878 (41 *Vict. c.* 16), *s.* 82.

Section 82 *of the Factory and Workshop Act*, 1878, *provides:* "*If any person is killed or suffers any bodily injury in consequence of the occupier of a factory having neglected to fence any machinery required by or in pursuance of this Act to be securely fenced, . . . the occupier of such factory . . . shall be liable to a fine.*"

Held, that the fact that the death or injury is due to the negligence of the person so killed or injured does not exempt the occupier from liability.

Case stated under 20 & 21 Vict. c. 43.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The Factory and Workshop Act, 1878, s. 81, provides: "If a factory or workshop is not kept in conformity with this Act, the occupier thereof shall be liable to a fine not exceeding ten pounds." Section 82 provides as stated in the head-note, and proceeds: "The whole or any part of which may be applied for the benefit of the injured person or his family, or otherwise as a Secretary of State determines."

An information and complaint was laid against the respondents under section 82 for having neglected to fence certain dangerous parts of their machinery, in consequence of which a boy in their employment suffered bodily injury.

The machinery at the point where the accident happened was not fenced, and it was a part of the machinery which, under the terms of the Act, ought to have been fenced. But the accident was due to the boy's own negligence, in standing, for the purpose of doing his work, at a part of the machinery where he had been forbidden to stand. The magistrate before whom the information was heard, found that the accident was caused by the wilful misconduct of the boy, and dismissed the information.

Sutton, for the appellant.—The magistrate ought to have convicted the respondents under section 82, because it was proved that the boy was killed in consequence of the respondents having neglected to fence machinery which ought to have been fenced. The boy's negligence is immaterial. The object of the Legislature being to protect negligent people, it was no answer to the information to say that the machinery was safe if used by prudent people. Section 13 of the Factory and Workshop Act, 1895, extends the provisions of section 82 of the principal Act to death or bodily injury or injury to health in consequence of the occupier having neglected to observe any of the provisions of the Factory Acts—"Provided that, in the case of injury to health, the occupier shall not be liable under the section unless the injury was caused directly by such neglect." It is clear from this provision that the Legislature, in 1895, took the view now contended for.

Ruegg, Q.C. (*Foreman* with him), for the respondents.—In order to substantiate the offence under section 82 it is necessary to show that the neglect to fence the machinery was the proximate cause of the injury or death. Here the magistrate expressly found that the proximate cause was the boy's own wilful misconduct.

GRANTHAM, J.—We have no doubt that the learned magistrate was wrong, and ought to have inflicted a fine under section 82. It was argued by counsel for the respondent that the section can only refer to cases where the injury was not caused by the negligence of the person injured, as he says it was caused here. But I cannot accept his construction of the statute at all.

Assuming that some boys are playing in the road if somebody, properly or improperly, has dug a hole in that road and some of the boys tumble into the hole and are killed, what is it that causes the death? Why, the falling into the hole. Or to take another illustration, a man is out of his mind and puts his head upon the rails of a railway; his head is cut off by a passing train. What is it that kills him? Not his being out of his mind, but the wheels of the train going over his head. That is the direct cause of his death.

Therefore, where the injury results from the machinery not being fenced, although the boy may have been negligent too, yet that does not prevent the cause of the injury being the non-fencing of the machinery; and under these circumstances the per

occupying the factory ought to be fined. It is for the Home Secretary to determine what is to be done with the fine. The persons injured in these cases cannot recover anything themselves if they have been negligent, but it is in the power of the Home Secretary to make such compensation as he thinks fit. The object of the section is to fine a person where serious injury has resulted from the non-fencing of machinery.

KENNEDY, J.—I am of the same opinion. It appears to me to be clear that, it being admitted that without this absence of proper fencing this injury would not have been suffered by the boy, it would be wrong, looking at the purpose of the section and its natural language, to read "in consequence of" as if we were looking at "consequence" in an action for damages in which one person is seeking to recover money from another and fails, according to the old and well-established principle, because it is shown against him that the immediate and direct cause of the mischief was his own misconduct.

Here we are dealing with a section the object of which is to provide safe machinery in factories, and if the machinery is such that, should it not be safely fenced, bodily injury or death may ensue, it seems most reasonable that the State should say to the occupier of the factory "We must inflict a fine for your machinery being unfenced, although it may be that the person injured could not himself sue and get damages from you because he has been to some extent negligent himself." It is to the interest of the State that the machinery should be safe for negligent as well as for careful people, and the State say to the occupier, "If you do not take the precaution to make your machinery safe as you are required by the terms of the Act, you are liable to a penalty which we may use as we like and to such extent as we like by way of compensating an injured person."

So far as one may look at one section as throwing light upon the true intention of another, section 13 of the Act of 1895, to which our attention has been called, extending the provisions of this section to all breaches of duty under Factory and Workshop Acts, does, I think, to some extent, give additional force to that which I hold by itself to be sufficiently clear in the construction of this section.

I am not alarmed by the suggestion made by counsel for the respondents with regard to suicide or intentional injury. I should have thought it would have been very difficult to persuade the Secretary of State that a man who looked about for a machine to jump into in order to be killed, or put his hand into a machine in order to be injured, could be said to be a person who "is killed or suffers any bodily injury" by reason of the non-fencing of the machinery. The question, however, does not arise.

Case remitted.

Solicitor for the appellant, *Treasury Solicitor.*

Solicitor for the respondents, *B. Webb.*

C. C. R.
(Lord Russell of Killowen, C.J., and Hawkins, Wills, Kennedy, and Ridley, JJ.) April 2.

REG. v. HUMPHREY. (a.)

Criminal law—Betting—Using place for betting—Archway forming private thoroughfare—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The defendant habitually made use of an archway which formed a thoroughfare from a public street to a private yard and dwelling-houses for the purpose of betting on horse-races with persons who resorted to the archway.

Held, that the archway was a "place" within the meaning of the Betting Act, 1853, *and that the defendant was rightly convicted of an offence under that Act.*

Powell v. Kempton Park Racecourse Co., ante, *p.* 8, [1897] 2 *Q. B.* 242, *commented on.*

Case stated by the Recorder of Leeds as follows:

"John Humphrey was tried before me at the Epiphany quarter sessions for the city of Leeds on the 6th of January, 1898, upon an indictment charging him (under 16 & 17 Vict. c. 119) with having on the 3rd, 4th, 5th, 9th, and 24th of November, 1897, opened, kept, and used a certain place—to wit, an archway in Princes-street in the said city—for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to certain horse-races.

"The following facts were proved by the witnesses for the prosecution:

"(*a*) That on each of the days named in the indictment the said John Humphrey had been present in the said archway for divers periods between 12.30 and 2 p.m., and had on each of these occasions there made bets upon horse-races, receiving money, giving tickets, and making entries in a book with several persons resorting thereto on the said occasions, varying in number from thirteen to forty.

"(*b*) That when the said bets were made the said John Humphrey was standing sometimes on one side and sometimes on the other of the said archway, and that he had on the first of such occasions also made several bets in Princes-street, outside the archway.

"(*c*) That the said archway was a private thoroughfare, the property of Messrs. Gaunt & Hudson, millowners, and was the only means of access from Princes-street into a yard at the back of their said mills, containing four dwelling-houses, three stables, and five workshops, which were also their property.

"(*d*) That neither the said John Humphrey nor any other person had any right in the said archway at any time except for the purpose of passing through the same into the said yard and to the houses, stables, and workshops therein.

"(*e*) That the said archway was 29ft. 9in. long by 10ft. 11in. wide and 12ft. high.

"At the conclusion of the case for the prosecution counsel for the defence submitted that there was no evidence upon which it could properly be found that the said John Humphrey had used for the purpose of betting any place akin or equivalent to a house, office, or room, and that there was therefore no evidence of any offence within the meaning of the statute aforesaid, and that I ought to direct an acquittal.

"I declined to withdraw the case from the jury, and directed them that the evidence showed that the archway was a 'place' within the meaning of the said statute, and that if they believed that the said John Humphrey had on the days specified in the indictment used it for the purpose of betting, they ought to find him guilty.

"The jury found the said John Humphrey guilty, and I sentenced him to pay a fine of £20.

"On the application of counsel for the defence I reserved the following question of law for the consideration of the court—viz.: Whether I was right in leaving the case to the jury and in so directing them as aforesaid."

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Joseph Walton, Q.C. (*George Banks* with him), for the defendant.—This archway is not a place within the meaning of the Betting Act, 1853; it is not analogous in character to a betting-house or office: *Powell* v. *Kempton Park Racecourse Co.*, *ante* p. 8, [1897] 2 Q. B. 242, in which the Court of Appeal disapproved of *Hawke* v. *Dunn*, 45 W. R. 359, [1897] 1 Q. B. 579. Here the archway was a thoroughfare, and though it was physically capable of being used as a "place" for betting, the defendant had no exclusive right to use or occupy it as against other persons; it is therefore outside the Act: see *per* Lord Esher, M.R., [1897] 2 Q. B., at p. 257.

Asquith, Q.C., and *Felix Palmer* in support of the conviction were not called upon to argue.

LORD RUSSELL OF KILLOWEN, C.J.—The real question which we are asked to decide is whether the verdict of the jury is supported by adequate evidence. A question might have arisen as to whether the learned recorder was right in directing the jury that this archway was a place within the meaning of the Act or whether he ought not to have given the jury his views on what was a place within the Act, and then to have asked them to say whether on the evidence the archway was a place used by the defendant for the purpose of betting on the particular occasion. But no such question is before us to-day.

The main ground upon which the defendant contends that the conviction is wrong, is that it is contrary to the judgments of the Court of Appeal in *Powell* v. *Kempton Park Racecourse Co.* I express no opinion on the question whether that case is an authority which this court is bound to follow; but it is clear that the opinions expressed by the judges in that case must be treated by us with deference and respect. Here, however, the question is whether in view of that decision we ought to say that no offence has been committed by the defendant. It would be a matter for regret, and in my opinion most injurious to the public interest if it were so; but I think that that decision has no such effect.

There the charge was of betting on a racecourse, to which multitudes were in the habit of resorting for purposes of sport. There was an enclosure on the racecourse to which people might go who desired to see the races, and to be in shelter from the weather. It was capable of containing some two thousand people, and everyone who chose to pay the charge for admission had access to it. Some persons, known as bookmakers, went there for the avowed purpose of making bets; others went there who were not bookmakers, but who nevertheless wished to make bets on certain horses—to back their fancy, as it is called; others again went there merely for the purpose of watching the races. No particular part of the enclosure was appropriated or specially used for the purpose of betting. These facts are very different from those found in the present case. I do not wish to express any unnecessary opinion upon *Powell* v. *Kempton Park Racecourse Co.*; but when one considers the number of enclosed racecourses in this country, that case (if it be good law) certainly makes it difficult to say that betting on any part of such enclosed racecourse would not constitute an offence within the meaning of the Act. But in the present case the place in question is a gateway open at one end to the street, and leading at the other end to a courtyard. The defendant habitually resorted there, and offered himself to persons desirous of betting with him—holding the bank, as it were, against all comers. This is betting of the worst possible description, into which no consideration of sport enters at all. The betting takes place away from any racecourse, and without any palliating circumstances. It was admitted that structurally this archway was capable of being a "place" within the Act, and it is plain from the cases that this is so. Thus the only question is whether the defendant used it for the purpose of betting with persons resorting thereto. Unquestionably he did; he was there for no other purpose. I am therefore of opinion that he has committed an offence against the Act, and that the conviction must be affirmed.

I desire to add that it seems to me to be a serious public evil that the ambiguity which surrounds this subject should exist. It is impossible to reconcile the various decisions, and the results of judicial disagreements and the consequent ambiguity are most deplorable. In my opinion there is urgent need for legislation on the subject—legislation which ought, perhaps, to be preceded by a commission of enquiry.

HAWKINS, J.—I entirely agree as to the decision of this case. It is in accordance with the considered judgment in *Hawke* v. *Dunn*, which affirmed the opinion expressed by myself in *Reg.* v. *Preedy*, 17 Cox 433. I absolutely adhere to the judgments I delivered in those cases. The decision of the Court of Appeal in *Powell* v. *Kempton Park Racecourse Co.* must be treated with the greatest deference; but I must say that that decision was given under very peculiar circumstances, and that I do not wish to be understood as expressing approval of it. I agree with my lord as to the pressing necessity for legislation on the subject.

WILLS, J.—I am of the same opinion. It appears to me that the result of the decision in *Powell* v. *Kempton Park Racecourse Co.* is that the test whether an offence has been committed depends on several circumstances: the spot in question must be capable of being described as a "place," and it must be used for the purpose of betting. In that broad view I agree, and I think that in the present case we have exactly those circumstances. The archway is clearly within the description of a "place" given by Lord Esher, M.R., in the case referred to, and its user by the defendant is clearly within the mischief of the Act.

The decision in *Powell* v. *Kempton Park Racecourse Co.* is undoubtedly entitled to be treated with the greatest respect, if indeed it is not actually binding on us, but I regret the manner in which it was brought before the Court of Appeal. It was brought by agreement between the parties to get rid of the decision in *Hawke* v. *Dunn*, and it was practically a collusive action. The parties agreed on a statement of facts as to the antiquity of the kind of betting involved in that case and in *Hawke* v. *Dunn*. That statement may be true, but there is no means of testing it. It was unquestionably calculated to influence the construction to be put by the court on the statute, and it was unfortunately accepted, and in some measure relied upon in the Court of Appeal. In so far as that collusive statement influenced the decision, the value of the judgment must be impaired.

KENNEDY, J.—I agree that this conviction must be affirmed; the facts are practically undistinguishable from those in *Liddell* v. *Lofthouse*, 44 W. R. 349, [1896] 1 Q. B. 295, a decision of Lindley and Kay, L.JJ., sitting as a Divisional Court, which was approved in *Powell* v. *Kempton Park Racecourse Co.* In so deciding I do not think that we are differing from the decision of the Court of Appeal in the latter case.

RIDLEY, J.—I entirely agree in the judgment of my lord.

Conviction affirmed.

Solicitor for the defendant, *H. A. Child*, Leeds.

Solicitor for the prosecution, *W. Ward*, Leeds.

House of Lords.

From C. A. (England). March 18.

SOUTH AFRICAN TERRITORIES v. WALLINGTON. (a.)

Company — Debentures — Payment by instalments — Specific performance of agreement — Agreement to lend money — Damages.

Specific performance of a contract to lend money will not be granted, and this is equally so where the agreement on the one side is to lend money for a term of years, and on the other to give the lender certain specified security for his loan.

Decision of the Court of Appeal (45 *W. R.* 467, [1897] 1 *Q. B.* 692) *affirmed.*

This was an appeal by the plaintiff company from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Chitty, L.JJ.), 45 W. R. 467, [1897] 1 Q. B. 692, which reversed an order of Wright, J.

The facts are given at length in Lord Herschell's judgment.

Sir R. T. Reid, Q.C., and *C. Herbert-Smith* (*H. D. Woodcock* with them), for the appellants.

Bray, Q.C., and *Gore Browne*, for respondent.

March 18.—Lord HALSBURY, L.C.—The forms which have been contrived for the business of joint-stock companies, and which, when applied to their proper purposes, are convenient, are nevertheless somewhat calculated to mislead when their mere language is regarded. The applicant for debentures on the face of the instrument contracts to pay something, but the real nature of the whole transaction is an agreement by the applicant to lend money at certain interest, and the action in this case was in truth mainly, if not altogether, directed to compel the intending lender to perform his contract to lend, which undoubtedly he had refused and neglected to do.

With respect to the claim for specific performance, a long and uniform course of decision has prevented the application of any such remedy, and I do not understand that any court or any member of any court has entertained a doubt but that the refusal of the learned judge below to grant a decree for specific performance was perfectly right. But, of course, in this, like any other contract, one party to the contract has a right to complain that the other party has broken it; and if he establishes that proposition he is entitled to such damages as are appropriate to the nature of the contract.

In this case, as I have said, the contract was to lend money. Referring to the question of damages, the amount of interest to be paid for the loan, and the fact that £80 was under the contract itself forfeited to the company for the non-performance of the contract in its entirety, render it difficult to see what substantial damages could have been recovered, and I regret that under the circumstances it should have been thought advisable to appeal to your lordships in a case which, upon a review of the facts, does not appear in any view of it to have been worth the expense necessarily involved in such an appeal. Your lordships were informed that the action took seven minutes to try, with the result that it has now gone to two courts of appeal, and, but for what I am about to say, might have resulted in a new trial. Upon a careful review, however, of the facts, I have come to the conclusion that it would be impossible to suggest any serious damages in this case, and the tacit admission of the parties, by their declining to consider the question of a new trial upon payment of costs, renders it unnecessary for me to do more than to say that in this case justice has been done by the Court of Appeal reversing the decision of the learned judge below.

I think it right, however, to add that if any serious right were involved, or if it was reasonably possible that injustice had been done, I should have felt myself at liberty to give my opinion in favour of a new trial.

I agree that in this case the parties had in a great measure themselves to blame, but I think the blame was not entirely theirs, and where a miscarriage has taken place by errors in procedure, I think the proper remedy is to make the party in default pay for his error in the shape of costs, and not to deprive him of important rights, if any such exist. Of course, where error in procedure leads to altering the position of the other litigant party, it may well be that mere payment of costs will not do justice, and in such cases the party in default must suffer. But, speaking generally, a blunder in procedure, if it can be set right, and if important rights are involved, receives its most appropriate penalty in being made the subject of an order for costs.

I think, therefore, in this case that the appeal ought to be dismissed, and dismissed with costs; and I move your lordships accordingly.

Lord WATSON.—The appellant company, in September, 1895, invited tenders for a loan of £75,000, to be secured by the issue of first mortgage debentures for £50, and bearing interest at 6 per cent. repayable with a bonus of £5 10s. upon each debenture on the 30th of September, 1900. The whole floating assets of the company were to be conveyed to trustees for behoof and for security of the bondholders. Ten per cent. of his advance to the company was to be paid by the subscriber upon application for an allotment and the balance in four subsequent instalments.

The respondent applied for an allotment of sixteen debentures, representing an advance of £800, and with his application remitted the sum of £80. His offer was duly accepted and the remittance retained by the company. The respondent having declined to make any further advance, the present action was brought against him by the company for payment of a capital sum which they claimed (1) as in specific performance of his obligation, (2) as the balance of the price which he had undertaken to pay for the debentures, and (3) as damages which they had sustained by his breach of contract

The only engagement made by the respondent with the company consisted in a promise to advance money to them in loan; and it is settled in the law of England that such a promise cannot sustain a suit for specific performance. It is equally clear, in my opinion, that the obligation of the company to issue mortgage bonds against the loan did not in any way alter or affect the character of the transaction or give the company any right to sue as for the price of an article sold by them which they were ready to deliver. The only remedy open to the company was by action against the respondent for any loss or damage which they might sustain through his breach of promise.

The case was tried before Wright, J., who gave the company a decree as for the price of the debentures which the respondent had agreed to take up. I cannot say that the trial was satisfactory. The proceedings were chiefly occupied by a discussion between the learned judge and the respondent's counsel, in the course of which the former indicated the terms of the

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

order which he meant to pronounce. No evidence of damage was tendered by the appellant company.

An appeal was taken by the respondent, upon a notice of motion that the decree of Wright, J., should be reversed or varied, and that judgment should be entered for him or a new trial allowed. At the hearing of the appeal, counsel for the company urged the first and second of the claims made by them and did not refer to their claim of damages. After the judgment of the Appeal Court was delivered reversing the order appealed from and entering judgment for the respondent, counsel, in the absence of the head of the court, moved two Lords Justices to remit the case for trial of the question of damages. Their lordships declined to entertain the application.

On the hearing of this appeal, counsel for the company again pressed upon your lordships the desperate arguments which they had addressed to the Court of Appeal, and moved your lordships to send back the case in order that the company might have an opportunity of proving damage. I do not doubt that it is within the discretion of the House to grant or refuse that motion, but I am very clearly of opinion that, in the circumstances of this case, that discretion ought not to be exercised in favour of the appellants, and that the order appealed from ought to be affirmed with costs.

Lord HERSCHELL.—This action was brought by the appellant company to obtain specific performance by the defendant of a contract to take certain mortgage debentures, or in the alternative to obtain payment of the balance of the price of the debentures or damages.

The appellant company issued a prospectus offering to the public an issue of £75,000 6 per cent. first mortgage debentures of £50 each repayable on the 31st of December, 1900. It was stated that the allottees of this issue would have the right to exchange them at par for an equal amount of shares at any time within two years after the 31st of December, 1896. The debentures were to be payable —10 per cent. on application; 15 per cent. on allotment; 25 per cent. two months after allotment; 25 per cent. four months after allotment; and 25 per cent. six months after allotment.

The defendant in September, 1895, applied for the allotment to him of sixteen of the debentures, and agreed to take such debentures, or any less number that might be allotted to him, on the terms of the prospectus. The appellant company accordingly on the 15th of October, 1895, allotted to the defendant sixteen debentures in the company, and the defendant paid the sum of £80, being the 10 per cent. required by the contract. In his letter of application the defendant in terms agreed to pay the further instalments due thereon, in accordance with the terms of the prospectus.

The defendant having refused to make any further payments the present action was brought on 6th of March, 1896, when all the instalments except the last, had become due.

The action came on for trial before Wright, J., and the learned judge held that the claim for specific performance could not be sustained, but gave judgment for the plaintiffs on the ground that a debt had been created by the defendant's promise to pay contained in his letter of application. Judgment was accordingly entered for the plaintiffs for £520 and costs. From this judgment the defendant appealed, giving notice that he should move that the judgment be reversed, and that in lieu thereof judgment should be entered for the defendant, or a new trial had. The Court of Appeal reversed the judgment of the court below, and ordered that judgment should be entered for the defendant with the costs of the appeal and the costs of the action incurred subsequent to the date of the payment into court by the defendant of the sum of 5s.

I do not think it is open to any doubt that a person with whom a contract to lend money has been entered into cannot obtain specific performance of that contract. All the learned judges who have considered this case have been of that opinion, and none of the authorities cited afford any real support to the contrary view.

But for the fact that Wright, J., arrived at another conclusion, I should have though it equally clear that the sums of money constituting the instalments which the defendant agreed to pay did not constitute a debt. It was argued that the defendant had agreed to purchase certain debentures of the company, and that the moneys sought to be recovered were the price of the debentures so agreed to be purchased. I think this is a fallacy. The transaction was not in its nature a contract of purchase, it was an agreement on the one side to lend money for a term of years, and on the other side to give the lender the specified security for his loan. I am at a loss to see how an agreement of this description can create a debt from the lender to the borrower.

So far the case is free from any difficulty, but the alternative claim of damages for breach of the contract remains to be considered. At the trial no evidence was given to show that the plaintiffs had, in fact, sustained any damage by the breach of contract, and that the 5s. paid into court over and above the £80 paid on application was not sufficient to compensate the plaintiffs for any damage they had sustained. By the terms of the prospectus the failure to pay the subsequent instalments rendered the £80 payable on application liable to forfeiture. Wright, J., in the course of a discussion initiated by the learned judge during the opening address of the plaintiffs' counsel, said: "In order that an end may be made of the matter, if I am wrong on one point and right on the other, can you suggest that the damages, if it is damages, should be less than the amount which he agreed to pay?" In answer to this the learned counsel for the defendant pointed out that though the plaintiffs were deprived of the use of the money for four years, they would have had, according to the prospectus, to pay about 8 per cent. for its use, and that they had got the £80 deposit. The learned counsel for the plaintiffs made no observation upon this, and the learned judge then gave judgment.

I think that in strictness the counsel of the plaintiffs should have called attention to the fact that he was prepared to tender evidence in proof of actual damage sustained by the plaintiffs, if he wished to reserve the benefit of it supposing the learned judge were wrong in his view as to the measure of damages. I can quite understand that he was embarrassed by the course taken by the learned judge in bringing the trial at so early a stage to a summary conclusion. I think it is to be regretted that, no doubt with a view to save the public time, the learned judge interposed at so early a period and did not let the trial take its natural course. At the same time, where a learned judge has intimated, as Wright, J., did, a desire that an end might be made of the matter, in case he should be wrong, I think the proper course is, if counsel has any evidence which in that view might be material, to mention the matter to the judge. Nevertheless, the learned counsel for the plaintiffs had, in the Court of Appeal, called the attention of that court to the fact that, supposing the learned judge in the court below to be wrong, the amount of damages to which they were entitled had been left undetermined,

think, considering the course which the case took at the trial, the Court of Appeal might quite properly have granted a new trial if they thought a substantial point had been left untried. Their attention, however, it is admitted, was never called to the fact that the plaintiffs were prepared to offer evidence as to the amount of damage sustained, and it was not urged on their behalf that if the judgment in their favour was not allowed to stand, judgment should not be entered for the defendant, but only a new trial be ordered. It was indeed stated at the bar that the learned counsel for the plaintiffs had expressly abandoned any such point, but I do not insist on this. On the materials before them I do not see how the Court of Appeal could have given any other judgment than the one they gave. How could they order a new trial when it was not brought to their notice that there was anything to try, or that there was any further evidence forthcoming?

After judgment had been delivered, the learned counsel for the plaintiffs for the first time asked that the order should be for a new trial, and stated that they wished to give evidence as to damages. I do not doubt that the court might even then, on such terms, if any, as they thought fit, have made an order for a new trial instead of entering judgment for the defendant. But in my opinion a party is not entitled to wait until judgment has been delivered against him, and then for the first time raise such a point.

If he has obtained judgment in the court below, and the opposite party moves to substitute a judgment in his favour, the respondent, if he intends to maintain that even though he cannot maintain his judgment, the other party is at most entitled to something less than a judgment in his favour, ought, I think, to make the point in the course of his argument. I cannot see that his contention that the court below rightly decided would be in the slighest degree weakened by his contending, as an alternative, that the appellant was entitled at the most to something less than the full relief he claimed.

I have thought it right to say so much because I am unwilling to afford any countenance to the view that a party is entitled to wait until judgment has been delivered before presenting such a contention. It would tend to lax procedure, and frequently to great inconvenience.

For the reasons I have expressed I do not think the plaintiffs are entitled, as of right, to demand that your lordships should vary the order of the court below, and grant a new trial. At the same time, I do not doubt the power of this House to make such an order on suitable terms, where, in its opinion, the ends of justice so require. The learned counsel who appeared for the plaintiffs at the bar, stated, in answer to a question put to them, that they did not desire a new trial if it were to be granted only on payment of costs. I do not feel it necessary therefore to inquire whether the course which the case took at the trial would have rendered this a proper order in the present case.

It may be well that I should add that I do not believe the plaintiffs suffer any prejudice by not obtaining a new trial. In view of the nature of the contract broken, and the measure of damages applicable to it, I am satisfied that they could not have established a right to anything beyond what they have already received.

Lord MACNAGHTEN, after stating the facts: The appellants claimed by their writ (1) specific performance, (2) payment of the remaining instalments described in the writ as "the price of the debentures," or (3) damages. The first two claims have been rejected by the Court of Appeal. The third has not been considered as yet.

It is quite plain that the contract made by the offer of these debentures, and the acceptance of that offer, is nothing more or less than a contract to borrow and a contract to lend so much money payable by instalments. The essential character of the transaction is not altered either by the circumstance that the creditor in a certain event is to have the option of exchanging his position for that of a shareholder or by the complicated nature of the arrangements made for the lender's security.

That specific performance of a contract to lend money cannot be enforced is well established, and is obviously so wholesome a rule, that it would be idle to say a word about it.

As regards the second head of claim it is enough to observe that there is no contract at all to pay except as incidental to the contract of loan. The term "price" applied to such a transaction as this is quite out of place. To order payment, as a debt or by way of damages or otherwise of an amount equal to the sum of the remaining instalments, is to enforce the agreement against one of the parties to the contract and to set the other free—free from any obligation to pay interest, and free, too, from any obligation to repay the principal. That would be a very one-sided sort of specific performance, contrary to all precedent, and in the result plainly unfair.

So far there is no difficulty and there can be no room for doubt. But the learned counsel for the appellants raised a point in connection with the third head of claim which requires rather more consideration. That claim, as they said, and said truly, had not been dealt with at all. It was not disputed that the contract has been broken. There was therefore, *primâ facie*, a case for damages. That there were no materials before the court for assessing the amount of compensation was not, they said, wholly their fault, and so they asked this House, under the circumstances, to allow a new trial on that one point.

If I thought there had been any miscarriage of justice—if I thought that, owing to some accident or to anything but the neglect or the prudence of the appellants themselves, they had been shut out from the trial of a question which they seriously desired to try, I should for my part have thought that the indulgence ought to be granted assuming that it could be granted on terms not unfair to the other side. But I think there is no substance in this claim; and I much doubt whether the appellants ever really meant to put it forward, except as a sort of cover in case of disaster, or as a justification or excuse for embarking on litigation of an experimental character.

Thinking, as I do, that there is nothing substantial in the claim for damages, and that the appellants, if they keep the deposit, will be more than compensated for any loss which they could possibly prove, and thinking too, that this claim for damages may have been advisedly not pressed before the Court of Appeal, and seeing that it was not put forward until after judgment was given, I am of opinion that the application for a new trial ought to be rejected. To admit such a claim would, I think, be a very dangerous precedent.

I think the appeal should be dismissed altogether, and with costs.

Lord MORRIS, after stating the facts, continued: I cannot add anything to the reasons given in the judgments in the Appeal Court and by your lordships as to why the company cannot recover either by way of specific performance or by the payment of the balance of the price of the debentures. I am equally clear that the company

was entitled to recover on the third head of claim for damages to such amount as they gave evidence in support of. The defendant had clearly broken his contract contained in his letter of application, and necessarily was bound to indemnify the company in respect of such damage. The real question between the parties was never tried, because the learned judge at the trial summarily ruled that the company was entitled to recover £520, the balance of the price of the debentures, and gave judgment accordingly. What damage, if any, the company really sustained has never been investigated.

The respondent by his notice of appeal sought either that judgment should be entered for him or for a new trial. In the judgments of the Lords Justices in the Court of Appeal there is no trace of any argument having been urged as to a right to recover some damages; but after judgment had been pronounced, counsel for the company applied to the Court of Appeal that the order should be for a new trial as the plaintiff had witnesses at the trial to prove damages. In my opinion that should have been the order made, but on the terms of the plaintiff paying the costs of the first trial, as the plaintiff had accepted the ruling of the learned judge on the second ground of action for the price of the debentures, leaving the third claim for damages untried; and, in my opinion, that is the order your lordships should now make, but that the plaintiff's counsel stated they could not take an order for a new trial on the terms of paying such costs.

I therefore concur in the judgment that the appeal should be dismissed with costs.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Francis Voules & Co.*

Solicitors for the respondents, *Ranger, Burton, & Frost.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Collins, L.JJ.) — May 7.

MARKS v. FROGLEY AND OTHERS. (a.)

Army—Volunteer—"Persons subject to military law"—"Being trained or exercised with" regular forces—Breaking up of camp—Subsequent detention—"Military custody"—Army Act, 1881 (44 & 45 *Vict. c.* 58), *ss.* 43, 45, 158, 176, *sub-section* 8 (a).

The plaintiff, a member of a volunteer corps, was, with other members of the corps, in military training with a portion of the regular forces at a camp under a War Office order, which provided for the formation of a volunteer brigade at the camp from the 1st to the 8th of August. Upon the morning of the 8th of August, while the corps was still in camp, the plaintiff was, by order of the adjutant, placed under arrest on a charge of larceny in the camp, and taken to the railway station, where a special military train was waiting to convey the corps to their home destination, and he was then given into the custody of the defendants, three members of the volunteer corps, who, acting under orders, upon the arrival of the train at the home destination, took the plaintiff to the police-station and handed him over to the police. The defendants were then formally dismissed. The plaintiff was subsequently tried at quarter sessions and acquitted. In an action against the defendants for assault and false imprisonment.

Held, that the training or exercise of the volunteer corps with the regular forces, within section 176, *sub-section* 8 (a), *of the Army Act,* 1881, *did not cease, as regards the plaintiff and the three defendants, until they were dismissed after the plaintiff had been handed over to the police, and that until that time they were subject to military law; and that, therefore, the defendants were not liable to the action.*

Held, also, that the defendants could justify taking and keeping the plaintiff in military custody under section 158 *of the Army Act,* 1881, *as that section applied to an offence alleged to have been committed by a person subject to military law.*

Held, further, that, under section 43 *of the Army Act,* 1881, *the plaintiff's only mode of redress was by complaint to his superior officer as therein provided, and that no action would lie.*

Application for judgment or a new trial in an action tried before Kennedy, J., and a special jury. The learned judge upon further consideration gave judgment for the plaintiff as against three of the defendants: reported *ante*, p. 249, [1898] 1 Q. B. 396.

The facts and arguments are fully stated in the judgment of A. L. Smith, L.J.

J. Lawson Walton, Q.C., and *R. D. Muir*, for the defendants.

A. J. Tassell, for the plaintiff.

Cur. adv. vult.

May 7.—A. L. SMITH, L.J., read the following judgment: This is an action for false imprisonment brought by the plaintiff, who was a private in the Bedfordshire Regiment of Volunteers, against three of his comrades in the same regiment (a lance-corporal and two privates), and also against a police superintendent of the Herts County Constabulary. The superintendent has succeeded in the action, for he showed to the satisfaction of the jury that he had reasonable cause for suspecting that a felony had been committed by the plaintiff; but as the other three defendants were unable to show that a felony had in fact been committed—for the plaintiff had been acquitted at quarter sessions—it was held by the learned judge who tried this case that, as the three defendants were mere civilians when they did what is complained of, they were consequently undefended, and they have had damages assessed against them by the jury to the amount of £300. The three defendants, with the aid of the War Office, appeal, and the questions are whether they have a good defence to this action upon the ground that they were not civilians but were soldiers under military law when they did the act which is charged against them, and if not, whether the damages are so excessive that a new trial should be ordered as regards them. The material facts are these: Upon Saturday, the 8th of August, 1896, the plaintiff and the three defendants were quartered with their regiment, the 2nd Bedfordshire Volunteers, in camp at Shorncliffe, training and exercising there with a portion of her Majesty's regular forces. The volunteer regiment had gone into camp on the previous Saturday under an order of the War Office dated the 22nd of April, 1896, "for the formation of the Home Counties Volunteer Brigade at Shorncliffe, August 1 to August 8, 1896." It will be noticed that by the order this camp, as it has been called, began on Saturday, the 1st, and ended on Saturday, the 8th of August, 1896. Upon the morning of Saturday, the 8th of August, 1896, whilst the regiment was still in camp, the plaintiff was accused by some of his comrades of having stolen certain

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

articles belonging to them. Captain Foote, of the Royal Inniskillings, who was adjutant of the regiment and in charge of the volunteer battalion, was called up to the tent where the felony was supposed to have been committed, and, having investigated the matter, ordered the plaintiff under arrest and into the custody of one of the volunteers present, to be taken to the Shorncliffe Railway Station with the baggage guard of the regiment; and he ordered that the plaintiff should be taken under escort and arrest in the special military train which on that day was about to take the regiment to Boxmoor Station; and he also ordered that upon arrival there the plaintiff should be taken under arrest and handed over to the police authority at Hemel Hempstead, which is about two miles from the Boxmoor Station and is the plaintiff's home. Under the order of Captain Foote the plaintiff was placed under arrest and into the custody of one of the volunteers of the regiment, and was so taken to the Shorncliffe Station with the baggage guard of the regiment, the plaintiff as well as the volunteer who had him under arrest being in uniform and under arms. Shortly after the plaintiff reached the Shorncliffe Station the regiment under arms and under command arrived there with the three defendants in the ranks. They were then told off and ordered by their superior officer, pursuant to the order of Captain Foote, to escort the plaintiff under arrest in the special military train about to start for Boxmoor, and upon arrival there to take him under arrest to Hemel Hempstead and hand him over to the police authorities there. This order the three defendants obeyed, both they and the plaintiff being all the time in uniform and under arms. The regiment, which had formed up in marching order in camp at Shorncliffe, was not dismissed until after its arrival at the Boxmoor Station, and the three defendants were not dismissed until the orders of Captain Foote had been carried out and the plaintiff handed over to the police authority at Hemel Hempstead, to which place they had marched the plaintiff from Boxmoor Station in uniform and under arms by a side road from the station.

The learned judge, against whose judgment, as also against the verdict of the jury as to damages, the three defendants appeal, has entered judgment for the plaintiff for £300, having first amended the statement of claim, which claimed £200, by altering the claim into one for £300, the result being that these three defendants, who are working-men and of the same rank of life as the plaintiff (he being a working tailor and the others journeyman painters and a carpenter), have been mulcted in the sum of £300 for simply obeying the orders of their superior officer. If they had disobeyed those orders they would, I apprehend, have found themselves in a perilous position by reason of section 21 of the Volunteer Act, 1863, and of section 20 of the Army Act, 1881.

I now proceed to inquire whether the law is such as to sanction a judgment for false imprisonment at all, no matter for what damages, against the three defendants in the above circumstances. There can be no possible doubt that upon the morning of the 8th of August, 1896, Captain Foote, in the camp at Shorncliffe, gave a lawful order concerning "a soldier" engaged in military service for a military offence. The offence for which the plaintiff was placed under arrest was cognizable by either military or civil authority. That the plaintiff when the order was given was a soldier subject to military law is beyond dispute. Section 176 of the Army Act, 1881, and article 374 of the Regulations for the Volunteer Forces are conclusive as to this. But it is argued for the plaintiff that, although this might be so, the order to the three defendants given at the Shorncliffe Station by their superior officer pursuant to the order of Captain Foote to escort the plaintiff under arrest with his regiment from Shorncliffe Station to Hemel Hempstead was illegal, because the plaintiff and the three defendants had then ceased to be subject to military law and had become civilians, which, it is said, they became immediately they left the camp, and that, therefore, the three defendants could only justify the imprisoning —that is, escorting the plaintiff under arrest pursuant to orders from Shorncliffe Station to Hemel Hempstead—by proving that a felony had in fact been committed, and that they had reasonable cause for suspecting that the plaintiff had been guilty of it, and this fact the three defendants had failed to establish. Now, first of all, did these four men—that is, the plaintiff and the three defendants—become civilians either when they left the camp in the circumstances in which they left it or when they left the Shorncliffe Station with the regiment, all being in uniform under arms, and under command in the military train? It has been held by the learned judge that upon the true construction of the statutes they became civilians when they left the Shorncliffe camp, and it is argued that, as Captain Foote had only a jurisdiction limited to such time as military law existed, the three defendants cannot justify under an order which, though good so far as the primary arrest was concerned, was bad so far as it ordered the keeping of the plaintiff under arrest, for, as to this, it was in excess of jurisdiction. In my opinion the War Office order of the 22nd of April, 1896, above referred to, covered and included the whole of Saturday, the 8th of August, 1896. It was argued that it did not. Inasmuch as it must be conceded that the order covered some part of the day, What part of it did it cover if it did not cover the whole day? No answer was given to this. In my opinion the order covered and included the whole of Saturday, the 8th of August, in the same way as it covered the whole of Saturday, the 1st of August, 1896. So soon as the Bedfordshire volunteers fell in under arms and under command on that day as a regiment to proceed to the camp at Shorncliffe to take part in military training there with regulars, in my opinion from that time they became subject to military law, and remained so subject until they were dismissed upon Saturday, the 8th of August, 1896. I can find in the War Office order no fraction or part of a day as distinct from the whole day as being only covered by the order, but, on the contrary, I find that, by section 573 of the Regulations for the Volunteer Force, an additional allowance of 4s. per day is granted to a volunteer private to cover time occupied in joining and quitting camp, which points to the day being entire. If the Bedfordshire regiment of volunteers had remained in camp at Shorncliffe the whole of the 8th, during the whole of that day it would have formed part of the Home Counties Volunteer Brigade at training and exercise with regulars, even though during that day the regular forces might have been leaving the camp, and the camp itself was being dismantled. If all the regulars had left the camp on the morning of the 8th, leaving the Bedfordshire Regiment still in camp, can it be said that the regiment did not continue under military law whilst it remained in camp? I heard no suggestion in argument that the regiment became a regiment of civilians whilst in camp; then what becomes of the argument of the learned counsel for the plaintiff that the regiment became a regiment of civilians, though under arms and under command, the moment it became a unit by itself. If the regiment had been dismissed in camp and each volunteer had had to find his own way to his home as best he could, this would have been another matter, but is not the present case. By section 176, sub-section

8 (a), of the Army Act, 1881, it is enacted that "persons subject to military law as soldiers" are "all non-commissioned officers and men belonging to the volunteer forces of the United Kingdom when they are being trained or exercised with any portion of the regular forces," and by article 374 of the Regulations for the Volunteer Force it is provided that "volunteers become subject to military law when they join a camp with regular forces or are assembled for training or exercise with any portion of the regular forces." The question arises, When did this volunteer regiment begin to and cease to be trained or exercised with a portion of the regular forces? In my judgment each member of this regiment became subject to military law when he fell in and formed up at Boxmoor with his comrades as a regiment under arms and under command upon Saturday, the 1st of August, 1896, in order to train and exercise with regular forces at Shorncliffe, and that the subjection did not cease so long as it continued to be a regiment under arms and under command—that is, until it, and its component parts were dismissed from being any longer under arms upon the 8th of August. In my judgment the training or exercise of a regiment under arms and command to carry out efficiently what is called "entraining" and "detraining" is a military exercise, and constitutes part and parcel of the forming as well as the unforming of a camp, and is as much a military training or exercise as the formation of a regiment into square or of a company in fours, or the bringing about of any other military manœuvre. I cannot agree with the learned judge that the plaintiff and the three defendants became mere civilians upon leaving Shorncliffe Station as a regiment under arms in the special military train, but I should add that it does not appear that the War Office order of the 22nd of April, 1896, was called to his attention as it has been to our's in this court.

But there is another section of the Army Act, 1881, which, in my judgment, is fatal to the plaintiff's case. It is section 158. By it it is enacted in sub-section 1 that "where an offence under this Act has been committed by any person while subject to military law such person may be taken into and kept in military custody and tried and punished for such offence, although he or the corps or battalion to which he belongs has ceased to be subject to military law, in like manner as he might have been taken into and kept in military custody, tried, or punished if he or such corps or battalion had continued so subject." This section, to my mind, obviously means where an offence is alleged to have been committed, and indeed the learned counsel for the plaintiff had to admit that it would be absurd to construe the section in any other way, for otherwise the jurisdiction under it to try could only arise if, after trial, the prisoner be convicted, which, with all respect to the draftsman of the section, is ridiculous. It is clear that the plaintiff whilst subject to military law was taken into and placed in custody for an offence under the Act.

But it is said that this only applies to and justifies the keeping in military custody, and not the keeping in civilian custody, which the defendants are charged with having done in the present case after leaving Shorncliffe Station. I have already said what I have to say about the continuance of military law in this case. But it is argued that military custody means the custody of a regular soldier only, which custody is defined by section 45, sub-section 2, of the Army Act, 1881, thus: "Military custody means, according to the usages of the service, the putting the offender under arrest or the putting him into confinement"; and by article 29 of the Queen's Regulations, "military custody in the case of a private soldier means confinement under charge of a guard, picket, patrol, or sentry, or of a provost marshal"; and it is said that military custody therefore means the custody by a regular soldier. In considering what is military custody when dealing with a volunteer, section 21 of the Volunteer Act must be looked to as well as the Army Act, 1881. This section, in addition to empowering the commanding officer of a volunteer corps to discharge from the corps any volunteer for disobedience of orders while doing any military duty with his corps, enacts that "if any volunteer while under arms or on march or duty with the corps . . . or while wearing the clothing or accoutrements of such corps . . . and going to or returning from any place of exercise or assembly of such corps . . . disobeys any lawful order of any officer . . . or is guilty of misconduct, the officer then in command . . . may order the offender, if an officer, into arrest, and if not an officer, into the custody of any volunteer belonging to the corps . . . but so that the offender be not kept in such arrest or custody longer than during the time" prescribed by the section. Now, is this civil or military custody? There can be but one answer. It is not civil; it is therefore military. I can see no sense or reason for holding that the custody in which the plaintiff was from Shorncliffe Camp to Hemel Hempstead police-station was not military custody, which in my judgment it was, and consequently section 158 of the Army Act, 1881, also avails the three defendants.

There is also another ground upon which it appears to me, if it were necessary to resort to it, that this case ought to be decided adversely to the plaintiff, and it is this. By section 43 of the Army Act, 1881, it is enacted under the heading of "Redress of Wrongs" as follows: "If any soldier thinks himself wronged in any matter . . . by any soldier he may complain thereof to his captain, and if he thinks himself wronged by his captain, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to his commanding officer, and if he thinks himself wronged by his commanding officer, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to the general or other officer commanding the district or station where the soldier is serving; and every officer to whom a complaint is made in pursuance of this section shall cause such complaint to be inquired into, and shall, if on inquiry he is satisfied of the justice of the complaint so made, take such steps as may be necessary for giving full redress to the complainant in respect of the matter complained of." For the reasons above given, in my opinion, the plaintiff and the three defendants were soldiers under military law between Shorncliffe Camp and Hemel Hempstead, and this section therefore applies to the plaintiff. I find in the judgment of Lush, J., in *Dawkins* v. *Lord Paulet*, 18 W. R. 336, p. 343, L. R. 5 Q. B. 94, p. 121, some remarks in connection with the Articles of War, of which this section is the equivalent, which appear to me to be such sound sense and good law that I will repeat them. He says: "Can it be reasonably inferred that any other mode or measure of redress was intended by the Act than that which is specified in this article? It is no argument to say that the remedy is imperfect because no pecuniary compensation is given to the injured party. That defect, if it be one, is a defect in the code itself which we cannot remedy. The plaintiff has no reason to complain, for he has all which the law military, to which he engaged to submit when he entered the service, entitles him to have. The same code creates

both the right and the remedy, and this court cannot add to the one or to the other." This statement of Lush, J., applies to the present plaintiff, and if there were no other ground adverse to him I think it suffices to put an end to this unseemly action against the three defendants, and I entirely agree with what that learned judge said. I need not refer to passages which may also be found in the judgment of Willes, J., in the case of *Keighly* v. *Bell*, 4 F. & F. 763, and in *Dawkins* v. *Lord Rokeby*, 4 *Ibid.* 806, showing that the civil courts cannot be invoked to redress grievances arising between persons both subject to military law. For the reasons I have given I think that the plaintiff's action fails.

In regard to the damages being excessive, I need say nothing except that in my judgment as against these three defendants they were so excessive that I think a new trial should have been ordered upon this ground, if it were necessary to have done so. I do not doubt that the jury have heaped upon the shoulders of the three defendants damages which Frogley, the police superintendent, might possibly have had to bear, and for which the three defendants were not liable, had Frogley not succeeded, as he did, under his plea of justification. But what I might have to say as to this, in the view I take of this case, is now immaterial.

For these reasons above, in my opinion, the appeal should be allowed and judgment entered for the three defendants with costs here and below.

CHITTY, L.J., read the following judgment: The original arrest of the plaintiff within the actual boundaries of the camp at Shorncliffe by order of the adjutant then acting in command of the volunteer battalion in which the plaintiff was then serving as a private was unquestionably valid and justifiable in law. This proposition was not and could not be denied by the plaintiff's counsel. In the language of section 176 of the Army Act, 1881, the plaintiff was then "subject to military law as a soldier." His battalion was then being trained or exercised with a portion of the regular forces of the Crown, and was attached to or otherwise acting as part of or with such regular forces. The man into whose charge he was committed when first placed under arrest was a member of his corps and was himself also subject to military law as a soldier. The offence with which the plaintiff was charged was a military offence as well also as a crime for which he might have been indicted under the ordinary law. All that was done subsequently, down the marching of the plaintiff under escort to the police-station at Hemel Hempstead was done in execution of the order given by the adjutant in the camp. The plaintiffs' three comrades, members of the same corps, against whom the judgment under appeal was given, were acting throughout in obedience to the original order transmitted to them at Shorncliffe Station in the usual military manner through subordinate officers who were their superiors and whom they were bound to obey.

The question is at what point of time and space the military status of the plaintiff and his three comrades ceased. The learned judge has held that it ceased upon their departure from the camp at Shorncliffe, and that thereupon their status became that of civilians subject only as to discipline to the provisions of the Volunteer Act, 1863, and subsequent statutes relating to volunteers. He held that the training and exercise mentioned in section 176 of the Army Act, 1881, then came to an end, and that such training and exercise did not include the proceeding to or from the camp itself.

In the argument on the appeal the plaintiff's counsel supported these propositions. He further argued that if the status of the plaintiff and his three comrades was not changed on their departure from the camp, it became changed when they reached Shorncliffe Station; and if not then, when they reached Boxmoor Station; and if not then, at all events before they reached the police-station.

Now, in my opinion there are upon the admitted facts two points only at which it can be reasonably argued that the change of status took place—viz., the departure from the camp and the arrival at the police-station. In my judgment the change did not take place until the plaintiff and his three comrades reached the police-station, and the plaintiff was given in charge of the police. It was not contested that the plaintiff was and remained under lawful military arrest until he came to the boundary of the camp, but it is said that the transition took place immediately the boundary was passed. The argument, if well founded, presents a curious result. As the volunteer battalion was marching out of camp, so much of it as had passed the boundary would be civilians subject to volunteer discipline only; so much as had not crossed the line would remain subject to military law as soldiers. According to the argument each individual man as he steps over the line changes his status, though he forms part of a battalion under arms and in marching order. However curious and anomalous this result may seem, still it must be submitted to if it is the true result of the Acts of Parliament as applied to the facts.

An important factor in this case is the order of the 22nd of April, 1896, which seems to have been lost sight of in the court below, and to which it would appear the attention of the learned judge was not called. It is headed, "Home District Orders—Horse Guards, Whitehall." It runs thus: "Referring to paragraph 275 of the Volunteer Regulations, 1895, sanction is hereby given under authority dated War Office, 16 September, 1896, No. V., Camps, 3578, to the formation of the Home Counties Volunteer Brigade at Shorncliffe 1st to 8th August, 1896. The commanding officers have been informed accordingly. By order." It was signed by the proper authority. The order is for the formation of a brigade, and not merely of a camp. In point of time it extended from the 1st to the 8th day of August, both inclusive. It covered the whole of the 8th of August, the day on which the plaintiff was taken to the police-station. Under the 573rd of the Regulations for the Volunteer Force an additional allowance of 8s. for every officer and 4s. for every man of other rank is made to cover the time occupied in joining and quitting a camp when the volunteer's attendance at the camp reckons towards qualifying him for the efficiency capitation grant. This regulation is also of importance. It provides a payment in respect of joining and quitting the camp. The brigade was formed and constituted by the War Office order already stated.

Now, I take it that the military authority of the officer appointed to command the brigade covered the whole period of the eight days. It would be within the scope of his authority to direct the commanding officers of the various volunteer battalions, who had signified their intention of forming part of the brigade, by what route they should march into and from camp. In practice, probably, in small bridades he leaves the arrangements as to the route to the discretion of the officers commanding the battalions. But section 176 applies equally to the assembling of a larger body than a mere brigade consisting of from two to four battalions. It applies to a division or an army corps. The greater the number of the battalions and troops of all arms,

including artillery, cavalry, and artillery volunteers, and regulars, the greater would be the necessity for prescribing the routes by which the various bodies should march to and from the place where they are ultimately to be assembled, and the times of their marching, and other like details; and I consider that all such details would constitute an essential part of the training.

I come now to the critical point of the case. When did the training or exercise of the corps or company to which the plaintiff belonged, with a portion of the regular forces, begin and end? In my opinion it began at the time when the corps or company fell in under arms in military formation for the purpose of marching to, and being conveyed by the special military train to Shorncliffe; and it ended as to the corps or company, other than the plaintiff and his three comrades, when, having reached their homeward destination, they were finally dismissed; and it ended as to the plaintiff and his three comrades when they had reached the police-station and the plaintiff was taken in charge by the inspector and his three comrades were dismissed. In my opinion it makes no difference whether the march to and from the place where the different battalions forming part of the brigade or larger body is long or short, or whether it is performed wholly or partly on foot or by railway train or any other mode of conveyance. In this case the homeward march was performed partly by conveyance in the railway train. The getting into and out of the train in military order and formation, technically called "entraining" and "detraining," is an important part of military duty and exercise. The training and exercise mentioned in section 176 cannot be reasonably restricted to what is actually done in the presence of the regular force. If at any time during the eight days the plaintiff's battalion had been marched out of the camp, and had been drilled or put through evolutions, they would still be training with the regular troops, although all the regular troops had remained in camp or had been marched out in some other direction for temporary separate exercise. I can find no sufficient reason for confining the training or exercise to training or exercise in or at or near the camp itself. The object and the effect of the section is to place the whole force, composed of regulars and volunteers, under one and the same military law during the period to which the training extends. The Act ought, in my opinion, to be so construed as to afford a safe, practical, and working rule for the officers and men under arms.

I think it unnecessary to go over again all the other sections of the Acts and the various regulations which A. L. Smith, L.J., has fully dealt with. But section 158 of the Army Act, 1881, requires special notice. The section opens with the words "Where an offence under this Act has been committed by any person while subject to military law." These words constitute a condition precedent to all that follows. The section continues: "Such person may be taken into and kept in military custody and tried and punished for such offence, although he or the corps or battalion to which he belongs has ceased to be subject to military law in like manner as he might have been taken into and kept in military custody, tried, or punished if he or such corps or battalion had continued so subject." The learned judge has taken the words of the condition literally, and has held that the offence must have been actually committed. I am unable so to read the condition. So to read it, in my opinion, not only reduces the section to a palpable absurdity, but renders it meaningless. In some impossible manner it must be shown that the offence has been committed by the person before he can be put upon his trial for the offence. It is manifest that the words "alleged to have been committed" must be read into the condition in order to give it any meaning at all.

The result, in my opinion, is that the defence has been established and the acts of the defendants are justified in law. The grievances of which the plaintiff complains are grievances suffered by him when subject to military law at the hands of persons also subject to military law in execution of their military duty. To these grievances section 43 of the Army Act, 1881, applies, and for them the plaintiff must seek redress in accordance with the section. The court cannot add to the remedy which is thus provided. It is the plaintiff's only means of seeking redress.

As the action fails there is no question in reference to the damages. But in my opinion they were monstrous in amount, and would have justified us in directing a new trial on the ground of their being excessive. The plaintiff's three comrades put no indignity upon him; they did not even deprive him of his rifle. His only complaint against them, apart from the question of law, seems to be that they did not speak to him when in the train. The only probable explanation of the amount of damages is that the jury, in mistaken sympathy with the plaintiff, who was acquitted on his trial, heaped upon the three defendants all the consequences that followed after his being given into custody at the police-station. I may add that had the case been otherwise than as above stated, it would, in my opinion, have proved detrimental to the true interests of the volunteer force.

COLLINS, L.J., agreed.

Application allowed.

Solicitor for the plaintiff, *H. W. Lathom.*

Solicitors for the defendants, *J. N. Mason & Co.*, for *Sworder & Longmore*, Hertford.

High Court of Justice.

Chan. Div. } Feb. 10; April 5.
Kekewich, J. }

NORTH v. PERCIVAL. (a.)

Vendor and purchaser—Specific performance—Mistake—Condition precedent to complete contract—Repudiation by vendor—Wilful default—Interest—Form of order.

By certain heads of agreement it was agreed that thirty-six acres of land—to be measured, as the boundary on one side was unmarked—should be sold for £3,600, the purchase-money to bear interest at 4 per cent. from a fixed day until completion. A proviso was also inserted—"subject to approval of conditions and form of agreement by purchaser's solicitor." The vendors, by a mistake on their part, required the purchaser to take forty-two acres at £100 per acre. The purchaser refused, and brought an action to enforce specific performance of the contract for the sale of thirty-six acres, which contract the vendors repudiated.

Held, that the mistake did not go to the root of the contract; that the proviso was not a condition precedent to a complete contract; and that the purchaser was therefore entitled to the specific performance he asked.

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Held, also, that the repudiation of the contract by the vendors did not amount to "wilful default" on their part so as to deprive them of interest on the purchase-money.

On the 10th of April, 1897, John Andrew Percival and two others, as vendors, entered into an agreement with Frederick William North, as purchaser, whereby it was agreed as follows: "Heads of agreement. Land purchased, 36 acres of land; bounded on south by the parish of Yaxley, west by Great Northern Railway, and on other sides by the land of the vendors. A strip of land on the north side of the width of 30 feet, with sufficient land on the north-west corner to have access to the railway, estimated altogether at one acre, is reserved to the vendors, and the 36 acres to be measured leaving such strip and access. Purchase-money, £3,600. Settlement July 6th, 1897. Purchaser may take possession forthwith on arranging with tenant, and paying interest at 3 per cent. from time of taking possession. If purchase not completed on the 6th of July, purchase-money to bear interest at 4 per cent. from that day until actual completion. Where no fence exists between the land sold and the land retained, the vendors to make and maintain a fence for the southern half of the distance, and the purchaser for the northern half. Subject to approval of conditions and forms of agreement by purchaser's solicitor."

The boundaries of the land agreed to be sold were, it was admitted, defined upon three sides, but there was no division on the eastern side between the land agreed to be sold and land intended to be retained by the vendors. Before completion the vendors discovered that the whole amount of their land in the locality was fifty-two acres, and was not, as they had supposed when making the agreement, forty-six acres. They alleged that what they had intended to sell was the whole amount of their land minus ten acres, and said that what they had intended to sell was therefore forty-two acres and not thirty-six acres. They accordingly required the purchaser to take forty-two acres at £100 per acre. They had marked out no boundary on the eastern side.

The purchaser refused to take forty-two acres, and brought this action for specific performance of the contract for the sale of thirty-six acres. By their defence the vendors alleged there was no complete and binding contract for the purchase or sale of any land; that, if there was, it was subject to approval of conditions and form of agreement by the purchaser's solicitor, which had not been given; that there was no sufficiently defined land, and that it had not been marked off; that there had been a common mistake, the land agreed to be sold amounting to forty-two acres at £100 per acre. They then counter-claimed that if the agreement were held to be binding it might be rescinded on the ground of mistake.

Warrington, Q.C., and *R. Rowlands*, for the purchaser.—The contract was for the sale of thirty-six acres only. If there is uncertainty the defendants can and should mark out the eastern boundary.

They referred to *Plant* v. *Bourne*, 45 W. R. 498, *ante*, p. 59, [1897] 2 Ch. 281; and *Wylson* v. *Dunn*, 35 W. R. 405, 34 Ch. D. 569.

The purchaser can waive the proviso as to approval. We ask for an order similar to that in *Wilkins* v. *Green*, 27 Beav. 437.

Benshaw, Q.C., and *Christopher James*, for the vendors.—There was no binding contract at all. There was a mistake and the vendors are entitled to rescission: *Crossley* v. *Maycock*, 22 W. R. 387, L. R. 7 Eq. 180; *Paget* v. *Marshall*, 33 W. R. 608, 28 Ch. D. 255; *Wilding* v. *Sanderson*, 45 W. R. 675, [1897] 2 Ch. 534. The purchaser cannot waive the proviso as to approval: *Lloyd* v. *Nowell*, 44 W. R. 43, [1895] 2 Ch. 744.

KEKEWICH, J.—Omitting for the moment the last two lines contained in the heads of agreement of the 10th of April, 1897, and reading it as the production of two business men embodying a bargain come to between them it seems to me to present no great difficulty. [His lordship then, after considering the agreement, said that it was a contract for the sale of thirty-six acres and that the boundary line would be determined without difficulty, and continued:] Then comes a much more serious question. Mr. Percival says: "Not only am I entitled to resist specific performance of this agreement, but I am entitled to resist it on the ground of mistake." Although authorities were cited upon that point, I shall not go into them, because a mistake must first be established.

Now, what was the mistake? There was, in one sense, no doubt, a mistake. The parties did not know that the land contained 52 acres. Mr. North says that he bought, not 52 acres less 10, but 36 acres, while the vendors thought they were only going to get back 10 acres, and that there were only 46 altogether. It now appears that Mr. North will get just what he intended to get—namely, 36 acres. The vendors, on the other hand, will retain more than they intended to retain; they agreed to sell 36 acres, and thought they would only retain 10 acres, whereas, as they bitterly complain, instead of keeping 10 acres they will keep 16 acres. It seems to me to be a strange sort of complaint, but it does not seem to me to be a mistake which goes to the root of the contract; it may be to the disadvantage of the vendor, but it does not really touch the substance of the contract. The claim, therefore, for rescission seems to me to fall to the ground. There is one thing more. Near the end of the heads of agreement these words occur, "subject to approval of conditions and form of agreement by purchaser's solicitor." That means something, no doubt; but the question is, what does it really mean? The point has come up for decision again and again, and I can only repeat the passage in Lord Blackburn's judgment in the case of *Rossiter* v. *Miller*, 26 W. R. 865, 3 App. Cas. 1124, which I followed in *Lloyd* v. *Nowell*. Lord Blackburn says: "I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up." It is a point which is not free from difficulty, but I think this was not a condition precedent to a complete contract. The parties did agree, as I hold, to what was to be sold, and to the price to be paid, and to some few smaller matters, such as the fence to be erected. Then it probably occurred to them that that would not quite do, and that a formal contract ought to be prepared. Then the purchaser said that his solicitor must approve of such formal document. No contract has been prepared, and the purchaser's solicitor has not given his approval. I think that was only meant to be a final stipulation to make the matter move smoothly. I cannot myself see in this case that it governs the whole contract so as to prevent its being now completed. I think, therefore, that there is a complete contract without any formal agreement.

[By the minutes of the judgment as drawn up it was declared that the agreement constituted a binding contract and ought to be specifically performed, and it was ordered that the defendants should be at liberty to fix the exact eastern boundary of the land

having regard to the terms of the agreement, but that they were not entitled to exercise that liberty so as to interfere with the beneficial enjoyment by the plaintiff of the 36 acres of land; and the plaintiff by his counsel accepting the title to the land, it was ordered that interest should be computed at the rate of 4 per cent. per annum on the sum of £3,600, the purchase-money for the land from the 6th of the July, 1897, when the same ought to have been paid according to the terms of the agreement; and it was ordered that an account of the rents and profits of the land received by the defendants or persons on their behalf since the 6th of July, 1897, should be taken, and that that together with the plaintiff's taxed costs should be deducted from the amount of the purchase-money and interest thereon; and that upon the plaintiffs' paying the balance to be certified to be due to the defendants in respect of the purchase-money and interest after such deduction as aforesaid, the defendants should execute a proper conveyance of the land, &c.]

On the 5th of April, 1898, the plaintiff moved to vary the above minutes, *inter alia*, by striking out the order for payment of interest.

Warrington, Q.C., and *R. Rowlands*, for the motion.—The vendors have been guilty of wilful default and the purchaser ought not therefore to pay interest. *De Visme* v. *De Visme*, 1 Mac. & G. 336. [KEKEWICH, J., referred to *Woods and Lewis's Contract*, *ante*, p. 373, [1898] 1 Ch. 433.] The plaintiff did not admit the title, and asks that the recital as to admission be struck out of the order.

Renshaw, Q.C., and *Christopher James*, for the vendors.—The vendors' conduct does not amount to wilful default. They are, therefore, entitled to the interest. The purchaser cannot have the contract specifically performed and then try to vary it.

KEKEWICH, J.—My judgment did not prevent this point from being taken on a motion to vary the minutes. It is agreed that the order was one for the usual decree for specific performance. Of course there is no usual decree of one form adapted to all cases, but what is meant by the usual decree is one made in accordance with the practice and books on the subject and adapted to each particular case. Sometimes it is made in a vendor's action, sometimes in a purchaser's; sometimes the title is accepted and sometimes not. I think it is open to doubt whether the registrar was right in ordering the purchaser to pay this interest. The question turns on the words in the contract: "If purchase not completed on the 6th of July, purchase-money to bear interest at 4 per cent. from that date until actual completion." I think, however, that I must follow Romer, J., in the case of *Woods and Lewis's Contract*, to which I have just referred. Speaking of a case where the interest clause made interest payable if delay occurred "from any cause whatever," he says: "But it had been previously settled that the generality of those words did not allow a vendor to claim the interest where delay occurred by his 'wilful default.'" The question is, then, have the vendors been guilty of "wilful default," so that they cannot claim interest notwithstanding the stipulation in the contract giving interest after the 6th of July until actual completion? There are many cases illustrating the meaning of "wilful default," and the case before Romer, J., shows what does not amount to "wilful default." "Wilful default" is obstruction to the completion of the contract. All the cases go to that, that there must be obstruction in the matter of completion. But the question here is, Does the repudiation of the contract by the vendors amount to "wilful default" within the authorities. I do not think it can be said that this is a case of wilful default of the kind mentioned in the authorities; but is it a default of a similar character; I think it is not. The vendors having repudiated the contract, the question arose whether the contract should be performed or not. The purchaser insisted upon it, and having obtained his decree, now comes here and says, "I insist on the performance of the contract, but with modifications in my favour." Mr. Warrington says that that is not so, but that the purchaser ought not to be made to pay interest where the vendors have themselves obstructed him. The answer to that, to my mind, is that the vendors have not obstructed the purchaser, and I therefore think that the registrar was right in providing, according to the usual form, that interest should be paid until completion and set off against rents and profits. As the purchaser has withdrawn his admission of title, that will be struck out, and there will be an inquiry as to title. Otherwise the order will go as drawn. The purchaser must pay the costs of the motion.

Solicitors, *Morley, Shirreff, & Co.; Clarke, Rawlins, & Co.*, for *Percival & Son*, Peterborough.

Chan. Div. }
Romer, J. } May 14.

NORTH METROPOLITAN TRAMWAYS CO. v. LONDON COUNTY COUNCIL. (a.)

Practice — Costs — Action against public authority — Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (b).

When in substance "judgment has been obtained" by a public authority as defendant within the meaning of sub-section (b) *of section* 1 *of the Public Authorities Protection Act*, 1893, *and costs have been given in its favour, such judgment carries the right to have taxation as between solicitor and client, although no direction as to the mode of taxation is given in the judgment.*

The action here had been brought against the defendants for an injunction to restrain an alleged trespass on the tramway belonging to the plaintiffs.

It was successfully contended on behalf of the defendants that they were entitled to acquire and purchase the tramways under the provisions of section 43 of the Tramways Act, 1870, and the plaintiffs' action was dismissed with costs, but no direction was given in the judgment as to how the costs should be taxed.

The defendants brought in a bill for taxation as between solicitor and client, and the taxing-master so taxed it, acting in pursuance of section 1 of the Public Authorities Protection Act.

The plaintiffs objected to such taxation on the ground that an order for taxation of costs as between solicitor and client ought to have been asked for at the hearing.

J. Tanner, A. H. Carrington, and *F. Richardson*, for the parties.

ROMER, J.—In my opinion the taxing-master is right in this case. The action was one that came within the provisions of the Public Authorities Protection Act, 1893, and judgment was in substance (apart from a special provision as to certain costs which I need not further refer to) obtained by the defendant council with costs, so that under the Act

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

the council became entitled to have its costs taxed as between solicitor and client. I do not think the Act was intended to take away the discretion of the court in an unsuccessful action of the kind described in the Act, of depriving the public authority in a proper case of its costs. In other words, the court would not, in my opinion, be obliged to let "judgment be obtained" by the defendant within the meaning of the phrase as used in the Act where, in the judicial discretion of the court, the case appeared one in which the defendant authority ought not to recover any costs against the plaintiff. But where, in substance (and each case ought to be dealt with as a question of substance and not of form), the defendant authority in an action falling within the Act succeeds, so that substantially the defendant obtains judgment, then the court is bound by the Act to give the defendant solicitor and client costs. Now, in the case before me the defendant council substantially obtained judgment, and I never intended to deprive it of its rights to solicitor and client costs. But owing to the Act not being specially referred to at the time judgment was given by me, my judgment as drawn up merely directed the plaintiff to pay the defendants' costs, without saying how they were to be taxed. I do not think the form of the judgment prevents the defendants from having their costs taxed as between the solicitor and client.

According to the statute of course the matter could easily be made quite clear by an application to the court to have the form altered, but I do not think it is necessary to bind the defendant to the expense of making such application. No doubt *primâ facie* an order to tax costs, means taxation between party and party, and it would be better in cases of the kind now before me to insert expressly in the judgment that the costs are to be taxed as between solicitor and client. But the omission would not deprive the defendants entitled to the benefit of the statute, the court having no discretion in the matter when once it is clear that in substance judgment has been obtained by the defendant. Nor is it necessary that the judgment itself should show on its face that the action was one falling within the Act: see *Finlay* v. *Seaton*, 1 Taunt. 210, where a somewhat similar question arose under the Act 11 Geo. 3, c. 19; and see also *Forman* v. *Dawes*, 11 M. & W. 730, with reference to the special Act there referred to. What Wood, V.C., said in *Lister* v. *Leather*, 4 K. & J. 425, 7 W. R. Ch. Dig. 54, is not inconsistent with the view I take. There the Vice-Chancellor was only deciding what form it would be right his judgment should take in a patent action having regard to the provisions of the 43rd section of the Patent Law Amendment Act, 1852.

I may add, too, that I am informed that it is the practice in similar cases in the Queen's Bench Division that the masters should tax as between solicitor and client although there is no express direction in the judgment as to how the costs should be taxed or as to the Act applying. For these reasons I think the taxing-master was right.

Solicitors, *W. A. Blaxland; Hugh C. Godfray.*

Q. B. Div.
(Wills and Kennedy, JJ.) May 24.

HORN *v.* SLEAFORD RURAL DISTRICT COUNCIL. (*a.*)

Local government—Rating—Water supply—Water rates—Water rents—Contributory place—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 229.

When a district council provide a supply of water to a contributory place, in pursuance of section 51 *of the Public Health Act*, 1875, *it is within their discretion how much of the sum required to meet the expenses of such supply shall be raised by water rates and water rents. The residue may be raised by a rate upon the contributory place, as for special expenses, under section* 229.

Semble, *section* 229, *by which the expenses of providing a water supply to any contributory place are made special expenses, includes such supply to a part of a contributory place.*

Case stated by quarter sessions.

The appellant appealed to quarter sessions from a rate made upon the owners and occupiers of property in the parish of Heckington to pay the instalments of principal and interest due under a loan raised by the respondents to defray the cost of providing a supply of water for the village of Heckington. The appeal was dismissed, this case being stated for the opinion of the High Court.

The facts and arguments sufficiently appear from the judgment.

Vesey FitzGerald, Q.C., and *Bonsey*, for the appellant.

R. C. Glen, for the respondents.

Cur. adv. vult.

WILLS, J.—The parish of Heckington is one of the group of parishes forming the rural district of Sleaford. Within the parish of Heckington, and forming perhaps a twentieth part of the area of the parish, is the village of Heckington.

The district council have provided a supply of water for the village of Heckington, and in respect of the water supply they charge water rates. To provide the supply, however, they borrowed, on the security of the rates applicable to the purpose, a sum of £1,350, repayable with interest by instalments. To pay some instalments overdue, with interest, they have made a rate upon the whole of the parish of Heckington.

The appellant, who is rated in Heckington parish, but whose rateable property is two or three miles from the village, objects, and says that the whole of the expense of providing the water supply ought to be paid out of the rates payable by the consumers of the water. To ascertain how this capital expenditure is to be paid involves a minute examination of a somewhat complicated set of enactments.

The district council succeeds to the powers of the rural authority under the Public Health Act, 1875. By section 51 they may provide their district or any contributory place or any part of any such contributory place with a supply of water sufficient for public and private purposes, and for that purpose may construct and maintain waterworks, dig wells, and do any other necessary acts. "Contributory places" are defined by section 229, and in this instance the whole of the parish of Heckington is the contributory place involved.

By section 233 the district council may, with the sanction of the Local Government Board (which has been given), for the purpose of defraying any costs, charges, and expenses incurred by them in the execution of the sanitary acts of the Public Health Act, 1875, borrow any necessary sums of money. The sums so borrowed are made chargeable, if applied to the general expenses of the authority, upon the common fund out of which such expenses are payable —*i.e.*, out of the rates levied upon this district generally; if applied to special expenses of the

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

authority, upon any rates out of which such expenses are payable.

By section 229 expenses incurred by a rural authority are divided into two classes—general and special expenses. General expenses are all such as are not special. The determining element is therefore to be sought in the definition of special expenses.

"Special expenses," says that section, "shall be the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within the district, the providing a water supply to any such place and maintaining any necessary works for that purpose, if and so far as the expenses of such supply and maintenance are not defrayed out of water rates or water rents under this Act" and other matters not material in this case. Special expenses are by the same section made a separate charge on each contributory place

The language is not happy. So far as sewers are concerned, the expenses connected with sewers in any contributory place—*i.e.*, within that area—are made special expenses. So far as water supply is concerned, the cost of providing a water supply to any such place is what is made a special expense. The case of the supply to a part of the contributory place has been omitted. I believe this to be a mere slip of drafting, for the power of a certain number of ratepayers to require that water rates or rents shall be charged to consumers (the exercise of which in default of such requirement is optional with the rural authority) given by section 10 of the Public Health (Water) Act, 1878, is confined to the ratepayers of the contributory place. Such a power would be absolutely unnecessary in the case of a supply to part of a contributory place unless the ratepayers in question are liable to the cost of the water supply, and the restriction of the power to ratepayers of the contributory place would be simply monstrous if they were not the only persons in the district so liable—in other words, if they were not special expenses within the section. It is, after all, no great stretch of language to treat the water supply to the part of the contributory place as (for the purpose of payment) a supply to the contributory place if the contributory place has to pay for it, or for so much of it as is not covered by the water rates or rents.

The question does not arise in the present case, which grows out of an appeal, under 12 & 13 Vict. c. 45, to the quarter sessions, the foundation of which is a notice of appeal which must (section 1) state the grounds of appeal. The quarter sessions are precluded from entertaining any ground not stated in the notice, and so, therefore, is this court. It was impossible to discuss section 229 without referring to it, and the variation of the language which it exhibits has led us to an elaborate consideration of all the enactments bearing upon the meaning of the complete phraseology, with the result we have indicated, and although we have felt bound to allude to this matter, we have no intention of casting any doubt upon the correctness of the assumption upon which this case has been argued, and which we believe has been generally recognized in practice—namely, that the supply of water to part of a contributory place is included in the expression in section 229, "a supply to any such place."

The objection raised by the appellant is of quite a different character. It is that the whole of the cost both of construction and maintenance of the necessary works and of the supply generally must be paid out of the water rates or rents, so far as is arithmetically possible, and that the expression "if and so far as the expenses are not defrayed out of water rates or rents," which implies that there may be a balance not covered by those sources of income, is intended only to meet such trivial portions of the expenses as fall within a proviso to section 230, which says that where the amount required by any precept from a contributory place in respect of special expenses is less than £10, or so small that a rate of less than a penny in the £ would be required to raise the sum, the overseers to whom the precept is directed shall not assess or levy any special rate for the same, but shall pay the amount as if it formed part of the contribution required from them in respect of general expenses. I cannot think that this view is right.

By section 56 of the Public Health Act, 1875, where the authority supply water to any premises, they may, and by section 10 of the Public Health (Water) Act, 1878, if required by a certain number of ratepayers of the contributory place within which they supply the water, they must charge in respect of such supply a water rate to be assessed upon the net annual value of the premises to which the water is supplied, or they may enter into agreements for the supply of water, in which case the charge is called a water rent, not a water rate. There is nothing at all to indicate the scale of charge, or to give a limit in either direction. The supply of water is to be paid for by the consumer, excepting in certain cases in which upon a report from the surveyor of the authority it appears that a house is without a proper water supply, and the cost is very small or fixed at such an amount as the Local Government Board may think reasonable under all the circumstances; and, except in the limited class of cases to which the elaborate machinery of section 3 of the Public Health (Water) Act, 1878, applies, there is no power to compel anyone to take water from the supply provided, nor, except in the case of persons who are within 200 feet of a stand-pipe, to compel anyone who does not take water to pay for it. Under such circumstances it is obvious that the authority must do like anyone else who has a commodity to sell which the customer may buy or not as he likes. They must make their price sufficiently low to attract custom. If the whole expense—or the whole except a sum too small to make another penny in the pound in the water rate—had to fall upon the consumers and they had to pay an extravagant price they would, wherever they could, do without it, and the people who would have to pay the whole cost of the water supply would be the persons who could not do without it and the persons who live within 200 feet of a stand-pipe. There would be, to say the least, a temptation to set up a great number of stand-pipes.

It is impossible to suppose that anything of the kind was intended. It is of the essence of legislation of this kind that works necessary or desirable for the sake of health should be paid for by the inhabitants at large of the chargeable unit, though the direct benefit may accrue only to a portion—perhaps to a small portion, perhaps even to only one of the inhabitants. What is A's turn to-day may be B's turn to-morrow. Very often the works are too expensive to be borne by those directly benefited, and, had they to be so borne, they could not be done at all. The whole community very often benefits indirectly, and even if they do not, their turn may come and other works for their peculiar benefit may likewise be done at the general expense.

It is of no purpose to put extreme cases and to show that any unreasonable things might be done by the local authority. All the legislation which confers powers upon authorities of any kind is founded upon the assumption that they will act reasonably. Nor is the expectation disappointed, as a general rule, so far as one may judge from the cases—numerous as they are—which bring under the review of the courts the proceedings of local authorities. Large powers for

good involve the theoretical possibility of doing high-handed and unreasonable things.

An observation which perhaps touches more closely the present case is that legislation of this kind has necessarily a very wide and general application, and that although it may appear to the appellant hard that he should have to pay for the cost of works to supply water to people three miles off, the operation of a general enactment cannot depend upon whether the parish is one mile long or ten, or the particular area is at one end or the other of the parish.

It is to be observed further that the water supply may be for both private and public purposes. Public purposes, though carried out only in one part of a contributory place, may be of very general benefit not only to the consumers of the water supply, but to others and to persons who live outside the area of the water supply, and it cannot be supposed that expenses applicable to such purposes were intended to be paid exclusively by persons taking the supply for their own private purposes.

In the operation of section 229 no distinction, as it seems to me, can be drawn between capital and current expenditure. Both fall within the category of special expenses. In relief of both is to be carried to the account any sum which can practically and reasonably be raised by water rates and water rents. Of such reasonableness and practicability the local authority must be the only judges. When the amount required has been reduced by the sum raised by the water rates and water rents, the balance, so far as it is capable of being estimated by unbroken pence in the pound in a rate upon the contributory place, is to be charged upon and paid for by the contributory place.

There is nothing to show that in the present instance the proper deductions have not been made, or that any portion of the water rates and rents has been available to reduce the sums required to meet the instalments of debt and the interest in arrear; and I am of opinion, therefore, that the rate was rightly made, and the appeal must be dismissed with costs.

KENNEDY, J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Trass & Jarmain*, for *Millington & Simpsons*, Sleaford; and *Jessopp & Godson*, Sleaford.

Solicitors for the respondent, *Paterson, Snow, Bloxam, & Kinder*, for *Peake, Snow, & Son*, Sleaford.

Q. B. Div.
(Wills and Kennedy, JJ.) May 20.

In the Matter of AN ARBITRATION BETWEEN GEORGE AND THE GOLDSMITHS' AND GENERAL BURGLARY INSURANCE ASSOCIATION. (*a*.)

Insurance — Burglary and housebreaking — "Actual forcible and violent entry"—Entry by turning handle of door.

A policy of insurance against loss of jewellery in the assured's shop by burglary and housebreaking defined these terms as "loss by theft following upon actual violent and forcible entry upon the premises." At 8 a.m., during the temporary absence of the porter in charge of the shop, an entry was effected by turning the handle of the door of the shop, which was shut, but neither bolted or locked, and jewellery was stolen.

Held, that the loss was covered by the policy.

Special case stated by an arbitrator.

On the 24th of December, 1891, George effected with the association a policy of insurance of his stock-in-trade and jewellery situate at his shop and premises, 78, Strand, London, "against loss or damage by burglary and housebreaking, as hereinafter defined." The policy provided that the assured should be paid the value of any of the property insured which should be "lost by theft following upon actual forcible and violent entry upon the premises."

On the 12th of March, 1897, the policy being then in force, the front door of the shop was at 8.30 a.m. shut, but neither locked or bolted, and access to the shop could be gained by turning the handle of the door. Soon after 8.30 a.m., in the temporary absence of the porter, who was moving the shutters of the shop to the rear of the premises, one or more persons opened the front door, entered the shop unobserved, and stole, took, and carried away certain jewellery which was then in the shop.

The question for the opinion of the court was whether the assured had sustained a loss of the jewellery by theft following upon actual forcible and violent entry upon the premises within the meaning of the policy.

Joseph Walton, Q.C., and *A. T. Lawrence, Q.C.*, for the assured.

Bucknill, Q.C., and *C. L. Attenborough*, for the association.

WILLS, J.—It is somewhat difficult to say what is the proper construction to be placed upon the language of this policy, but, broadly speaking, it seems to me to be a policy against burglary and housebreaking, for it says that the assured shall be insured against burglary and housebreaking as thereinafter defined. We must therefore look to the definition of those terms given in the policy, but it will, I think, be convenient to state first of all what would have been the appropriate description of burglary and housebreaking if those words had been intended to have borne an unqualified meaning. The technical definition of burglary and housebreaking is a felonious breaking and entering of premises for the purpose of committing a felony therein. This policy, however, contains no reference to "breaking" as a term by itself, which is an essential part of the definition of burglary and housebreaking, and substitutes for it "an actual forcible and violent entry upon the premises," and instead of saying for "the purpose of committing a felony therein," the policy says that theft must follow the entry. It is apparent that some qualification of the terms burglary and housebreaking is intended, for, whereas breaking may technically be only a constructive breaking, the policy says there must be an actual forcible and violent entry. Therefore constructive burglary or housebreaking is got rid of. Now, do the words "forcible and violent entry" mean anything more than a burglarious entry, for force is part of the notion which enters into every definition of burglary or housebreaking? In old indictments the expression used was, by force and arms; now we say, feloniously and burglariously. If the policy had omitted the word "violent" and had said "a forcible entry followed by theft" it would have had much the same meaning as the ordinary definition of burglary or housebreaking with the substitution of a theft committed for the intent. Does it, then, make any difference that the word "violent" is used? "Violent" only means by force. In the dictionaries

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

the first synonym given for "violence" is physical force. Does the word "violent" in this policy mean anything more than that? If it did, cases might occur which the policy must obviously have been intended to cover, in which, nevertheless, the force used would be so trivial that they would be excluded from the policy. Take the case of an entry effected by pushing aside a catch and lifting a window, Can it be supposed that the policy would not apply to such a case as that? Another instance might be taken from the opening of premises by means of a skeleton key, which would take no more force than opening a door in the usual way. Illustrations such as these show, to my mind, that the word "violent" in this policy cannot have been intended to be construed in its popular sense, and I do not think it was intended that violence in any special degree must be used. I think that the policy gives a somewhat inartistic definition of burglary and housebreaking subject to certain important qualifications which explain why the parties resorted to a special definition of those terms instead of leaving them to be interpreted according to their ordinary legal meaning.

KENNEDY, J.—I am of the same opinion. This is a policy against burglary and housebreaking, and, seeing that those are words which although they have a technical meaning are also fairly well understood in a popular sense, it would be necessary, I think, to use very clear words to deprive the assured of the benefit to be obtained from the policy by reason of the words burglary and housebreaking having been used. It is quite true that the policy does not say that the assured is desirous of effecting an insurance against burglary and housebreaking *simpliciter*, but "as thereinafter defined."

What the company would want to be protected against in the strict interpretation of burglary and housebreaking would be what is called constructive burglary. It is also assumed that the premises will be closed by some physical obstruction and therefore the policy says there must be an actual forcible and violent entry, and that really gives an equivalent to the breaking which is an essential part of burglary. So long as there is an actual closing of the premises by some obstacle, there is that condition of things which the company intended to have and what the language of the policy fairly construed gives them. These premises were closed by a door which was intended to prevent persons from coming in, and that obstacle was overcome by force. Nothing would be more undesirable than to have a discussion as to what constituted violence as distinguished from force, for it would be a most difficult matter to settle.

WILLS, J.—I should like to add to what I have already said, that we must not be taken to have decided that shoplifting comes within this policy.

Judgment for the assured.

Solicitor for the assured, *Stanley Attenborough.*

Solicitors for the association, *Attenborough & Son.*

Q. B. Div. (Ridley and Channell, JJ.) — May 20.

REG. *v.* JUSTICES OF LONDON AND JUSTICES OF THE STRAND DIVISION.

Ex parte LONDON COUNTY COUNCIL. (*a.*)

Licensing law—Appeal against refusal to transfer—Notice of appeal served on justices—Order by court of quarter sessions on justices to pay appellant's costs— Certiorari—*Alehouse Act,* 1828 (9 *Geo.* 4, *c.* 61), *ss.* 27, 29.

D. appealed to quarter sessions against a refusal of the licensing justices to transfer a licence. At the hearing of the appeal the justices appeared by counsel to inform the court of the reasons on which they had acted; but the quarter sessions allowed the appeal and made an order directing that the justices should pay all the costs that the appellant had incurred.

Held, that so much of the order as directed the justices to pay costs was ultra vires, *as the quarter sessions had no jurisdiction under sections* 27 *and* 29 *of the Alehouse Act,* 1828, *to make such an order.*

Cause shown against a rule *nisi* for a *certiorari* to bring up to be quashed an order of quarter sessions for the county of London, so far as it referred to the payment of the successful appellant's costs by the justices of the Strand Division.

In January, 1898, the justices for the Strand Division of the county of London held a special session for the transfer of licences to such persons as desired to keep inns, alehouses, and victualling houses to sell excisable liquors pursuant to 9 Geo. 4 and Acts amending the same. Dalton, a publican, applied to them to transfer to him a licence in respect of the "Horse and Dolphin" public-house, and they refused his application. Dalton having served due notice of his intention to appeal to the Clerkenwell Quarter Sessions on the justices of the Strand Division, the latter appeared by counsel at the hearing of the appeal to inform the court of the reasons on which they had refused to grant the transfer. The court of quarter sessions, after hearing counsel on both sides, reversed the decision of the Strand justices; and further ordered that the justices "should forthwith pay or cause to be paid to the clerk of the peace of this county for Messrs. Layton & Sons, solicitors for the said Dalton, the sum of £35 for his costs, and this court doth further order that the treasurer of the county council for London, charged with the receipt and expenditure of moneys from and out of which the costs of public prosecutions have ordinarily been defrayed, do repay unto the said justices and their solicitor the said sum of £35 and a further sum of £7 18s., and indemnify the said justices from all costs and charges whatsoever to which such justices may have been put by reason of their having had served upon them the notice of the intention of the said Dalton to appeal."

The following sections are material to the argument:

Section 27 of the Alehouse Act, 1828, provides that "any person who shall think himself aggrieved by any act of any justice done in or concerning the execution of this Act" may apply to quarter sessions, "provided that such person shall give to such justice notice in writing of his intention to appeal, and of the cause and matter thereof, within five days next after such act shall have been done, and seven days at least before such session . . . and the court at such session shall hear and determine the matter of

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

such appeal, and shall make such order therein, with or without costs, as to such court shall seem meet; and in case the act appealed against shall be the refusal to grant or to transfer any licence, . . . and the judgment be reversed, it shall be lawful for the said court to grant or to transfer such licence in the same manner as if such licence had been granted . . . or transferred . . . at the licensing meeting, and the judgment of the said court shall be final and conclusive; and in case of the dismissal of such appeal . . . the said court shall order the said judgment to be carried into execution and costs awarded to be paid. . . ."

Section 29 provides that in "every such case where notice of appeal against judgment of any justice in or concerning the execution of this Act shall have been given, and such appeal shall have been dismissed, or the judgment so appealed against shall have been affirmed or such appeal shall have been abandoned, it shall be lawful for the court to whom such appeal shall have been made or intended to be made, and such court is hereby required, to adjudge and order that the party so having appealed or given notice of his intention to appeal shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum by way of costs as shall, in the opinion of the court, be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal," with power to commit to prison until payment.

The Licensing Act, 1872 (35 & 36 Vict. c. 92), by section 75 repealed sections 27, 28, and 29 of the Alehouse Act, 1828, except in so far as they "relate to the renewing of licences or to the transfer of licences under sections 4 and 14 of the same Act."

By section 66 of the Local Government Act, 1888 (c. 41): "All costs incurred by the quarter sessions or the justices out of sessions of a county, and all costs incurred by any justice in defending any legal proceedings taken against him in respect of any order made or act done in the execution of his duty as such justice, shall, to such amount as may be sanctioned by the standing joint committee of the county council of quarter sessions, and, so far as they are not otherwise provided for, be paid out of the county fund of the county."

F. Low showed cause.—There can be no "parties" to this appeal except the appellant and the justices; the justices being "parties," the order directing them as the unsuccessful party to pay the costs of the applicant is right, and ought not to be quashed. They had notice served on them by Dalton of his intention to appeal, and they appeared on the hearing of the appeal by counsel. It was not as if a third party had raised objection to the granting of the licence. The quarter sessions had jurisdiction to make this order on them to pay costs, under sections 27 and 29 of the Alehouse Act, 1828. By the Summary Jurisdiction Acts, 1848, 1878, and 1884, and the Quarter Sessions Act, 1849, other provisions (to the 29th section of the Act of 1828) were made relative to costs on appeal and all costs inconsistent with the provisions of the Summary Jurisdiction Act, 1879. But by the decision of the House of Lords in *Boulter* v. *Justices of Kent*, *ante*, p. 114, [1897] A. C. 556, it was decided that licensing justices were not a court of summary jurisdiction. Therefore all the cases decided on that ground, in which it has been held that no order for costs could be made against the justices cease to be authorities against my contention. Moreover, the case of *Reg.* v. *Justices of London*, 43 W. R. 387, [1895] 1 Q. B. 616, is now an authority that no longer can be relied on against me. It is clear that if the justices are the successful parties in an appeal that they are indemnified against loss. Under the Act of 1828 the successful party is entitled to costs from the justices if they are the unsuccessful party. That appears clear from section 66 of the Local Government Act, 1888. [*Avory, contrà.*—There again the indemnity is restricted to costs incurred in legal proceedings.] [RIDLEY, J.—Do you say, Mr. Low, that these proceedings were legal proceedings?] I submit these were legal proceedings. [*Avory, contrà.*—If the justices are active litigant parties, then, under sections 27 and 29 of the Act of 1828, they may be liable to pay costs, but I shall contend that the mere service of a notice to appear and their appearing and stating the reasons for refusing the licence does not make them litigant parties to the appeal within the meaning of the statutes.] The question depends solely upon the contruction to be placed upon sections 27 and 29, read together, of the Act of 1828, since the procedure followed under the Judicature Acts has now no bearing on it.

The following cases were referred to during argument: *Rex* v. *Cottingham*, 2 A. & E. 250; *Price* v. *James*, 41 W. R. 57, [1892] 2 Q. B. 428; *Reg.* v. *Purdey*, 13 W. R. 75, 5 B. & S. 909; *Reg.* v. *Goodall*, L. R. 9 Q. B. 557, 22 W. R. Dig. 125.

H. Avory, in support of the rule, was not required to argue.

RIDLEY, J.—I think that this rule should be made absolute. The argument of Mr. Low is that in consequence of the ruling of the House of Lords in the case of *Boulter* v. *Justices of Kent*, which puts the Summary Jurisdiction Acts out of the question upon this subject, that there must be, by implication if not expressly stated, within section 27 of the Licensing Act of 1828, a power to award costs against the justices because there is nobody else against whom they can be awarded.

That is really the argument; but we must look at the section itself and see whether it means that in every case there shall be the possibility of the power of making any such order, and I am not able to find it. The section remains as it was before, and under that section as it was construed before, without the assistance of the Summary Jurisdiction Acts, there would not have been, as I understand it, the power to order costs against the justices; but with the assistance of those Acts and the decision of *Reg.* v. *Justices of London* (which has been quoted by Mr. Low) it could be argued that, if they made themselves parties, there was power to order costs against them if they were parties to the appeal, and in that case the justices had made themselves parties to the appeal, otherwise that case would be a decision completely against Mr. Low, in the present instance, because here the justices have not made themselves parties to the appeal. But although the Act no longer does apply, and therefore the case of *Reg.* v. *Justices of London* is not a precise authority against Mr. Low's contention here to-day, it does not follow that it is a decision in his favour; nor do I see in the original Act, without the assistance of Summary Jurisdiction Acts, anything from which it can now be argued that there was more in it than it has been allowed that the Act contained previously to the decision of *Boulter* v. *Justices of Kent*. The Act surely is the same as it was before, and we are not to read into that Act power which it was held it formerly did not contain, merely because it has been ruled that the licensing justices are not a court of summary jurisdiction. It appears to me clear that in section 27 there ought to be words

can be understood to mean that the costs may be awarded against the justices, before we decide that it should be so. There are no such words that I can find in section 27, and in section 29 it is quite clear to me that whilst the appellant, if unsuccessful, is to pay to the justices such costs as are dealt with in the early part of section 29, there is no provision under which the justices are to be ordered, or can be ordered to pay to a successful appellant his costs. There are, indeed, provisions under which the justices may recover from the treasurer of the county such costs as he has been put to—"to which he has been so put"—and I should have thought that those did not include the costs of the appellant; but, however that may be, the order in the present case has been that the justices shall pay those costs, and that they are to be reimbursed by the treasurer of the county, or, as in this case, by the county council. I think there is no power contained in either section 27 or section 29 of the Licensing Act of 1828 to make that order, and I am not able to accept the argument that because the case of *Reg.* v. *Justices of London* is no longer in point against Mr. Low in this case, that therefore he is entitled to succeed. It reverts to the old state of things which existed before, and without the Summary Jurisdiction Acts. I think, therefore, the rule ought to be made absolute.

CHANNELL, J.—I am of the same opinion. The only effect of *Boulter* v. *Justices of Kent* is that it prevents certain cases being authorities in the matter which they otherwise would be, and conclusive authorities. As it stands they contain certain *dicta* which, as far as they go, go against Mr. Low's argument, but it prevents any authority in them being binding on us. The result is it throws us back on the true construction of 9 Geo. 4, and in my judgment you cannot find any power in section 27 to give costs against justices who appear to fight the case. The only words which appear to do so are "shall make such order therein, with or without costs, as to the said courts shall seem meet." It does not seem to me that that necessarily involves that in every case which comes before them under the section there must be some party against whom they can give costs. Those words occur in the general part of that section (27) which relates to an appeal by any person who thinks himself "aggrieved by any act of any justice, done in or concerning the execution of this Act." There may be a very great number of appeals under it, in the great majority of which there would be somebody against whom costs could be given. This is a general power relating to them, but not necessarily applicable in the particular case.

The particular case before us is dealt with in the subsequent part of section 27, which says: "In case the act appealed against shall be the refusal to grant or to transfer any licence, and the judgment be reversed." That is this very thing then; it gives express power to the court to grant or transfer the licence in the same manner as if it had been granted at a licensing session and that the judgment of the court shall be final and conclusive to all intents and purposes, and that is all it says as regards the case where the judgment of the licensing justices is reversed. But in the next part of the section it says, "And in case of the dismissal of such appeal or of the affirmance of the judgment in which such act was done and which was appealed against, the said court shall adjudge and order the said judgment to be carried into execution and costs awarded to be paid, and shall, if necessary issue process for enforcing such order." So that there is an express power to enforce the order as to costs in the one case of the appeal being dismissed, and to issue process for it, and there is nothing whatever said about costs in the case of the appeal being allowed, which certainly looks as if when it was allowed there were to be no costs given to the appellant. Section 29, so far as it has any bearing on that, is quite consistent with that.

Rule absolute.

Solicitor for the London County Council, *W. A. Blaxland.*

Solicitors for Denton, *Layton, Sons, & Lendon.*

Prob. Div. & Adm. Div. Divorce. } Oct. 27.

WYNNE v. WYNNE. (a.)

Divorce — Desertion — Intention at time of leaving— Criminal proceedings pending.

A husband left his wife in 1895 *after divorce proceedings in which he had appeared as co-respondent (the jury disagreeing). At the last interview, he left her under the impression that this was the cause of his departure, and that he would return in a few months. He was in financial embarrassment, his firm immediately became bankrupt, and ultimately the official receiver applied for a warrant against him. He had carried on an intrigue with an actress in* 1893 *and* 1894 *unknown to his wife. He sent one letter to his wife begging for money, but with no address; but otherwise he did not communicate with or see her.*

The court held that, at the time he left his wife, he intended to desert her, and, adultery being proved, granted a decree nisi *for dissolution of marriage.*

Hearing of undefended divorce action in which the wife, Marianne A. Wynne, petitioned for a dissolution of the marriage on the ground of her husband's adultery and desertion.

The parties were married on the 11th of January, 1881, and there was no issue of the marriage. The husband was a solicitor, and continued in business till March, 1895, when the firm became bankrupt with very heavy liabilities. They lived happily together till the husband was a co-respondent in the divorce suit of *Hawtin* v. *Hawtin and Wynne*, which was tried in February, 1895, when the jury disagreed. Immediately afterwards the husband telegraphed to his wife, and on the 2nd of March she met him at an hotel in London; he told her he was ruined, he could not face the disgrace, and must leave for a few months till the matter had blown over. The wife thought the disgrace he referred to was the divorce case. She did not see him again, but in July, 1896, he wrote to her asking for help, but did not give his address other than by saying he had written to his brother telling him his plans. In the bankruptcy the official receiver ultimately procured a warrant for the husband's arrest, it appearing that he had been speculating and living very extravagantly. After his departure the wife found that her husband had been carrying on an intrigue with an actress in 1893 and 1894, and this was the adultery charged and proved.

Bargrave Deane, Q.C., and *Priestley*, for the petitioner, referred to *Drew* v. *Drew*, 36 W. R. 921, 13 P. D. 97, as an authority that in the present case there was desertion without cause for two years.

JEUNE, P.—The adultery is clearly proved, the only question is whether there has been desertion. At

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

first sight there is this difficulty, the respondent undoubtedly left for reasons of a financial kind and fear of the consequences of the acts of which he had been guilty; but that is not conclusive. Sir J. Hannen in *Drew* v. *Drew* pointed out that the test to be applied is, What was the respondent's intention with regard to the petitioner when he left her. Here he had previously been carrying on an intrigue with another woman, which shows he had lost all affection for his wife, and he gave a false reason for his departure, and saying that he should only be away for a few months. He also concealed his address from her, although he appears to have sent it to his brother. These facts show that the respondent when he left his wife was anxious to get rid of her society. I think that desertion has been proved, and there must be a decree *nisi*.

Decree nisi.

Solicitors for the petitioner, *Arthur Newton & Co.*

Privy Council.

(*From the Supreme Court of New South Wales.*)

March 10.

MUNICIPAL COUNCIL OF SYDNEY v. YOUNG. (a.)

Corporation—Municipal corporation—Street vested in corporation—Compensation—Sydney Corporation Act, 1879 (43 *Vict. No.* 3)—51 *Vict. No.* 37.

Under the Sydney Corporation Act, 1879, *all public ways in the city of Sydney were vested in the council. A local Act* (51 *Vict. No.* 37) *enabled the Secretary for Public Works to form a tramway. In the course of construction it became necessary to take a small portion of a street in the city of Sydney, and the municipal authority claimed compensation under the Act, which entitles the owner of property taken to compensation.*

Held, that the vesting of a street or public way vested no property in the municipal authority beyond the surface of the street and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, and did not vest the soil or land in them as owners; and, consequently, that the surface of the street was not subject-matter for compensation.

This was an appeal from the Supreme Court of New South Wales.

The sections of the Acts of Parliament and the facts sufficiently appear in their lordships' judgment.

Witt, Q.C., and *Poley*, for the appellant.

Sir R. Reid, Q.C., and *Vaughan Hawkins*, for the respondent.

The judgment of their lordships (the Earl of HALSBURY, L.C., Lords HERSCHELL, MACNAGHTEN, and MORRIS, and Sir RICHARD COUCH) was delivered by

Lord MORRIS.—In this case their lordships feel no difficulty. A local Act (51 Vict. No. 37) enabled the Secretary for Public Works of Sydney, who is called the constructing authority, to form a tramway. It became necessary in the making of the tramway to take some twelve perches of a street leading from a particular named place to a public park. The municipal authority of Sydney alleged that by the taking of those twelve perches of this street they were entitled to compensation under the Act, which of course entitles the owner of the property to compensation. That of course depends on whether the municipal authority of Sydney are the owners of the street in any sense that would give them a claim for compensation. The provision by which the property in the street in any respect rests in them is under the Sydney Corporation Act of 1879, the 43rd Victoria, No. 3, which states that "all public ways in the city of Sydney now or hereafter formed shall be vested in the council, who shall have full power," and so on.

Now, it has been settled by repeated authorities, which were referred to by the learned chief justice, that the vesting of a street or public way vests no property in the municipal authority beyond the surface of the street, and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, but that it does not vest the soil or land in them as the owners. If that be so, the only claim that they could make would be for the surface of the street as being merely property vested in them *qua* street, and not as general property. Their lordships are of opinion that that is not the subject-matter of compensation, for the street being diverted into a tramway is in no way a taking of property within the meaning of the compensation to be assessed under the Public Works Act of Sydney. In point of fact it is rather the opposite, because the municipal authority, by getting rid of the street, *pro tanto* have less expense, and it is in that respect a relief to the ratepayers.

Then it has been said that the construction should not be given to the words "shall be vested in the council" in the Sydney Corporation Act of 1879 which has been given to similar Acts in England, because there has been an amending Act passed which seems, as is suggested, to widen that interpretation as to what is vested in them. Their lordships are of opinion that the amending Act does not do so. It provides that "it shall be lawful for the municipal council of Sydney, for the purpose of opening, altering, and widening," &c., to purchase land, to exchange land, or to sell land. That must mean to which they are really entitled as land, and which as a matter of law they have acquired, and can sell like any ordinary individual.

Their lordships are of opinion, therefore, that the judgment of the Supreme Court ought to be affirmed, and they will accordingly humbly advise her Majesty to that effect. The appellant must pay the costs of this appeal.

Solicitors for appellant, *Barraud & Jupp.*

Solicitors for respondent, *Light & Galbraith.*

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Court of Appeal.

From Q. B. Div. (Earl of Halsbury, L.C., and A. L. Smith and Collins, L.JJ.) — May 4.

TRINDER, ANDERSON, & CO. v. THAMES AND MERSEY MARINE INSURANCE CO. (a.)

Insurance—Marine—Freight—Notice of abandonment—Personal negligence of the assured.

Where a ship carrying a cargo sustains sea damage to such an extent as would justify an abandonment to the underwriters on ship, and under such circumstances that the cargo could not possibly be carried on in any substituted ship, it is not necessary that notice of abandonment should be given to the underwriters on freight.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Rankin v. Potter, 22 *W. R.* 1, *L. R.* 6 *H. L.* 83, *followed.*

It is no defence to an action on a policy of marine insurance, claiming as for a loss by perils of the sea, that the loss was brought about by the personal (though not wilful) negligence of the assured in the navigation of the ship.

Appeal from the judgment of Kennedy, J., at the trial of the action without a jury.

The action was brought in the interest of the owners of the sailing ship *Gainsborough* on a policy of marine insurance on freight effected with the defendants by the plaintiffs. The principal plaintiff was A. McPhail, who was the owner of forty-two sixty-fourths of the ship, and was also master.

The Gainsborough, while carrying a cargo of coal on a voyage covered by the policy, stranded on a reef near the island of Honolulu, in consequence of the negligent navigation of the master, and two days afterwards the ship and cargo, being in a very perilous position, were sold as they were by the master to a purchaser, who after jettisoning part of the cargo, ultimately succeeded in getting the ship and the remainder of the cargo, which was greatly deteriorated, off the reef. The circumstances were such that it was impracticable to carry on the cargo either in the stranded ship or in a substituted ship. The plaintiffs claimed as for a total loss of freight.

Another action, *Westport Coal Co.* v. *McPhail*, *post*, p. 566, arising out of the same circumstances was brought by the owners of the cargo against the shipowners, and was tried before Kennedy, J., and a jury a few days before this action was tried. It was agreed that the findings of the jury in that case should be taken to be findings in this case. The findings of the jury were that the stranding was due to the negligence, but not the wilful negligence, of the master in the navigation of the ship; and that the sale of the cargo by the master two days after the stranding was unnecessary.

Kennedy, J., gave judgment in the present case for the plaintiffs.

The defendants appealed on the grounds—first, that no notice of abandonment had been given; secondly, that the loss of freight had been caused by the personal negligence of the assured.

Joseph Walton, Q.C., and *T. E. Scrutton*, for the appellants.

Robson, Q.C., and *Joseph Hurst*, for the respondents.

The following cases were cited besides those mentioned in the judgments: *Mordy* v. *Jones*, 4 B. & C. 394; *Philpott* v. *Swann*, 11 C. B. N. S. 270, 10 W. R. C. L. Dig. 46; *Christie* v. *Secretan*, 8 T. R. 192; *Cullen* v. *Butler*, 5 M. & Sel. 461.

Cur. adv. vult.

May 4.—A. L. SMITH, L.J., read the following judgment: This is an action by a shipowner for a total loss of freight upon a policy of marine insurance covering freight; and the first point taken by the defendants, who are an underwriting company, is that as neither the ship carrying the goods for the carriage of which the freight was to be earned, nor the goods themselves, were actual total losses, notice of abandonment must have been given by the plaintiff to the underwriters upon freight, to entitle him to recover for total loss of freight. The second point is that, as the stranding of the vessel which brought about the loss of freight sued for, was caused by the negligent navigation, though not the wilful act, of the plaintiff the assured (he being part owner and captain of the ship), he cannot recover upon the policy. The facts are as follows: On the 27th of May, 1896, the plaintiff caused a policy of marine insurance to be effected with the defendants on his and his co-owners' behalf against perils of the sea upon "freight chartered or as if chartered" in the ship *Gainsborough* from Sydney to Newcastle, New South Wales, while there and thence to any port or ports in New Zealand, while there and thence to San Francisco. When the ship was proceeding on her voyage from New Zealand to San Francisco with a cargo of coal, the plaintiff found himself short of water and thereupon justifiably, as it has been held, put into Honolulu for water. Upon nearing Honolulu on Saturday, the 29th of August, 1896, owing, as it has been found, to his negligent navigation, the ship was run upon and became firmly stranded upon a reef and commenced at once to make water. Endeavours were made to get her off by means of towing but without avail, seas were washing over her decks, she was bumping heavily upon the reef and kept going further on, her cargo became wetted by the sea-water, and the ship and cargo were in a very critical and perilous position. In these circumstances the plaintiff took the opinion of Lloyd's agent at Honolulu, together with that of the harbour-master there, and of a Captain Campbell, and they agreed in advising him that, considering the condition and position of the ship and cargo, they should be at once sold; and upon Monday, the 31st of August, they were accordingly sold, situated as they were, and realized the sum of £374, the purchaser Allen having also to pay some charges to the amount of £43. It has been found that this sale was not justified at the time it took place, but my brother Kennedy, who tried the case, has found that the sale, although premature, must have taken place within a few days of the time at which it did. The ship and cargo remained upon the reef until the 26th of September, when Allen commenced operations in order to get the ship and cargo off, a steam pump having by that time been obtained. Some 200 tons of coal were then jettisoned, and upon the 4th of October the ship, with the remainder of her cargo in her, was got off. This coal when got out of the ship was sold at Honolulu by Allen for £1,000.

Without dealing with the evidence in detail, in my judgment it shows that the sea damage which the ship had sustained—situated, as she was, 2,000 miles from San Francisco, which was the nearest port at which the ship could be repaired to make her a cargo-carrying ship, and then only at a cost which would have exceeded the value of the ship when repaired—was such as would have justified an abandonment of the ship and a claim against the underwriters upon the ship for a total loss. The learned judge has found that "it was not a practicable thing to carry on the cargo either in the stranded ship or in any other ship, for none could be obtained, and that it could not have been carried on, and no abandonment would have enabled the assurers to do so; that the cargo, although it did not actually perish, was in a condition in which it was not doubtful whether notice of abandonment could give the assurers any advantage, for it was quite clear it would not; that the cargo would have had to be sold at Honolulu, and that the freight by reason of the stranding was an actual total loss, and that there was a destruction of the voyage." These being the findings of the learned judge, as there was clearly evidence to support them, I see no ground for differing from him. There was no telegraphic communication between Honolulu and San Francisco or anywhere else. Honolulu was, as before stated, 2,000 miles from San Francisco, and this was the nearest place to Honolulu wherefrom to communicate with England. Had notice of abandonment of freight been given by the plaintiff from Honolulu,

as the underwriters upon freight now contend it should have been, it would have taken from five to six weeks before the underwriters could have communicated with Honolulu. The evidence shows that the coal in its wet state could not have been carried on board any ship from Honolulu to San Francisco by reason of its inflammable condition and liability to spontaneous combustion. It could have been dried at Honolulu, but it was proved that the process of unshipping, drying, reshipping, and afterwards conveying coal on to its destination is such that, besides the heavy cost of drying, the coal itself becomes greatly deteriorated and damaged, and, as before stated, the learned judge has found that the sale of the coal at Honolulu must have taken place within a few days of the time at which it was actually sold. It was argued for the underwriters that as there was no actual total loss of the ship, for she remained a ship after the stranding and is so still, and as there was no actual total loss of the cargo, for it remained coal after the stranding as before, though wetted and greatly deteriorated and depreciated in value, the assured could not recover for a total loss of freight unless notice of abandonment of freight had been given to the underwriters upon freight. Now, the question of giving notice of abandonment upon a policy covering freight is distinct from the question of giving notice of abandonment upon a policy on a ship, and they must be kept apart. At one time there was a conflict of opinion upon this question of giving notice of abandonment, Lord Abinger, in *Roux* v. *Salvador*, 3 Bing. N. C. 266, holding that there were cases in which, although the subject-matter insured against remained *in specie*, notice of abandonment need not be given; Lord Campbell on the contrary (*Knight* v. *Faith*, 15 Q. B. 649) holding that notice of abandonment must be given in all cases except in cases of actual total loss. This controversy was finally, as regards a policy on freight, determined in the case of *Rankin* v. *Potter*, 22 W. R., L. R. 6 H. L. 83, in the House of Lords, in which case the judges were called in to advise the House as to the necessity of an assured upon freight in all cases giving notice of abandonment in the case of a constructive total loss of ship before he could recover for a total loss of freight. Lord Abinger's view was supported. In *Rankin* v. *Potter* the appellants, the underwriters upon freight, contended that, by the insurance law of England, where the thing insured existed in kind, however deteriorated or damaged, there could be no total loss without notice of abandonment, and one of the questions asked by the House of the judges was this: Was notice of abandonment, either of ship or freight, or of both, necessary to enable the plaintiff to recover for a total loss on a policy on freight? In this case the subject-matter of insurance was chartered freight. I will cite a passage from the opinion of Brett, J., given in answer to the question asked, for it is very pertinent to the present case. The learned judge says (p. 102), "I venture to affirm that it is a correct proposition of insurance law to say that no abandonment is necessary, and no notice of abandonment is required, where there is nothing to abandon which can pass to or be of value to the underwriter. It follows that on a policy on freight in general terms there need be no abandonment of freight, and no notice of abandonment is required, where the ship is damaged to such an extent or under such circumstances as would authorize an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or, if on board, where none is saved with the chance of an opportunity of its being forwarded in a substituted ship. In the several states of circumstances above set forth and considered, the loss of freight on the policy on freight would be an actual total loss. This conclusion does not, as it seems to me, go the length of determining that there never can be a constructive total loss of freight. If, for instance, the ship should be damaged as described, but cargo which was on board has been saved under circumstances which leave it doubtful whether such cargo might or might not be forwarded in a substituted ship, or if the original cargo should be lost and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight the assured should give notice of abandonment of the chance of earning such substituted freight." It will be also seen upon reading the opinion of Blackburn, J., given to the House in this case, that that learned judge (p. 121) combats the contention that there was a technical rule of insurance law by which notice of abandonment must be given if the thing exists *in specie* at all, though the state of things was such that the underwriters could do nothing even if they had the notice. He says: "I think this (notice of abandonment) is from the nature of things confined to cases where there are some steps which the underwriters could take if they had notice. When they can do so, I think that the neglect to give a notice of abandonment may determine the owner's election. . . . If there was nothing they could do, no notice, I think, is required." And in another part of his opinion the learned judge says (p. 124), "But as to the freight, I can see nothing which could have been done by the underwriters if the idle ceremony of a notice had been gone though." Lord Chelmsford in delivering the judgment of the House points out that considerations having reference to a policy on freight must be kept entirely separate and apart from considerations having reference to a policy on ship, and after discussing the conflicting cases of *Knight* v. *Faith* and *Roux* v. *Salvador*, gave judgment upon the principles laid down by Blackburn and Brett, JJ., above alluded to, and the House of Lords held that the assured in the circumstances of that case could recover for a total loss of freight.

It seems to me that in the present case, applying the principles laid down in *Rankin* v. *Potter*, the circumstances were such as (*a*) to authorize an abandonment of the ship on a policy on ship; (*b*) that there was no chance of an opportunity of the cargo being forwarded in a substituted ship, for no other could be obtained; (*c*) that this was not a matter of doubt; (*d*) that the ship herself could earn no freight on the voyage insured; (*e*) that there was nothing which the underwriters upon freight could have done, had notice of abandonment been given to them, and it would have only been an idle ceremony to have done so. Five years after this decision in *Rankin* v. *Potter* in the House of Lords, Brett, L.J., in this court in *Kaltenbach* v. *Mackenzie*, 26 W. R. 844, 3 C. P. D. 467, when considering the necessity of giving notice of abandonment upon a policy upon ship, made some observations as to what had been decided in *Rankin* v. *Potter* in the House of Lords, which, if applicable to a policy upon freight, would raise a difficulty in the present case. That learned judge, when, as before stated, dealing with a policy upon ship, said (p. 475): "I am not prepared to say that if it could be shown that the subject-matter of insurance at the time when the assured has information upon which otherwise he would be bound to act" (*i.e.*, give notice of abandonment) "is in such a condition that it would absolutely perish and disappear before notice could be received or any answer returned, that that might not excuse the assured from giving notice of abandonment; but I am prepared to say that nothing

short of that would excuse him; and although I do not say what I have stated would excuse him, I am not prepared to say it would not." Cotton and Thesiger, L.JJ., gave judgment to the like effect, and held that as the ship had not ceased to exist and been entirely lost at the time when notice of abandonment should have been given, the assured could not recover for a total loss on a policy upon ship. It appears to me that the learned judges were dealing in this case of *Kaltenbach* v. *Mackenzie* with a loss occasioned by a sea peril upon an insurance upon ship, and not with a loss of freight upon a policy on freight, which, as pointed out by the House of Lords, are contracts entirely independent of each other; and that what I have already said about *Rankin* v. *Potter* governs the present case. I am of opinion, therefore, that this first point as to the necessity of there being a notice of abandonment given in this case fails the defendants.

The second point taken is that inasmuch as the ship was run upon the reef by the negligent navigation, though not wilful act, of the captain, as he was one of the assured he cannot recover upon the policy. It cannot be doubted that a policy upon ship covering perils of the sea covers a loss brought about by the negligent navigation of the captain and crew, if such loss is immediately caused by a peril of the sea. It was held over fifty years ago in *Dixon* v. *Sadler*, 5 M. & W. 405, at p. 414, that an assured of ship makes no warranty to the underwriters that the master and crew will do their duty during the voyage, and consequently their negligence is no defence to an action on a policy when the loss is brought about by their negligent navigation, if the loss is immediately occasioned by the perils of the sea. Parke, B., when delivering the judgment of the court, cited five cases in support of this proposition, commencing as far back as the year 1818 with the case of *Busk* v. *Royal Exchange Assurance Co.*, 2 B. & Ald. 73. That the negligent navigation of a ship by a person other than the assured affords no defence to an action upon a policy of marine insurance against perils of the sea, when the loss is immediately occasioned by a peril of the sea, is clear, the reason, in my opinion, being that what is insured against is a peril of the sea, which is none the less a peril of the sea though brought about by negligent navigation. Is there, then, any warranty by a part-owner, if he be one of the assured, that he will not personally be guilty of negligent navigation during the voyage covered by the policy? We are not dealing with a loss brought about by the wilful act of an assured. Negligent navigation has never been held to be equivalent to "dolus," or the "misconduct" which is spoken of by Lord Campbell in *Thompson* v. *Hopper*, 5 W. R. 83, 6 E. & B. 937, nor is it the negligence referred to by Lord Ellenborough in *Bell* v. *Carstairs*, 14 East 374. It cannot be doubted that the legal maxim, *In jure non remota causa sed proxima spectatur*, applies when considering what are the particular perils for which an insurer undertakes to be liable on a policy of marine insurance, if such maxim contravenes no principle of insurance law, and is not hostile to the manifest intention of the parties (see *per* Lord Campbell in *Thompson* v. *Hopper*). It is not disputed at the bar that negligence of an assured upon a fire policy, whereby the fire was occasioned which caused the loss, affords no defence to the insurer. Why so? Because loss by fire is what is insured against. And so in a marine policy sea perils are what is insured against. The risk undertaken by an underwriter upon a policy covering perils of the sea is that if the subject-matter insured is lost or damaged immediately by a peril of the sea, he will be responsible; and in my judgment it matters not if the loss or damage is remotely caused by the negligent navigation of the captain or crew or of the assured himself, always assuming that the loss is not occasioned by the wilful act of the assured. In the last case the maxim above referred to does not apply for the reasons pointed out by Lord Campbell in *Thompson* v. *Hopper*, for then not only does the maxim contravene the principles of insurance law and the manifest intention of the parties, but it is qualified by another legal maxim, *Dolus circuitu non purgatur*. I believe that there cannot be found in the insurance law of England a single case to support the proposition now contended for by the underwriters, which is that, assuming the loss has not been occasioned by the wilful act or default of the assured, but is immediately caused by a peril of the sea, the remote and not the proximate cause is to be looked to.

There are, on the other hand, cases which in my judgment strongly go to show that what I am saying is the law. I refer again to *Thompson* v. *Hopper* and the case in the House of Lords of *Dudgeon* v. *Pembroke*, 25 W. R. 499, 2 App. Cas. 284. In each of those cases the underwriters were sued upon time policies for losses immediately occasioned by perils of the sea. It never suggested itself to the underwriters to attempt to defend themselves upon the ground that the losses were occasioned by the negligence of the assured, but on the contrary in the first case the defence was founded upon the assured having "knowingly, wilfully, wrongfully, and improperly" committed acts whereby the loss was occasioned, and in the second case, upon the assured having "knowingly and without justifiable cause" sent the ship to sea in such an unseaworthy condition that the loss was thereby occasioned. If negligence of the assured whereby the loss was occasioned constituted a defence to the underwriters upon a policy covering perils of the sea, it is to me inconceivable that such defence was not set up, more especially when it is seen who the counsel were who appeared for the underwriters. The total absence of authority as to the point now suggested as being a valid defence, and the presence of authority where such a defence might have availed the underwriters but was not set up, to my mind is most significant. As Lord Penzance said in *Dudgeon* v. *Pembroke*, if what is now contended for be the law, "the underwriters have been signally supine in availing themselves of it, for there is no case where such a defence as this has been set up. The materials for such a defence must have existed in countless instances, and yet there is no trace of it in any case which has been brought to your lordships' notice, still less any decision upholding such a doctrine."

My brother Kennedy has dealt with what cases have been pressed into the service of the underwriters as being authorities, which in reality they are not, and I do not go over them again. I agree in his judgment, and for the reasons above I am of opinion that both points fail the defendants, and that this appeal must be dismissed.

COLLINS, L.J., read the following judgment: I am of the same opinion. On the question of abandonment I think that on the facts found the case is concluded by *Rankin* v. *Potter*. The arguments of the appellants were really those of the dissentient judges in that case.

As to the negligence point, I think this also is concluded by authority. There can be no doubt whatever that the proximate cause of the loss was a peril of the sea. It is now conclusively settled by the series of cases, of which *Hamilton* v. *Pandorf*, 36 W. R. 369, 12 App. Cas. 518, is the last, that "perils of the sea" mean the same thing whether they appear in a bill of lading, a charter-

party, or a policy of insurance. But the rights of a party relying on an exception of sea perils in a contract of carriage may be very different from those of an assured claiming for a loss by the like perils under a policy. Negligence by the carrier will defeat his right to claim the benefit of the exception, not because it prevents the loss being a loss by sea perils, but because his negligence gives a cross-right to the underwriter to an equivalent amount: see Lord Herschell's opinion in *The Xantho*, 36 W. R. 353, 12 App. Cas. 503, at p. 510, citing Willes, J., in *Grill* v. *General Iron Screw Collier Co.*, 14 W. R. 893, L. R. 1 C. P. 600. The loss therefore being by a sea peril, the right of the assured is absolute unless his own conduct has given a cross-right to the underwriter against himself. Now, it has been settled by a long series of authorities that negligence of the assured's servants does not give such cross-right and does not therefore on the absolute contract of insurance relieve the underwriter from making good the loss of which a sea peril was the proximate cause.

"I may say," says Willes, J., in the passage above referred to, "that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea; the fact that the loss is partly caused by things not distinctly perils of the sea does not prevent it coming within the contract. In the case of a bill of lading the case is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that, if the loss by perils of the sea is caused by the previous default of the shipowner, he is liable for the breach of his covenant."

If, therefore, negligence of the owner's servants does not excuse the underwriter, as it does not, it must be because such negligence gives no cross-right in a contract of insurance as it would in a bill of lading. These decisions, therefore, involve the proposition that the owner does not contract not to be negligent, otherwise the negligence of his servants, being just as much his negligence as it is under a bill of lading, would give the same cross-right in both cases. Unless, therefore, the personal negligence of the owner works some personal disability upon him, he is entitled to enforce the contract of insurance. His negligence does not any more than that of his servants alter the character of the sea peril, which still remains the *causa proxima*, and it does not give a right of cross-action as it is not a breach of contract. The observations of Willes, J., on this point in *Thompson* v. *Hopper*, in the Exchequer Chamber, 6 W. R. 857, E. B. & E. 1038, are again instructive. Dealing with the maxim *Dolus circuitu non purgatur*, which had been pressed to support the contention that the personal act of the shipowner in sending an unseaworthy ship to sea was an answer to a claim against insurers on a time policy, he says: "*Dolus* therein stands for *dolus malus*, and cannot mean simply anything which may lead to the damage of another. . . . Without entering into a discussion of the precise meaning of *dolus* or *dolus malus* in the civil law, I may say that if *dolus*, in the sense in which it is used in the maxim, can exist independent of evil intention, it cannot so exist without either the violation of some legal duty, independent of contract, or the breach of a contract express or implied between the parties. To recognize in a court of justice *dolus*, or wrong, or misconduct as a ground of action or defence apart from these conditions would be to confound all certainty in the law." The wilful default of the owner inducing the loss will debar him from suing on the policy in respect of it on two grounds, either of which would suffice to defeat his right; first, because no one can take advantage of his own wrong, using the word in its true sense, which does not embrace mere negligence: see *per* Bramwell, B., in *Thompson* v. *Hopper;* secondly, because the wilful act takes from the catastrophe the accidental character which is essential to constitute a peril of the sea.

"I think," said Lord Halsbury in *Hamilton* v. *Pandorf*, "the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'" Nothing short, therefore, of *dolus* in its proper sense will defeat the right of the assured to recover in respect of a loss of which, but for such *dolus*, the proximate cause would be a peril of the sea; and the law is so stated by Lord Penzance in *Dudgeon* v. *Pembroke* in the passage referred to in the argument. "In effect," says Willes, J., in a later passage in the judgment already quoted, "there being no violation of the law and no fraud in the assured, an increase of risk to the subject-matter of insurance, though such increase be caused by the assured, if it be not prohibited by the policy, does not avoid the insurance."

The cases relied on by the appellants do not support their contention. Those based on the absence of documents may be rested on two grounds, assuming that the act of the assured fell short of *dolus*, which is not clear—viz.: (*a*) That in the case of insurance against capture there is an implied contract that the ship shall be properly documented; it is put on this ground by Phillips, section 745, and by Arnould, 5th ed., p. 668; (*b*) that capture insured against being not the mere detention for the purpose of inspection of documents, but "the taking with intent to deprive the owner of all dominion or right of property over the thing taken" (Arnould, 5th ed., p. 748, citing Emerigon), the want of documents may be regarded as the proximate cause of the loss. Willes, J., in *Thompson* v. *Hopper*, explains these cases on this ground. Referring to *Bell* v. *Carstairs*, he says: "The loss was the immediate and direct result of the want of proper papers, and it was the duty of the owner of the ship, by the law which authorized its capture, if not by the general law (see Roccus), to be provided with those papers, and the want of them was the direct, immediate, and only cause of the loss." *Pipon* v. *Cope*, 1 Camp. 434, is explained by Parsons in his work on Marine Insurance, on the ground that the owners who were claiming in respect of loss by seizure for smuggling for the third time in three consecutive voyages must be taken to have assented to the barratrous acts of their servants (see at p. 571). It was at all events *crassa negligentia æquiparata dolo*. I entirely agree with the decision and reasons given by Kennedy, J.

A. L. SMITH, L.J.—The Lord Chancellor concurs in these judgments.

Appeal dismissed.

Solicitors for the appellants, *Waltons, Johnsons, Bubb, & Whatton.*

Solicitors for the respondents, *Pritchard & Sons.*

From Q. B. Div.
(Earl of Halsbury, L.C., and A. L. Smith and Collins, L.JJ.) } May 4.

WESTPORT COAL CO. *v.* MCPHAIL. (*a.*)

Ship—Bill of lading—Exception—Negligence of master—Ship navigated by owner—Liability of owner for negligence in navigation.

A bill of lading contained an exception of "the neglect and default of pilot, master, or crew in the navigation of the ship." The goods carried under the bill of lading were lost in consequence of the stranding of the ship, which was brought about by the negligence of the master, who was one of the owners of the ship.

Held, that the owner who was master was as much entitled as the other owners to rely on the exception.

Appeal from the judgment of Kennedy, J., at the trial of the action with a jury.

The action was brought by the owners of a cargo of coal shipped on board *The Gainsborough* against A. McPhail and others, the owners of *The Gainsborough*, for breach of the contract contained in a bill of lading to deliver the said cargo. McPhail, besides being part owner, was also master of the ship.

The Gainsborough, while proceeding on the carrying voyage, stranded in consequence of the negligent navigation of the master, and two days afterwards the ship and cargo, being in a very perilous position, were sold under the circumstances described in *Trinder, Anderson, & Co.* v. *Thames and Mersey Marine Insurance Co.*, *ante*, p. 561.

The bill of lading contained the following exceptions: "The neglect and default of pilot, master, or crew in the navigation of the ship, collisions, and all and every the dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever."

The jury found that the stranding was due to the negligence, but not the wilful negligence, of the master in the navigation of the ship; and that the sale of the cargo two days after the stranding was unnecessary.

Kennedy, J., gave judgment for the defendants other than McPhail, but he gave judgment for the plaintiffs against McPhail.

McPhail appealed.

Robson, Q.C., and *Joseph Hurst*, for the appellant.

Joseph Walton, Q.C., and *T. E. Scrutton*, for the respondents.

Cur. adv. vult.

May 4.—COLLINS, L.J., read the judgment of the court as follows: This is an action by owners and shippers of coal upon a bill of lading signed by the defendant McPhail, who, as master, on behalf of himself and his co-owners of the ship *Gainsborough*, signed the bill of lading for the coal shipped thereon; and the facts stated in the judgment in the case of *Trinder, Anderson, & Co.* v. *Thames and Mersey Marine Insurance Co.*, *ante*, p. 561, as far as material, apply to this case. The following are the material parts of the bill of lading upon the construction of which this case depends: "Shipped in good order and condition by the Westport Coal Co. on board the good ship *Gainsborough*, whereof is master for the present voyage A. McPhail, lying in the port of Westport and bound for San Francisco, 1,315 tons of coal to be delivered (subject to the exceptions hereinafter mentioned) in like good order and condition at the aforesaid port. The following are the exceptions, the act of God, . . . barratry, the neglect and default of pilot, master, or crew in navigation of the ship." It was signed, "A. McPhail, master." The question is whether these exceptions are such as to cover the negligent navigation of the defendant McPhail, who was master of *The Gainsborough* and was also interested in the ship as part owner. On the first point made by the plaintiffs, we are of opinion that the argument, that having regard to the words immediately preceding and following it, the word "master" in the exception must be read as not embracing a part owner who acts as master, cannot prevail. If the exception is inapplicable to such a person, the other co-owners are not protected; the person who caused the mischief does not come within the description of master against whose negligence they provided, and they have in fact made no contract relieving them from liability for his acts. Kennedy, J., has held that they are protected, and there is an appeal against his decision. The case of *Jones* v. *Nicholson*, 10 Exch. 28, 3 W. R. Dig. 179, decides that the relation of owners and captain may exist between part owners and one of their number so as to entitle them to claim against underwriters in respect of his acts on a policy against barratry of master or crew, and certainly it would be a strange result if the exception of master's negligence were wholly nugatory wherever he had an interest as part owner. It is also clear law that a party is not debarred from contracting against liability for his own negligence, and therefore there would be no personal incapacity in a part owner debarring him from setting up the exception of master's negligence even though he were himself the master; and in another case the present defendant has been held entitled to recover against underwriters for a loss brought about by the same negligence that we are now discussing. But though the defendant is, we think, to be treated as the captain within the exception, and though he is not debarred from relying upon it whether he be sued as captain or as owner, it does not follow that that suffices to relieve him from liability in this case. But it is very desirable to see what the precise ground is on which his non-immunity from liability must be placed. It is a well-established rule that exceptions must be strictly construed against the person for whose benefit they are inserted, and this rule has been frequently applied so as not to interpret them in bills of lading as relieving the owner from his obligation to take due care. This rule would debar us from reading into the exception any such words after "master" as would cover part owner's as distinguished from master's negligence. The exception, therefore, must be treated as not excusing a breach of the owner's duty as such. But it is at this point that the real difficulty arises. The captain is excused, the owner is not. But the holder of the bill of lading has given up the right to complain of loss traceable to the master's negligence, and it was the negligence of the master in the sphere of his duty as master which caused the loss, a loss, moreover, against responsibility for which he is certainly protected in his capacity as master by the bill of lading itself, which is signed by him, and in which he is expressly named. The plaintiffs seek to make him liable by viewing him in two different capacities—that is to say, they distinguish his capacities for the purpose of limiting the exception, but they mix them up again for the purpose of fixing him with liability as owner. But does it follow that because one and the same person is captain and part owner negligence in either capacity is to be deemed negligence in both? Or does not this question involve an examination of what his duty is in

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

each capacity, so as to see whether there was in fact negligence in both? So far as the navigation of the ship is concerned, the duty of the owner as distinguished from the master would be to take due care to appoint a competent person, and therefore the defendant's co-owners in this case, having discharged that duty and being protected against the master's negligence, are not now charged with negligence as owners. Does it make any difference that the master cannot divest himself of his personality as part owner when he is engaged in duties which have been properly delegated to him as master? Tried by the converse case, if the owners had appointed a notoriously incompetent master, whose incapacity had caused disaster, the exception of master's negligence would certainly not have protected them, and it would certainly have been no better protection to that one of their number who had been appointed captain, in respect of that part of his negligence, which would clearly be negligence as owner and not as captain. Moreover, if the negligence of the captain in the proper sphere of his duty is to be deemed a breach of the owners' duty because the captain is also part owner and cannot divest himself of his personality as such, it would follow that the other co-owners are liable. They are not protected against negligence of owners. The same person who, as captain, is their agent is also part owner, and, on the hypothesis, was negligent. If, therefore, they have been rightly held excused, it can only be because his negligence as captain is treated as the only negligence which in fact caused the damage. The case has been argued before us on the basis that they are excused as the learned judge held, and, if it is to be dealt with on that basis, it follows that the only ground on which the present defendant can be held liable while his co-owners are excused is that he is under a personal disability by reason of his negligence, and this ground, where there has been no wilful default, cannot be maintained. Are we then to give effect to the highly artificial reasoning by which it is suggested that the same acts of the same man are within or without the exception according as he is regarded as owner or as master, and this, though the acts were unquestionably done in the discharge of his functions as master only? It seems to us that it would be simpler and more in accordance with common sense to hold that the negligence which caused the damage was exclusively master's as distinguished from part owner's negligence within the meaning of the exception. The case of *Jones* v. *Nicholson*, above cited, favours this view. There was there no contract by the underwriters to be responsible for a part owner's barratry. Their only contract was against that of captain or mariners, and the argument was that the captain, being an owner, could not commit barratry. The court obviously regarded the act done by a captain, who was also part owner, as an act done by him as captain only, and not as part owner, and therefore as coming within the policy. Again in *Earle* v. *Rowcroft*, 8 East 126, it was contended that a captain, who was also supercargo, and as such represented the owner, must be taken to have assented as supercargo to his acts as captain, and therefore debarred the owner from claiming in respect of them as barratrous. Lord Ellenborough dealt with this argument by saying that it only required to be stated to be rejected. The plain common sense of the matter seems to be that the owners, including the defendant, bargained to be excused from the consequence of the negligence within the sphere of his duty of the person, whoever he might be, who should be properly charged with the command of the ship. That person was the defendant, and the loss has arisen by reason of the very negligence which they provided against—viz., negligence in the navigation of the ship. This construction involves no addition of words to those in the bill of lading, which as they stand are sufficient and unambiguous. We have pointed out that the logical result of the plaintiffs' contention, involving as it does the proposition that the acts of the defendant, being those of one man, are inseparable, and must be deemed to have been done in both capacities, must be that the co-owners are unprotected and the exception nugatory. There is certainly no reason in common sense for adopting this artificial contention unless we are forced to do so, for had the same master done the same acts, being one of seven persons formed into a limited company and holding the largest interest in it, he would be protected, while, on the proposed construction, if he were a part owner holding only one share, he would be liable to the full extent of the damage. The appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *Pritchard & Sons.*

Solicitors for the respondents, *Waltons, Johnson, Bubb, & Whatton.*

High Court of Justice.

Chan. Div. } Kekewich, J. } May 10.

NEW IXION TYRE CO. (LIMITED) v. SPILSBURY. (a.)

Patent—Agreement to assign—Subsequent licence—Notice—Priority—Equitable rights—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict.* c. 57), s. 87.

The proprietor of letters patent agreed to assign them to a company. He subsequently granted a licence to work the patent to certain persons who had, however, express notice of the agreement. The licence was registered before the agreement.

Held, that the licence, though on the register prior to the registration of the agreement, was void as against the company.

John Forrest Walters, on the 24th of June, 1896, entered into an agreement with the plaintiffs in this action, the New Ixion Tyre and Cycle Co. (Limited), to transfer to them for valuable consideration certain letters patent in respect of pneumatic tyres of which he was the registered proprietor. The agreement was not however registered until the 27th of September, 1897, although the plaintiffs were in possession of the letters patent from the date of the agreement. Walters, in pursuance of the agreement, assigned the letters patent to the plaintiffs on the 20th of October, 1897, when the assignment was duly registered. Before the registration of the agreement, Walters, on the 16th of September, 1897, granted a licence for valuable consideration to Spilsbury and three other defendants in this action to make and sell tyres under the letters patent, and notification of the licence was entered in the patent register on the 18th of September, 1897. Spilsbury and the three other defendants had express notice of the agreement of June 24th, 1896, and of the plaintiffs' equitable title to the letters patent thereunder, prior to the granting of the licence to the defendants.

On the 6th of October, 1897, Spilsbury and the three other defendants transferred their rights under the licence to the Licensed Tyre Syndicate (Limited),

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

who were also defendants in the action. The plaintiffs in this action asked for a declaration that the licence or the alleged licence was invalid and void as against them, and that they were entitled to the letters patent free from any right or interest of the defendants as licensees or otherwise; delivery up of the licence to be cancelled, an injunction, and damages.

Spilsbury and the three other defendants alleged that their rights under the licence were not subject to any rights or equities of the plaintiffs, and the defendant company claimed the right to work the patent under their title. The principal question which arose was whether express notice of the agreement by the defendants when they took their licence was an equity upon which the plaintiffs could insist, notwithstanding that their agreement was registered after the licence. This depended on the consideration of the Patents, Designs, and Trade-Marks Act, 1883, s. 87, which provides that: "Where a person becomes entitled by assignment, transmission, or other operation of law to a patent the comptroller shall on request and on proof of title to his satisfaction cause the name of such person to be entered as proprietor of the patent . . . in the register of patents. . . . The person for the time being entered in the register of patents . . . as proprietor of a patent . . . shall subject to the provisions of this Act and subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licences as to, or otherwise deal with the same and to give effectual receipts for any consideration for such assignment, licence, or dealing. Provided that any equities in respect of such patent . . . may be enforced in like manner as in respect of any other personal property."

Renshaw, Q.C., and *Rowden*, for the plaintiffs.—The defendants had express notice of our agreement when they took their licence; our equitable right is not, therefore, lost by the fact that they registered their licence before we registered our agreement. They referred to the Patents, Designs, and Trade-Marks Act, 1883, ss. 23 and 87, and in particular to the proviso at the end of section 87; and to *In re Green's Patent*, 24 Beav. 145, 6 W. R. Ch. Dig. 52. [KEKEWICH, J.—That case went on the words of the statute 15 & 16 Vict. c. 83]

They also referred to *In re Morey's Patent*, 6 W. R. 612, 25 Beav. 581; and *Hassall* v. *Wright*, 18 W. R. 821, L. R. 10 Eq. 509, 513.

Arthur Powell, for Spilsbury and the three other defendants.—There is no equity here which the court will enforce. An equitable interest to be enforced must be on the register.

A. Cartmell, for the defendant company.—We are not affected with notice. Both the legal and equitable interests are to be registered; the register is a complete record of all facts of title, and you cannot go outside the register.

KEKEWICH, J.—The plaintiffs are, in my opinion, entitled to judgment. In arriving at that conclusion one must first consider the meaning of the 87th section of the Act of 1883 to see how it affects the title of the plaintiffs and the defendants respectively what it requires, and also what is allowed independently of the Act. There is to be a register of title—that is provided for by section 23; and that register, it is not unimportant to observe, as Mr. Cartmell says, includes equitable interests as well as legal, and this section 87 protects the interest of the man who is on the register, so as to prevent a man who is not on the register asserting a legal or equitable title against the man who is on the register. That is the general principle. Anyone who registers an instrument, whether an assignment or otherwise, under this section, must register it subject to any rights appearing from such register to be vested in any other person; and, therefore, it seems perfectly plain and beyond all dispute to my mind that when the plaintiffs registered their agreement of June, 1896, after the defendants had registered their licence, so far as the registered title was concerned they took subject to that licence; and it is in fact because their agreement and the assignment which followed it are subject to that licence that they come here to insist that as against them the licence is invalid. The object of the action is to get rid, on the equitable ground, of the legal right which the statute gives to the defendants.

That brings me to the question, Is it competent to plaintiffs to insist upon the equitable right which is the foundation of their claim? There might be other equities brought forward with reference to other facts. The equity which they insist upon here is this, that at the time the defendants accepted that licence they had, not as it happens constructive, but express notice of the agreement with the plaintiffs under which the plaintiffs afterwards took their assignment; and that, therefore, they cannot insist on their registered licence as against the agreement of which they had notice. That is their point. Why should they not make it? As regards the register of ships, it took considerable legislation—at any rate repeated legislation—amending legislation, to keep the register clear of equities; and I take it that the defendants here are bound to show that there is not by any implied—I will not say "implied" by any doubtful construction, but by language of which there can be no doubt—a provision excluding such title as that alleged by the plaintiffs. There is a proviso at the end of section 87, which is, at any rate, not in favour of the defendants: "Provided that any equities in respect of such patent, design, or trade-mark may be enforced in like manner as if in respect of any other personal property." If the subject-matter of the agreement or assignment were a leasehold, there can be no doubt that the defendants, having notice of the agreement, could not take a title from Mr. Walters so as to defeat the plaintiffs; and that is a species of personal property assignable at law; and it seems that what is applicable to one is necessarily applicable to the other. But it may be that that proviso requires some discussion—that the limits and extent of that proviso may not be easily reached; that any equities may have to be considered with reference to the letters patent in particular, and that questions may arise which I ought not to consider at the present moment. I am content to say that that proviso, at any rate, even if it is not in favour of the plaintiffs is not in favour of the defendants, and that in the absence of any proviso or any decision in their favour, I think the proper construction of the Act is that such an equity as the plaintiffs allege is open to them as an argument with reference to their title as appearing on the register.

Having disposed of that, I come to the question whether that equity is established. As regards the first point, and as regards the second which I am now approaching, I think it better to put aside the authorities cited by Mr. Renshaw, and for this reason, that those authorities deal with earlier statutes; they do not touch, and they could not touch, because they were anterior to it, the statute which I am now construing, and it is better to say, of course without in the slightest degree criticizing those decisions, that they cannot affect me because they do not affect the

statute which is before me. Therefore I deal with the whole question on general principles. [His lordship then considered the evidence on the question of notice and said that it was clear that the defendants, before they took their licence, had express notice of the agreement, and that they must therefore have taken the licence subject to the agreement. His lordship then, considering further arguments of the defendants, held that the agreement was a binding agreement and one capable of being specifically performed, and that it had been carried out by the assignment, and continued:] The result is that I must hold that this licence, although on the register, and although on the register prior to the registration of the agreement of the 24th of June, 1896, does not interfere with the plaintiffs' rights and that as against them it is not binding, but is void.

Solicitors, *Lewis & Lewis; Foster, Grave, & Co.; Foss & Ledsam.*

Chan. Div. Kekewich, J. } Oct. 27; Feb. 18.

In re GAGE.
HILL *v.* GAGE. (*a.*)

Power—Appointment—Period of ascertaining class—Gift over on marriage or death of surviving unmarried daughter—Remoteness.

In 1835 *a husband and wife, in exercise of a power of appointment conferred upon them by their marriage settlement, appointed that a certain fund should be held by the trustees upon trust (in the events which happened) to pay thereout the sum of* £1,500 *to each of their three daughters, F., L., and S., who should thereafter marry; and upon further trust, so long as they or any or either of them should be from time to time living and unmarried, to pay the income of the fund to such of them as should from time to time be living and unmarried, if more than one in equal shares; and in case one or two only of them should marry, then upon trust, after the decease or, as the case might require, the marriage of such one of them as should be last living and unmarried, to pay the fund unto the four other children of the marriage, and such one or more of them the said F., L., and S., as should marry as aforesaid, in equal shares.*

Held (1) *that the final gift over was void for remoteness;* (2) *that the appointment of the* £1,500 *to each of the three unmarried daughters was also void for remoteness; and* (3) *that the appointment of the income of the fund to the three unmarried daughters was a valid appointment of an equal undivided third share of such income to each of such daughters so long as she was living and unmarried, but that the gift over of such one-third share on her marriage was void for remoteness.*

Wainwright *v.* Miller, 45 *W. R.* 652, [1897] 2 *Ch.* 255, *approved.*

Summons.

By the settlement, dated the 17th of May, 1793, executed upon her marriage with John Gage, Mary Milbanke settled a reversionary interest, to which she was absolutely entitled, in a sum of £30,000 expectant upon the determination of her father's life interest therein upon the trust therein contained in favour of herself and her husband successively for life, and after the death of the survivor in trust for such of the children of the marriage as they should by deed jointly appoint, or as the survivor should by deed or will appoint, and in default of appointment for their children in equal shares, sons at twenty-one and daughters at twenty-one or marriage.

There were two sons and five daughters of the marriage, and they all attained the age of twenty-one years.

Mrs. Gage's reversionary interest fell into possession before the date of the deed-poll next referred to.

By a deed-poll dated the 30th of November, 1835, under their hands and seals, Mr. and Mrs. Gage, in exercise of their power in that behalf, appointed that (subject nevertheless to their own prior respective life interests) the trustees of the settlement should hold the settled funds representing the £30,000 upon trust to pay six months after the death of the survivor of them, the appointors, certain sums to each of the children (naming them) of the marriage, amounting in the aggregate to £18,000, and out of the residue of such funds to raise and pay to each of the three then unmarried daughters—namely, Frances Elizabeth Gage, Louisa Henrietta Gage, and Sophia Matilda Gage, "who shall hereafter marry," the sum of £15,000 to be paid to her or her respective executors, administrators, or assigns, if she should marry after the death of the survivor of the appointors (which event happened), upon the day of her respective marriage, or as soon thereafter as conveniently could be; and upon further trust so long as the said Frances Elizabeth Gage, Louisa Henrietta Gage, and Sophia Matilda Gage, or any or either of them should be living and unmarried, to pay the income of the residue of the said fund unto them or such of them as should "from time to time be living and unmarried," and if more than one in equal shares; and if all of them should happen to marry then upon the trusts therein declared, but in case all of them the said F. E. Gage, L. H. Gage, and S. M. Gage "shall die without having been married, or in case one or two only of them shall marry," then in the first-mentioned case (which did not happen) upon the trusts therein declared, "and in the said secondly-mentioned case" (which did happen) "the trustees or trustee do and shall immediately after the decease or, as the case shall require, the marriage of such one of them the said F. E. Gage, L. H. Gage, and S. M. Gage, as shall be last living and unmarried as aforesaid pay the said residue of the said sum of £30,000, or of such stocks, funds, or securities as aforesaid" unto the four other children of the marriage, naming them, "and such one or more of them the said F. E. Gage, L. H. Gage, and S. M. Gage as shall marry as aforesaid in equal shares as tenants in common and their respective executors, administrators, and assigns."

Mr. and Mrs. Gage both died in 1846.

In 1847 Louisa Henrietta Gage married Baron de Bertouche, and upon her marriage she was paid £1,500 by the trustees of her parents' settlement. Previous to her marraige she had settled all her interest under the deed-poll of 1835. She died in 1880.

Frances Elizabeth Gage never married, and died in 1888.

Sophia Matilda Gage never married, and died in 1897.

The present trustees of Mr. and Mrs. Gage's marriage settlement took out this originating summons against the trustees of Frances Elizabeth Gage's will, and the personal representatives of the Baroness de Bertouche and of the four other children entitled under the gift over contained in the deed-poll, for the determination of the following questions—namely (1) whether the appointment by the deed-poll of 1835 of the residue of the £30,000, after payment thereout of the specific sums therein mentioned was a good exercise of the power given to Mr. and Mrs. Gage by their marriage settlement or whether the appointment of such residue was wholly or in part void for

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

remoteness; (2) who were now entitled, and in what shares, to the funds subject to the settlement of 1793; and (3) if and so far as might be necessary execution of the trusts of that settlement.

The first question argued was whether the gift over in the deed-poll of the residue of the £30,000 was void for remoteness or not.

M. Baillie, for the plaintiffs, stated the case.

E. E. Fletcher, for the trustees of Frances Elizabeth Gage's will.—We are entitled in default of appointment. The appointment is bad because it offends the rule against perpetuities. The question is, is the gift over to the four named children "on the death or marriage," as the case may be, "of the last living or unmarried" of the three named daughters a good gift? It is not a good gift, for the class must be ascertainable within twenty-one years from the death of the survivor of the father and mother, and this gift is not ascertainable till the death of the last of the unmarried daughters, which in fact happened fifty-one years after the death of the surviving parent: *Stuart* v. *Cockerell*, L. R. 7 Eq. 363, 17 W. R. Ch. Dig. 191; *Blight* v. *Hartnoll*, 30 W. R. 513, 19 Ch. D. 294; *Morgan* v. *Gronow*, L. R. 16 Eq. 1, 21 W. R. Dig. 176.

Vaughan Hawkins, for the representatives of some of the appointees under the gift over.—The appointment is good. It is a gift to the three daughters defeasible on their death unmarried. This case is the same as *Wainwright* v. *Miller*, 45 W. R. 652, [1897] 2 Ch. 255.

Norton and *Kenyon Parker*, for other appointees.

Fletcher, in reply.—*Wainwright* v. *Miller* is in my favour. The gift is not defeasible on death unmarried; on the contrary, no interest is given to the three daughters until they marry. The class to take is not ascertainable until that event, and the gift therefore is too remote.

KEKEWICH, J.—To my mind this is an example of an attempt to do a perfectly legitimate thing in a wrong way. I think the appointors might have done what they desired and provided as they purported to do without raising any real question as to the result. I say "any real question as to the result," for though *Wainwright* v. *Miller* removes any doubt there might have been, I cannot myself doubt that if this appointment had been made on similar lines it must have been upheld. Any contingency of defeasance might have been introduced, but the difficulty, to my mind, seems to lie in the precise form of the gift over. In the case I am now considering the gift over is to four named persons about whom there can be no question at all. There would have been no question either about the three unmarried daughters if they had been unconditionally included in that gift over, but they are not, for the appointors limited the gift over in their case "to such one or more of them as shall marry as aforesaid"—that is, "as shall have been married when the gift over comes into operation." But the gift over comes into operation by the death of the survivor of the three unmarried daughters. You have therefore to consider at that point of time whether any of them were married—that is, in this case, in the year 1897, an indefinite time, a time, in fact, far beyond lives in being and twenty-one years afterwards. But of course this is not a question of fact, but a question of possibility, whether it could or could not exceed the limit allowed by the law of perpetuities.

In limiting the appointment in this way the appointors were only postponing the determination of the class as regards these three daughters until it could be ascertained by the death of the last survivor of them whether one or two or all of them were married. Unfortunately, by postponing the ascertainment of the class as regards the three daughters you postpone it as to the other four children also, and so these latter have to wait until the death of the last survivor of the three unmarried daughters. In my opinion, therefore, the donees of the power have exceeded the limit allowed by the law of perpetuities and the gift over is void for remoteness.

R. F. Norton.—The appointment of £1,500 each to the three unmarried daughters "who shall hereinafter marry" is also bad as it likewise transgresses the rule against perpetuities.

Vaughan Hawkins.—The appointment is good. The gift is vested but defeasible on the happening of a certain event; and that is a good gift: *Wainwright* v. *Miller*.

KEKEWICH, J.—It seems to me that I cannot, consistently with my decision on the other point, hold that this appointment is good. The question can be stated in the simplest manner. A marriage settlement is made in the usual form and contains the ordinary power of appointment among the children of the marriage. In exercise of this power an appointment is made by the husband and wife directing the trustees of the settlement to hold the trust fund upon trust to pay to each daughter, as and when she marries, a sum of £1,500, and, subject thereto, disposing of the rest of the trust fund, or not disposing of it, or appointing part of it to some of the children of the marriage, and leaving the remainder to go as in default of appointment. The question is whether this appointment is valid seeing that a daughter may marry more than twenty-one years after the death of the survivor of the appointors, and that until a daughter marries it is necessarily left uncertain as to what will be taken by the other children under the appointment, or under the trusts of the settlement in default of appointment. That seems to me to be obnoxious to the rule against perpetuities, although it is a very moderate provision in favour of the children and might be very desirable; but of course I have nothing to do with that. The point seems to be quite new, and no case has been cited dealing with such an appointment. I must, therefore, decide the question on principle, and on principle I think that the appointment is bad and there must be a declaration to that effect.

Subsequently to the above decisions another summons was taken out by the trustees of the Baroness de Bertouche's marriage settlement, asking for a declaration that the trust in the deed-poll for payment of the income of the residue of the £30,000 so long as the three unmarried daughters, Frances Elizabeth Gage, Louisa Henrietta Gage, and Sophia Matilda Gage, or any or either of them should be living and unmarried, and if more than one in equal shares, was invalid.

The summons was adjourned into court, and came on for hearing on the 18th of February, 1898.

Vaughan Hawkins, in support of the summons.—The appointment in question is altogether void for remoteness; and even if the gift to them while living and unmarried is good, the gift over on death or marriage is bad. *Wainwright* v. *Miller* does not apply. This is not a case of a gift with cross-remainders over, but of a gift to a class which cannot be ascertained until after the legal limit is passed.

He also referred to *Boughton* v. *James*, 1 Coll. C. C. 26, and Lewis on Perpetuities, p. 173.

R. F. Norton, for persons in the same interest.

M. Baillie, for the trustees of Frances Elizabeth Gage's will and the representatives of Sophia Matilda Gage.—The whole gift is good. A gift to a class of unborn children for their lives is good, and a gift over determining any such life interests on the happening of a certain contingency was held to be good in *Wainwright* v. *Miller*, which applies here.

Vaughan Hawkins replied.

KEKEWICH, J.—It has been already decided on the construction of this very will, and, as it happens, by myself, that a gift over on the marriage of the object of the power, which marriage may not happen within the time limited by what we term the law of perpetuities, is bad. I do not mean to go back on that at all. It applies, it seems to me, to this clause which I have now to consider. But I think that Mr. Vaughan Hawkins and Mr. Norton are endeavouring to press that decision too far. I say at once that I accept *Wainwright* v. *Miller*, which indeed, commends itself to my judgment, and, I think, expresses the view of Knight-Bruce, L.J., in *Boughton* v. *James*. I will treat that case as a guide. It seems to me that I have to construe this will as one always has to construe any instrument in order to find out its legal meaning. If that legal meaning offends against the law, you cannot give effect to it; but if its legal meaning is within the law, then you can give effect to it. Now, this is a terse, succinct gift, and Mr. Norton says—and Mr. Vaughan Hawkins says the same thing—that there are no gifts here with cross-remainders over; that you cannot find here a gift to the three, and then if one marries to the two, and if two marry to the one. It is not written out at that great length. If it were written out it would occupy a whole page instead of a few lines; but to my mind the draftsman has succeeded in expressing all that in a succinct form, and it seems to me an excellent expression of intention. The gift is to these three daughters by name—not to so many "of my daughters"—but to these three ladies, or any or either of them as shall be living and unmarried at the date when they take possession. If, therefore, they are all living and unmarried they all take. Of course they take the whole between them. There are three of them, and one would expect to find that they take equal undivided shares as tenants in common, and the testator has so expressed it, and if you run on further down you will find that that is so provided, for the testator says that if there are more than one they are to take in equal shares; so that really, though it is a gift to all of them who shall be living and unmarried, it is really a gift of a third to each, and that works out throughout the whole sentence. There is no gift over in express words on the marriage of anyone to the others; but you are obliged to import that, as it seems to me, in order to give full effect to the sentence, because such of them as are living and unmarried take, while those who being alive and married, or those who, having been alive in the first instance, subsequently die, lose their shares; and it seems to me precisely the same thing as if the appointors had said, "We assume that the three will be living and unmarried at the time when the appointment takes effect. We give them the income between them in equal undivided shares as tenants in common until one of them marries; thenceforward we give it to the remaining two until another of them marries; thenceforward we give it to the remaining unmarried one until she marries." Then there is a gift over when all of them marry—that is to say, when the last spinster takes a husband. That seems to me the plain meaning of the words, though it is written in a succinct and, I think, perfectly accurate form. If that is so, on the authority of *Wainwright* v. *Miller*, and on the law generally, I see no reason why these three ladies should not take the whole property between them in equal and undivided shares as long as they are living and unmarried. It is not denied that they did. But an event happened within about a year—namely, one of them married. On the construction that I have put on the deed-poll there was a gift over in that event of one-third. I think that gift over is bad; I need not pursue it further. As regards what the two unmarried daughters had before—that is, each an undivided third, I cannot see that that was interfered with because one-third was given over. It really, according to my view, comes to a construction of the will. I think it must be declared that the appointment of the income was valid as to the share of each daughter so long as she was living and unmarried, but that the appointment was invalid as to one-third from the date of the marriage of Louisa; and it follows that the gift of one-third over on the death of Frances, who died unmarried, was also invalid as from her death.

Solicitors, *M. & H. Turner; Radcliffe & Griffiths; Leslie Field; Beachcroft, Thompson, & Co.; Trower, Freeling, & Parkin.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Mathew, J.) } March 31; May 14.

DAVEY v. WILLIAMSON.
RICHARDS (*Claimant*). (*a.*)

Company — Debenture-holders — Floating security — Execution creditor—Sheriff—Priority.

A trading company issued first mortgage debentures payable on the 31st of December, 1898. They were secured by a floating charge upon all the property of the company. Indorsed on the debentures was the provision that they should become payable "if an order is made, or an effective resolution is passed, for winding up the company"; also, "whenever the trustee of the within-mentioned trust deed shall have entered upon the mortgaged premises comprised in the trust deed, or appointed a receiver or receivers under the provisions therein contained." A further condition was that no part of the property subject to the security should be dealt with except in the ordinary course of business of the company.

The debenture-holders were entitled to the benefits and subject to the conditions of the said trust deed, which vested in a trustee for the benefit of the debenture-holders the leasehold property and the uncalled capital of the company, and gave to such trustee the right to call upon the company to vest in him all the property of the company, but the company was left free—until the trustee or the debenture-holders took action on the happening of any of certain events contemplated by the deed, one of which was "If any execution, sequestration, extent, or other process of any court or authority is sued out against the property of the company for any sum whatsoever," or until the happening of any of the events contemplated by the terms of the debentures—to carry on the business and deal, but only in the ordinary course of business, with the assets of the company.

The plaintiffs obtained judgment against the company for a sum of money, and a writ of fi. fa. was issued, under which the sheriff seized certain goods in the possession of the company which were charged by the debentures. The claimant then, for himself and the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

other debenture-holders, claimed the goods as theirs under the debenture securities. The sheriff thereupon interpleaded. The due date of the debentures had not then arrived, nor had any winding-up resolution been passed. No receiver had been appointed, nor had the trustee put in force his powers under the trust deed.

Held, that the rights of the debenture-holders prevailed against those of the execution creditor. The seizure under the execution on the judgment was not a dealing by the company in the ordinary course of business within the condition indorsed on the debentures. The security had become enforceable by reason of the fact that an execution had been sued out against the company. The goods seized were charged with the payment of the amount of the debentures, which exceeded the value of the goods, and the judgment debtor had therefore no interest in the property seized available to satisfy the judgment debt.

This was an appeal from the decision of His Honour Judge Paterson on an interpleader issue in which the question was whether the rights of the claimant, claiming for himself and the other holders of debentures of the defendant company (the judgment debtors) to certain goods seized under writ of *fi. fa.* by the sheriff prevailed over the rights of the plaintiffs, who were the execution creditors.

The learned county court judge held that they did not, and apparently on two grounds: (1) that the rights of the debenture-holders had not become "crystallized," the debentures not having become due and no receiver for the debenture-holders having been appointed; and (2) that seizure of the company's goods under execution was a dealing with such goods in the ordinary course of business and did not contravene any rights of the debenture-holders, whose securities were, in his judgment, subject to the risk of such seizure.

The company (a trading company) in January, 1894, being duly authorized to do so, issued £3,000 first mortgage debentures in sixty debentures of £50 each, and six of these were held by Richards, the claimant. They were made a charge on all the property of the company, real and personal, present and future, not assured or charged by the trust deed hereinafter mentioned, and were payable on the 31st of December, 1898, or on such earlier date as the principal moneys thereby secured should become payable in accordance with the conditions endorsed thereon. Amongst such conditions were the following: "(4) The principal moneys hereby secured shall become payable immediately on the happening of any of the events hereinafter specified, and also all right of the company to deal for any purpose whatsoever with any of the property shall forthwith cease on the happening of any such events." Here followed the events, *inter alia*: "(*c*) If an order is made or an effective resolution is passed for winding up the company"; "(*d*) Whenever the trustee of the within-mentioned trust deed (hereinafter called the trustee) shall have entered upon the mortgaged premises comprised in the trust deed or appointed a receiver or receivers under the provisions therein contained." By the third condition endorsed on the debentures it was provided that until the moneys thereby secured should become payable the debentures should be a floating security, and it was stipulated that the company should not before payment of such debentures create any charge to the prejudice of the debenture-holders without their sanction, and finally, that no part of the property subject to the floating security of such debentures should be dealt with except in the ordinary course of the business of the company. Further, by such debentures it was provided that the holders should be entitled to the benefit of, and be subject to, the conditions of the trust deed.

The trust deed (25th of January, 1894) referred to, was a deed between the company of the one part and James Thomas Harrison, called the trustee, of the other part, by which the company demised to the trustee certain leaseholds described in the first schedule thereto, and assigned to the trustee the amount uncalled on the shares of the company. The trust deed also contained a covenant that the company would immediately after being requested by the trustee, assure to or otherwise vest in the trustee the business of the company and the goodwill of such business and all the real and personal property and assets of the company present and future, if any, not thereinbefore assigned or demised to the trustee, except chattels within the meaning of the Bills of Sale Act. The deed further provided that the premises thereby demised and assigned and the premises comprised in the covenant should be held by the trustee as a security for the debenture-holders, and so that the principal money and interest owing in respect of the debentures should be a fixed and not a floating charge so far as relates to such of the premises as were thereby demised and assigned respectively and should be a floating charge so far as relates to such of the premises as were comprised in the covenant, and so that the company should not create any mortgage or charge upon the premises in priority to the money and interest secured by the debentures, and subject as aforesaid the trustee should hold the premises upon trust to permit the company and its assigns to hold and enjoy the premises and to carry on the business and any business authorized by the memorandum of association of the company until the happening of one or more of the events upon which the security thereby constituted became enforceable.

The events contemplated were twelve in number, but the only important one for the purposes of this case was the fourth, which was as follows: "(*b*) If any execution, sequestration, extent, or other process of any court or authority is sued out against the property of the company for any sum whatsoever."

The effect, briefly put, of the documents was that the debentures were secured by a floating charge upon all the property of the company, and that the trust deed vested in a trustee for the benefit of the debenture-holders the leasehold property and the uncalled capital of the company, and gave to such trustee the right to call upon the company to vest in him all other property of the company, including the goodwill of its business, but excluding any chattels within the meaning of the Bills of Sale Act; but the company was left free until the trustee or the debenture-holders took action on the happening of any of the events contemplated by the deed or by the terms of the debentures to carry on the business and deal freely, but only in the ordinary course of business, with the assets of the company.

The company got into difficulties, and was unable to discharge its obligations by payment as they arose. In the result the plaintiffs obtained judgment against them for £11 17s. 9d., and a writ of *fi. fa.* was issued, under which the sheriff seized certain goods in possession of the company which were charged by the debentures. The claimant then, for himself and the other debenture-holders, claimed the goods as theirs under the debenture securities. The sheriff thereupon interpleaded, and the goods seized were not sold. To complete the facts, it only remains to add that the due date of the debentures had not arrived; that no winding-up resolution had been passed; that no receiver had been appointed; and that the trustee had not put in force his powers under the trust deed.

H. Reed, Q.C. (*Cannot* with him), for the appellants.

Macaskie (*S. Mayer* with him), for the respondent.

The arguments sufficiently appear in the following judgment.

The following cases were cited: *Taunton* v. *Sheriff of Warwickshire*, 43 W. R. 579, [1895] 1 Ch. 734, [1895] 2 Ch. 319; *Edwards* v. *Standard Rolling Stock Syndicate*, 41 W. R. 343, [1893] 1 Ch. 574; *Read* v. *Joannon*, 38 W. R. 734, 25 Q. B. D. 300; *Wildy* v. *Mid-Hants Railway Co.*, 16 W. R. 409, 18 L. T. Rep. 73; *In re Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627; *In re Opera Co.*, 39 W. R. 705, [1891] 3 Ch. 260; *Robson* v. *Smith*, 43 W. R. 632, [1895] 2 Ch. 118; *The Governments Stock, &c., Investment Co.* v. *Manila Railway Co.*, 45 W. R. 353, [1897] A. C. 81; *In re Hamilton's Windsor Ironworks*, 27 W. R. 445, 12 Ch. D. 707.

Cur. adv. vult.

May 14.—Lord RUSSELL OF KILLOWEN, C.J., read the following judgment of the court: [After stating the facts above set out his lordship proceeded as follows:] In this state of things the question is, Do the rights of the debenture-holders prevail against those of the execution creditor? It may seem hard upon the execution creditors that they should not be able to realize their judgment for their debt incurred in supplying trade goods for the purpose of the company's business, and that they should be met by claims of debenture-holders of which they had no knowledge or public means of knowledge, and that such debenture-holders should be allowed to claim as theirs, goods in the apparent control of the company, and upon which, possibly, or indeed probably, credit had been given to them. But these are matters which concern the judgment and action of Parliament. We must determine the right of litigants in conformity with what we believe to be the law. In our judgment the rights of the debenture-holders do, in this case, prevail against the execution creditor.

We cannot assent to the view of the learned county court judge that a seizure under an execution on a judgment against the company is a dealing by the company in the ordinary course of business within the 3rd condition endorsed on the debentures so as to be within the authority given to the company by the terms of the debentures. It is not in the ordinary course of business that the debts of a going business, firm, or company shall be liquidated by seizure of their assets under legal process. Nor can the transaction be properly described as a dealing by the company at all. It is a compulsory legal process directed against the company, not a dealing by them.

The second ground on which the learned county court judge proceeded was that the rights of the debenture-holders had not "crystallized," or, in other words, that the moneys secured by the debentures had not become payable. As to this, it is, in the first place, to be observed that, although this is so, yet by reason of clause 4 (*b*) of the trust deed, previously set out, the security constituted by that deed had become enforceable by reason of the fact that an execution had been sued out against the company. But, apart from this, the sheriff can only realize the judgment against the goods of the judgment debtor. Here the goods seized are validly charged with the payment of the amount of the debentures, and it is admitted that that charge far exceeds the value of the goods in question. The rights of the execution creditor are subject, not only to the legal, but also to the equitable, rights of the debenture-holders. The sheriff cannot merely by seizing affect the rights of third persons to which property was subject when in the hands of the debtor, unless, indeed, such third persons have debarred themselves from the assertion of such rights.

It follows, therefore, that there was no interest of the judgment debtor in the property seized available to satisfy the judgment debt. Nor is the debenture-holder prevented from asserting his charge upon the property in the circumstances of this case. The company as a going concern had come to an end, and although the due date of the debentures had not arrived, the holders were entitled to intervene to protect their security. Neither were they bound to apply for a receiver or to proceed with a view to the winding up of the company. They are entitled to say to the sheriff, "The goods seized are validly charged to us, and you cannot sell them to the prejudice of our security." No case has been cited to us, and we know of no case, in which, in such circumstances as the present, the rights of the execution creditor have prevailed over those of debenture-holders.

It seems to us that this reasoning is fully supported by the authorities: see *In re Standard Manufacturing Co.*, in which case the rights of the debenture-holders had not "crystallized"; see also *In re Opera, Limited*.

The result is that the appeal will be allowed.

Solicitor for the appellant, *W. B. Glasier*.

Solicitors for the respondent, *McKenna & Co.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Hawkins, Day, Wills, and Wright, JJ.) — May 7.

KIRSHENBOIM (*Appellant*) v. SALMON & GLUCKSTEIN (LIMITED) (*Respondents*). (*a*.)

Trade-mark—Merchandise marks—False trade description—Application to goods—Goods supplied equal in quality to goods described—Absence of fraudulent intent—Offence—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *ss.* 2, 3.

By section 3 *of the Merchandise Marks Act*, 1887, *a false trade description is defined as "a trade description which is false in a material respect as regards the goods to which it is applied."*

Held, that a trade description which is false in point of fact as a description of the goods is "false in a material respect as regards the goods to which it is applied," and is therefore a false trade description within the meaning of the section, although the goods supplied are of as good a quality as the goods described, and although there is no intention to deceive or defraud the buyer; and, consequently, that a person who sells cigarettes to which a label is attached describing them as hand-made when in fact they are machine-made, is guilty of an offence under the Act, although he shows that the cigarettes actually sold were of as good a quality in all respects as if they had been made by hand, and that he had no intention to deceive the buyer.

Case stated by Mr. Lushington, metropolitan police magistrate sitting at Bow-street police-court.

An information was preferred by the appellant against the respondents under section 2 of the Merchandise Marks Act, 1887, for having sold to the appellant certain cigarettes to which a false trade description—namely, the words "Guaranteed hand-made by experienced workmen"—was applied, contrary to the provisions of the Merchandise Marks Act. This information was heard and determined on the 3rd of July, 1897, by the magistrate, who dismissed the information. The facts were these:

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law

The respondents sold to the appellant for the sum of 2½d. ten cigarettes in a packet, to which a printed label had been affixed bearing the words, "Ten cigarettes guaranteed hand-made by experienced workmen." The ordinary price for ten cigarettes made by hand of the same quality of tobacco would have been 2¾d.

The appellant was a member of the Amalgamated Cigarette and Tobacco Cutters' Union, and it was admitted by him that he purchased the cigarettes for the purpose of ascertaining whether they were hand-made or not, and with a view to eventual legal proceedings, and not in the belief that they were made by hand, or with the object of purchasing hand-made cigarettes for re-sale or consumption. It was admitted by the respondents that the cigarettes were not made by hand, and it was not suggested that the quality of the tobacco used by the respondents was inferior to what it should have been. The complaint was founded on the method of manufacture only.

The cigarettes were found upon examination by the magistrate to be free from tightness, looseness, or lumps, and to be well and evenly made for all smoking purposes.

It was proved that they were made by the respondents by a newly-invented machine called Barron's machine; that the same qualities of starch and paper were used in this making as would have been used if they had been made by hand and in the same quantities; and that Barron's machinery includes a sifting process by which the tobacco is freed from dust before it is packed inside the paper roll.

The magistrate found as a fact that the cigarettes made by Barron's machine were as pure and clean in point of material, and as proper in point of construction for all smoking purposes as they could have been if hand-made.

It was also proved that the printed label complained of was one of a parcel of two million labels for the ten-cigarette size of packet, which had been printed for and used by the respondents before their adoption of Barron's machine and while they still made their cigarettes by hand only, and that the respondents had continued to apply the remaining stock in hand (about half a million) of these labels to the ten-cigarette packets.

The magistrate was satisfied that in their continued use of the old ten-cigarette labels after they had ceased to make cigarettes by hand the respondents were actuated merely by a spirit of economy that prompted them to use the large remaining stock of labels which they had already paid for, and thereby to save the cost of printing an equivalent number of new ones; and he held that there was no intention to deceive the buyer or to induce him to purchase goods which he would not have purchased if the description in question had been omitted from the label.

As a matter of law he held that the words of the label constituted a trade description applied to goods within the meaning of the Merchandise Marks Act, in which goods are defined as embracing for the purposes of the Act anything which is the subject of trade, manufacture, or merchandise; and whereas a false trade description is defined by the Act to mean a trade description which is false in a material respect as regards the goods to which it is applied, he held that, in determining whether the label in question constituted a false trade description within the meaning of the Act, he was to interpret the terms of the statute in strict reference to the relation borne by the truth or falsehood of the description to the special and essential qualities and functions of the manufactured article, and he held that the label, although untrue in point of fact as a trade description, was not a false trade description in any material respect as regarded the cigarettes sold to the appellant within the meaning of section 3 of the Merchandise Marks Act, and he therefore held that the respondents had not been guilty of any offence under the Act, and he dismissed the information.

The question for the opinion of the court was whether, upon the facts aforesaid, the magistrate ought to have convicted the respondents.

The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), provides: Section 2 (1) "Every person who (*d*) applies any false trade description to goods, or . . . shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act. (2) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves (*a*) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade description; and (*b*) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or (*c*) That otherwise he had acted innocently; be guilty of an offence against this Act."

Section 3 (1) "For the purposes of this Act the expression 'trade description' means any description, statement, or other indication, direct or indirect, . . . (*c*) as to the mode of manufacturing or producing any goods. . . . The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade-mark, or part of a trade-mark, shall not prevent such trade description being a false trade description within the meaning of this Act."

Corrie Grant, for the appellant.—The learned magistrate was wrong in holding that this was not a "false trade description" within the meaning of section 3 of the Act. The description on the label was "guaranteed hand-made by experienced workmen." It was admitted that the cigarettes were machine-made, and not hand-made; and the magistrate has held that this description was untrue in point of fact. That was sufficient to render the respondents liable under the 2nd sub-section of section 2. [He was stopped.]

H. Avory, for the respondents.—The learned magistrate was right in refusing the convict. There are two grounds upon either of which his decision can be supported. In the first place, the question was a question of fact for the magistrate to deal with, and he has dealt with it as a question of fact and his decision upon it is final. Section 3 of the Act defines what a false trade description is, and it defines it as a trade description which is false in a material respect as regards the goods to which it is applied. In each and every case, therefore, the magistrate has to consider upon the evidence whether the description is false in a material respect as regards the goods; he has to consider and decide upon the materiality of the falsehood of the description. Applying that here he had to consider the materiality of the description

"hand-made" as compared with machine-made cigarettes. He has done so and he has found that the misdescription was not material so far as regarded the goods. The magistrate has to inquire in each case as to the materiality of the false description as regards the goods, and here he has found that the machine-made cigarettes were as good as the hand-made cigarettes, and that, therefore, there was no false description in any material respect as regards the goods. In the second place, the respondents have proved that they "acted innocently," which is a defence under clause (c) of sub-section 2. The magistrate has found in the case that there was no intention to deceive the buyer, or to induce him to purchase goods which he would not otherwise have purchased. There was no intention to deceive, and there was no profit made by the respondents by the misdescription; that being so, the respondents have succeeded in proving that they "acted innocently," which is a defence to this information. Upon both grounds the decision of the magistrate was correct.

He referred to the cases of *Starey* v. *Chilworth Gunpowder Co.*, 38 W. R. 204, 24 Q. B. D. 90; and *Gridley* v. *Swinborne*, 5 Times L. R. 71.

Lord RUSSELL OF KILLOWEN, C.J. — This case comes before us on a case very carefully stated by the magistrate, and we are asked to express the opinion of the court whether the magistrate ought to have convicted the respondents. The charge was a charge preferred under section 2, sub-section 2, of the Merchandise Marks Act, 1887, and that sub-section provides that it is an offence against the Act to sell any goods to which a false trade description is applied, unless the person so selling proves certain things therein specified. The facts are fully set out in the case, and the learned magistrate upon those facts finds, and very properly finds, that the description "guaranteed hand-made by experienced workmen" is a trade description within the meaning of this Act, and that it was falsely applied; and then he proceeds to explain what he means by that finding, and he thought that the goods supplied were at least as good as those ordered, and he further finds that there was no intention to deceive the buyer. He therefore finds that this was a false trade description applied by the respondents, but he also finds that the falsity of that trade description was not material under the circumstances. If the magistrate had contented himself with merely finding as a fact that the trade description, though false, was not materially false, probably it would have been the duty of the court to have accepted that as a finding of fact. But what he has done, and quite rightly done, is this: he has set out the grounds and reasons by which he has arrived at his conclusion, and he has arrived at that conclusion by what I may call the doctrine of equivalents—that is, that, though the purchaser did not get what was described by the particular description applied to the goods, yet he got other goods which were as good as those so described.

In dealing with the question it seems to me to be necessary to refer to the general scheme of the Act. The general scheme of section 2 is this: It enumerates several things which are offences against the Act, and then it points out how a party charged with any of these offences may meet the *primâ facie* case made against him. If the charge is one under sub-section 1 of that section, then he may meet the *primâ facie* case against him by showing that he "acted without intent to defraud." If the charge is under sub-section 2, then there are two ways in which the charge may be met. Under clauses (a) and (b) of that sub-section, he may meet the charge by proving that he took all reasonable precautions and that he gave all the information in his power, and that obviously applies where the person charged buys goods from someone else and re-sells them to another person; or if he proves under clause (c) that he "had otherwise acted innocently," and the onus is on the defendant to show that, once a *primâ facie* case is made out against him. I now come to the question of materiality. In dealing with that question we ought to remember that the Act was aimed at and intended for the protection of buyers, not only as to the number, quantity, or weight of the goods, but also as to the place or country in which the goods were made, and as to the mode of manufacturing the goods, so that goods from a foreign country should not be sold as home-made goods.

Then in section 3 we have the definition of a "false trade description," which is there given as a trade description which is "false in a material respect as regards the goods to which it is applied." Under that definition it is no answer to say that the buyer has got as good an article as was described. If that were an answer to a *primâ facie* charge against a person, I do not see anything to prevent a person selling, say, an American ham as Yorkshire ham, and then being entitled to say that the American ham was as good as, or better, than the Yorkshire ham; and the same answer might be given in the case of butter, cheese, cigars, or any other article which might be sold under a wrong description. I cannot see that that is an answer. Applying that to the facts of this case, I do not think that it is an answer to this charge to say that the cigarettes sold here were as good as hand-made cigarettes. There are people who think the hand-made cigarettes the better. These considerations seem to me to show that the ground on which the magistrate proceeded was not the right ground, and that he was wrong in the conclusion which he arrived at, and that that conclusion cannot be supported. The buyer is entitled to know what he is buying, and to have it properly described. Another point was taken on behalf of the respondents, that in doing what they did they "had acted innocently," within the meaning of clause (c) of sub-section 2; but I cannot accept that reason. They did this thing of affixing a false trade description to the goods deliberately, and it is impossible, therefore, to say upon the facts of this case that they acted innocently within the meaning of the Act. The case, therefore, must go back to the magistrate, with the intimation of our opinion that he must convict, but it will be for him in his discretion to determine what punishment he will inflict.

HAWKINS, J.—I entirely agree. I think that the question of the materiality of the description on the label cannot be made to depend upon the question whether or not the particular goods sold were better or worse than the goods as described.

DAY, J.—I am of the same opinion.

WILLS, J.—I am of the same opinion. The magistrate has found that the misdescription affected the price of the article to the extent of about twenty per cent. How can his decision be supported? It is said that the article so misdescribed was as good as it would have been if it had answered the description; but I do not think that that can possibly be an answer to the offence charged.

WRIGHT, J.—I am of the same opinion.

Appeal allowed; case remitted to magistrate.

Solicitors for the appellant, *Radford & Frankland.*

Solicitors for the respondents, *Lewis & Lewis.*

Q. B. Div. (Kennedy, J.) Jan. 10; Feb. 4.

MOLYNEUX v. FLETCHER AND CLARK. (a.)

*Will—Advancement clause—Power—*Bonâ fide *exercise of.*

A testator bequeathed his real and personal estate to trustees upon trust to pay the income to his children in equal shares. The will contained a proviso authorizing the trustees to apply a certain sum of each child's "presumptive share" towards the "advancement in life" of such child, the trustees to be sole judges of the advisability of such payment, and of what the term "advancement in life" might signify. After the share of one of the children, a married daughter, had become vested, the trustees advanced £250 to her at her request. This sum was intended, as the trustees knew, to be used in discharging a debt owed by the daughter's husband to one of the trustees.

Held, that the power to advance had not been exercised bonâ fide, *and was a breach of trust.*

Further consideration of an action tried before Kennedy, J., at the Liverpool assizes.

The action was brought against trustees of a will claiming a declaration that the advance of a sum of money by the defendants was a breach of trust and that the defendant Fletcher was liable to replace the sum advanced.

The facts are fully stated in the judgment.

W. F. Taylor, Q.C., and *McConkey,* for the plaintiffs.

McCall, Q.C., Rotch, and *H. Cuningham,* for the defendant Fletcher.

Pickford, Q.C., Segar, and *Cleave,* for the defendant Clark.

Cur. adv. vult.

Feb. 4.—KENNEDY, J.—This action was brought by certain infants (by their next friend) against two gentlemen, and it was claimed that the defendant Fletcher, acting as trustee under the will of Edward Durant, the plaintiffs' grandfather, had committed breaches of trust. By the terms of Edward Durant's will, which was dated the 18th of April, 1878, the testator appointed executors and trustees, and devised to them all his real and personal estate, with certain directions as to realization and investment, and made his children the beneficiaries under his will. The testator left two children surviving him, who were infants at the date of his death, on the 20th of April, 1878. The two children were Fanny Jane, who came of age in 1880 and is still living and unmarried, and Amelia Margaretta, who came of age in 1881, and in 1885 married Daniel Webster Molyneux. Both she and her husband are still living, and the plaintiffs, six in number, are the children of this marriage. Neither Miss Durant nor Mrs. Molyneux are parties to this action. The defendant Fletcher was appointed a trustee of the will by order of the court in 1887. The other defendant, Clark, became a trustee only quite recently, and long after all the events in respect of which the claim in this action is made had taken place. It is alleged on behalf of the plaintiffs that in 1887 the defendant Fletcher and his then co-trustee, Thomas Urmston Clare, committed a breach of trust in advancing out of the capital funds £500 to Miss Durant and £250 to Mrs. Molyneux, and the question I have to determine in this action is whether in either or both of those cases a breach of trust has been committed. The will contained a direction to the trustees to apply in or towards the maintenance and education or otherwise for the benefit of each child of the testator entitled under the trust of the will to a share, not absolutely vested, the annual income of such share. The will further declared that it should be lawful for the trustees to apply in or towards the advancement in life of each child a sum not exceeding £500 of her presumptive share, such sum or lesser sum to be paid if the trustees should think fit, notwithstanding that the child's share was settled as thereinafter mentioned, and the trustees were to be the sole judges of the advisability of such payment and of what the term "advancement in life" might signify. Subject to that power, the trustees were, after the shares became vested, by the children coming of age, to pay the income to the two children in equal shares, and after their death upon trust for such of their children as they should appoint, and in default upon the same trusts for the children. If the daughters had no children, then their shares were to go as they might appoint, and in default of appointment to their next-of-kin.

The claim in this action was put upon the ground that the moneys paid by Fletcher in 1887 were not paid with the single view of "advancement," but with the view of the money being used for the benefit of Fletcher himself. Fletcher was a large creditor of Mrs. Molyneux's husband, and was pressing him for payment, and it is said that, though the money was nominally advanced under the power in the will, it was in reality advanced with the well-understood purpose that it should pass into the hands of Molyneux to be used by him in reduction of his debt to Fletcher. In the first place, I think it right to say that upon the construction which I put upon this will there was no power to make any advance at that time at all. It is clear on the authorities that where a power is given to trustees to apply capital money for the advancement in life of a child that power is to be construed according to a well-understood meaning. Undoubtedly instances occur in reported cases where it was intended that the advance might be made at any time in the life of the beneficiary and not within some strictly limited period. Where there is such intention apt words, such as "or otherwise benefit," are always used to express it. In *In re Keshaw's Trusts,* 16 W. R. 963, L. R. 6 Eq. 322, Malins, V.C., held that where there was a power at any period of the daughter's life to apply a portion of the trust fund for her advancement or otherwise for her benefit (which the Vice-Chancellor described as a very large power) an advance might be made to the husband to set him up in trade. And again, in *Lowther* v. *Bentinck,* 23 W. R. 156, L. R. 19 Eq. 166, Jessel, M.R., said: "The words which precede those which I have to construe are 'preferment or advancement,' both large words but both having, I may say, a well-known legal meaning. They are followed by the words 'or otherwise for his benefit,' which are the largest terms of all." The learned Master of the Rolls in that case then goes on to say that the words "or otherwise for his benefit" were inserted so as not to limit the powers of the trustees, and that case therefore shows that without those larger words the words "preferment or advancement" would have had a more restricted and narrow meaning. Now, in this case the words are "advancement in life" alone, and there is a further provision that the money is to be a sum not exceeding "£500 of his or her presumptive share." That means, I think, that the advancement is to be limited to the time when the share is presumptive and not vested, and I am fortified in that view by the statement in Davidson on Conveyancing, 2nd ed.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

vol. 3, p. 555, where in dealing with the cognate subject of settlements it is pointed out that the power of advancement should be extended to vested as well as presumptive shares. I further think that in spite of the very large powers of discretion given by this will to the trustees to determine what is "advancement in life," it is doubtful whether in this case an advance of money for use by the husband in his business (quite apart from the question of the benefit to Fletcher) can be justified under the terms of the will, the fund being for the daughter's separate use without power of anticipation. In *Talbot* v. *Marshfield*, L. R. 3 Ch. App. 622, 17 W. R. Ch. Dig. 191, Lord Hatherley, then Page Wood, L.J., held that where a share was advanced to set up a married daughter in business for her separate use that was a good execution. But that case clearly shows where the line must be drawn, for Lord Hatherley points out that the fund was settled to the daughter's separate use (as is the case here), and that, therefore, an advance for the purpose of paying the husband's debts was not justifiable. On the facts of this case I feel bound to come to the conclusion that, although the money was paid on the formal request of Mrs. Molyneux and her sister, it was perfectly well understood by Fletcher that the money was to be used in the husband's business for the payment of his debt to Fletcher. At that time Fletcher was admittedly pressing Mrs. Molyneux's husband for payment of the money owing by him. It is not necessary for me now to go through all the evidence, but having considered the evidence very carefully I have come to the conclusion that Fletcher did, as I have said, know the object with which the advance was to be made, and also that Fletcher received from the husband money in payment of his debt which was undoubtedly the proceeds of the two cheques which Fletcher had handed to Mrs. Molyneux and to Miss Durant, and which they in Fletcher's presence handed to Mrs. Molyneux's husband. In justice to Fletcher I should add that I have no doubt that he believed that, as whatever the husband did was done with the consent of the ladies, therefore the transaction was not morally wrong. I think the consciousness of that blinded him as to the wrongfulness of doing that which, although the tenants for life consented to it, was in fact a breach of trust. I am of opinion that the payment of these two sums by Fletcher under these circumstances was not a proper or justifiable exercise of the power of advancement contained in this will. The law is laid down by Lord Westbury in *Duke of Portland* v. *Topham*, 12 W. R. 697, 11 H. L. Cas. 32, where he says (at p. 54): "I think we must all feel that the settled principles of the law upon this subject must be upheld—namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power." Another instance of the application of the principle is to be found in *Humphrey* v. *Olver*, 7 W. R. 334, 28 L. J. Ch. 406.

But another question now arises. The sole plaintiffs in this action are the infant children of Mrs. Molyneux; neither that lady nor Miss Durant are parties. On the evidence before me I have no doubt that both ladies knew what use was intended to be, and was in fact, made of the moneys advanced to them. The rule of equity is that where a trustee has committed a breach of trust of this kind with the consent of the tenants for life he is entitled to be indemnified by them (see *In re Holt*, 45 W. R. 650, [1897] 2 Ch. 525). As, however, they are not parties to this action, all I can do in this matter is that in making the order which I am about to make —viz., that Fletcher do replace the £250 advanced to Mrs. Molyneux, for the benefit of the beneficiaries of the will, I do so without prejudice to any proceedings that Fletcher may take against Mrs. Molyneux for an indemnity. With regard to the £500 advanced out of Miss Durant's share I cannot give the plaintiffs any relief, and for this reason. Their interest depends only on the possibility of Miss Durant dying unmarried and without exercising her power of appointment or intestate and the plaintiffs being her next-of-kin. That is not such an interest as entitles them to claim in this action in respect of the £500 advanced to Miss Durant: see *Clowes* v. *Hilliard*, 25 W. R. 224, 4 Ch. D. 413, and *Stockley* v. *Parsons*, 38 W. R. 712, 45 Ch. D. 51. The defendant Clark had no part in the breach of trust, but he has put in a defence in this action siding with Fletcher, and pleading that there was no breach of trust. Under these circumstances I cannot give him costs, but I do not give costs against him. I give directions for a reference to the registrar for the appointment of new trustees.

Judgment accordingly.

Solicitors for the plaintiffs, *Horrocks & Christian Jones*, Liverpool.

Solicitors for the defendants, *Masters & Rogers*, Liverpool.

Chan. Div. Stirling, J. — March 24; May 14.

CLEGG. v. ELLISON. (a.)

Literary and scientific institution—Institution in the nature of a joint-stock company — Literary and Scientific Institutions Act, 1854 (17 & 18 *Vict. c.* 112), *ss.* 30, 33.

The proviso to the 30th section of the Literary and Scientific Societies Act, 1854, *whereby institutions "which shall have been founded or established by the contributions of shareholders in the nature of a joint-stock company" are exempted from the operation of that section, does not require that the institution to be exempted should be actually in all respects a joint-stock company, but merely that such institution should, in some respects, partake of the nature of such a company.*

Held, therefore, that a society in which the following elements of a joint-stock company were present—that is to say, first, the existence of a joint-stock or common property; secondly, the contribution of members as the source of such property; and, thirdly, the holding of that property by numerous persons in transferable shares —fell within the exemption.

The observations of Kay, J., *in* In re The Bristol Athenæum, 38 *W. R.* 396, 43 *Ch. D.* 236, *discussed and dissented from.*

This was a summons by William Edwin Clegg, on behalf of himself and all the other shareholders of the Sheffield Botanical and Horticultural Society, asking that the defendants, the trustees and committee of management of the society, might be ordered to sell the property of the society pursuant to resolutions passed and confirmed at meetings of members of the society held on the 26th of April and the 10th of May, 1897, and to distribute the proceeds of sale in accordance with those resolutions.

(a.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

The society was established under a deed of constitution dated the 15th of October, 1844, made between the various persons whose names are mentioned of the first part, and three named persons of the other part, whereby it was witnessed that whereas the said several persons parties hereto, the greater number of whom were resident in the borough or in the neighbourhood of Sheffield aforesaid, had agreed to form themselves into a society for the encouragement and cultivation of the science of botany and horticulture, and for the instruction and recreation of the members of the society and their respective families and other persons thereinafter mentioned, and to observe the several articles, rules, and regulations thereinafter contained—that was to say:

Clause 1, that the society was to be denominated the Sheffield Botanical and Horticultural Society, and its objects were to be as there specified.

Clause 2 provided that "the said society shall not make any dividend, gift, division, or bonus in money into, between, or among any of its members, nor shall any member in respect of the share or shares held by him have or be entitled to any share or interest in the gardens or other property of the society further than that in the event of a dissolution thereof, under the rules for the time being in force, the members then constituting the society shall be entitled to the property of the society according to their respective shares therein, as personal estate, after payment of all debts due therefrom and promising for all engagements then entered into by the society, or to which it shall then be liable."

Clause 3 provided for the committee of management.

Clause 4 provided that certain gardens recently purchased should be vested in certain gentlemen there named "upon such trusts as shall secure to the members of the society and their families, and to such other persons as, pursuant of these rules, shall be entitled thereto, the free use and enjoyment of the gardens under the management of the committee and subject and according to the rules of the said society for the time being."

Clause 5 provided "that all the personal property of the society shall be vested in the committee for the time being."

Clause 6 provided that "every person who has already paid or who shall hereafter pay to the funds of the society £5, and who shall execute this deed or articles of constitution or a separate deed or agreement with any five of the committee for the time being that he will observe or perform the same and the rules and regulations for the time being in force for the management and government of the society, shall be a member of the society and shall be considered as having one share therein, and for every further £5 so paid by such person he shall be considered as having an additional share therein subject to such regulations as the committe for the time being shall make for limiting the number of shares in the society."

Clause 7 provided that "every member shall pay an annual subscription of 15s., or such smaller sum as the committee for the time being shall require in respect of each share held by such member, for which he shall receive a ticket of admission to the gardens of the society."

Clause 8 provided for the register of members.

Clause 9 provided for what was to become of a member's share on marriage.

Clause 10 provided that "any member or the executor or administrator of any deceased member who shall have duly observed all the rules and bye-laws of the society may, with the consent of the committee and in such manner and subject to such regulations as they shall from time to time appoint, substitute any other person in place of himself as a member of the said society in respect of his share or shares or of any one of his shares therein."

Clause 12 provided that "every member shall have admission for himself and his family to the gardens of the society."

Under clause 14 (which was added subsequently to the first deed under the powers of administration) the committee were empowered through the secretary to issue season tickets in each year and available for the following twelve months. The places of sale and price to be advertised as the committee might deem desirable, and each ticket should be consecutively numbered. The proceeds of such sales of season tickets should, under the inspection of the committee, be divided *pro rata* at the last meeting of the committee in each year amongst the holders of more than one share.

Clause 19 provided that "no person resident within the circuit of seven miles from the parish church of Sheffield, except such as are entitled by these rules, shall have admission to the gardens on any terms whatever."

Then came the management clauses, and amongst other provisions there was a provision as to meetings.

Clause 24 provided that "notice of every meeting shall be given by advertisement in all the Sheffield newspapers, or by a circular letter addressed to every member, or in both such ways at the discretion of the committee, at least seven days before the time appointed for holding such meeting."

Clause 38 provided for instruction in botany "so that no expense arising from such instruction shall be chargeable to the funds of the society."

Clause 40 provided for the sale of spare plants, fruit, and flowers, and so forth.

Clause 41 provided that "the annual subscriptions and all other moneys payable to the said society shall be applied under the direction of the committee in payment of the expenses of the society and to the maintenance and improvement of the gardens."

Clause 44 provided for the forfeiture of shares in certain cases.

Clause 45 for dissolution of the society by resolution of meetings specially called for that purpose.

The real estate of the society was vested in trustees and the personal estate in the committee of management, and every person who paid to the funds of the society £5 and executed the deed became a member and was entitled to one share in the society, which was transferable by him or his legal personal representatives. Each member was liable to pay an annual subscription of 15s., and was entitled to admission for himself and his family to the gardens of the society but was not entitled to any dividend or bonus, but was, upon the dissolution of the society entitled to a share of the profits of the society after the payment of debts and liabilities.

The gardens which formed the property of the society were conveyed to trustees for the society by a deed dated the 20th of June, 1845. The property at the time of conveyance was subject to a mortgage for £3,000, which had since been paid off. The purchase-money and the mortgage debt were paid and discharged out of the funds of the society contributed by the members. The trusts of the deed of 1845 were in accordance with the deed of constitution.

Recently the gardens had not been carried on with success from a financial point of view; and at the meetings mentioned in the summons a resolution was passed that the society be dissolved, and that the property of the society be sold to a public body known as the Town Trustees of Sheffield at a price

sufficient, after payment of debts, liabilities, and costs, to pay each member the sum of £5 for every share held by him. It was, however, admitted that the value of the property probably exceeded such amount.

The Literary and Scientific Institution Act, 1854 (17 & 18 Vict. c. 112), was passed on the 11th of August, 1854, nearly ten years after the establishment of this society. Section 29 provides that "Any number not less than three-fifths of the members of any institution may determine that it shall be dissolved forthwith, or at the time when settled upon, and all necessary steps shall be taken for the disposal and settlement of the property of the institution, its claims and liabilities, according to the rules of the said institution applicable thereto, if any, and if not, then as the governing body shall find expedient." And further provides that "in case of disputes the adjustment of the affairs of the society is to be referred to the judge of the county court of the district." Section 30 provides that: "If upon the dissolution of an institution there shall remain, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the said institution or any of them, but shall be given to some other institution to be determined by the members at the time of the dissolution, or in default thereof by the judge of the county court aforesaid, provided, however, that this clause shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint-stock company." Section 33 provides that "this Act shall apply to every institution for the time being established for the promotion of science, literature, the fine arts, for adult instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public."

Upjohn, Q.C., and *Ingle Joyce*, for the applicants.—The question is whether this society comes within the Literary and Scientific Societies Act, 1854. Now, that Act solely deals with institutions for the benefit of the public. Section 29, as to dissolution, is quite in conflict with the provisions in the present case. Even if we might be deemed to fall within the Act, we are taken out of it by the proviso to section 30, we are "in the nature of a joint-stock company." The definition of a member in section 31 of the Act is very different from that contained in our Act.

They referred to *In re Dutton*, 27 W. R. 398, 4 Ex. D. 54; and *In re The Bristol Athenæum*, 38 W. R. 396, 43 Ch. D. 236.

John Dixon, for the defendants, the trustees and managers.

Sir R. E. Webster, Q.C., A.G., and *R. J. Parker*, for her Majesty's Attorney-General.—We submit that this scheme cannot be carried out, having regard to the provisions of the Act, the property being worth more than the purchase-money. It is a mistake to treat these members as being shareholders in the ordinary sense, they are merely members who have paid an entrance fee, they consist solely of persons who have either taken a £5 share, or have been nominated by a person who has taken such a share. The expression "a company in the nature of a joint-stock company" must mean a company carried on for profit, but this society prohibits its members from receiving any profit. The mere fact that members get some advantage by becoming a member cannot make any difference.

Ingle Joyce replied.

STIRLING, J., stated the facts, and continued: The application was opposed by the Attorney-General, who insisted that the property of the society, after satisfaction of its debts and liabilities, ought not to be distributed among the members of the society, but ought, under the provisions of the Literary and Scientific Institutions Act, 1854, to be given to some other institution of a like nature.

The plaintiffs and the defendants, the trustees and managers of the society, contend that the society falls within the exception to section 30 of that Act—or, in other words, that the society is an institution which has been founded and established by the subscriptions of shareholders in the nature of a joint-stock company. The contention on behalf of the Attorney-General is that the shareholders are not members in the proper sense of the term; and, secondly, that the society is wanting in one of the necessary elements of a joint-stock company—namely, that it should be carried on for the purposes of gain.

As regards the first of these contentions on behalf of the Attorney-General it appears to me it is not well founded. The suggestion is that the payment of £5, mentioned in clause 6 of the deed of constitution, is merely in the nature of an entrance fee; but this seems to me to attribute too little force to the language of that deed. The contributor of £5 is to be considered as having a share in the society which is transferable, and entitles the holder to certain benefits in the way of enjoyment during the continuance of the society, and to participate in the distribution of the property upon a dissolution. Although, if the argument on behalf of the Attorney-General be well founded, any such participation is forbidden by the statute of 1854, still it is to be borne in mind that that prohibition was not in force at the date of the deed; and the provisions of clause 2 may be taken into consideration in ascertaining whether or no the members are shareholders. In my opinion they are. The other contention of the Attorney-General is one which requires much greater consideration. In the first place, I think that the society was not formed for the purposes of profit. Clause 2 distinctly prohibits any dividend, division, or bonus. The language here used follows that of section 1 of the statute 6 & 7 Vict. c. 36, under which societies established for purposes of science, literature, or the fine arts are exempted from rates on certain terms, of which two are that the society should be supported wholly or in part by annual voluntary contributions, and should not, and by its bye-laws might not, make any dividend, gift, division, or bonus in money unto or between any of its members, which is a reason for the prohibition of dividends found in the articles of constitution. Still, that prohibition constitutes a prominent feature in the deed of constitution, and the provisions of clauses 14, 15, 19a, and 40 appear to me to be provisions as to management and not to affect the result. As I have said before, I come to the conclusion that the society was not formed for the purposes of profit.

The question then arises whether the absence of any purpose of profit precludes the application of the proviso at the close of section 30. That proviso is not that the clause "shall not apply to any institution which shall be a joint-stock company," but "shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint-stock company." That appears to me to mean that such an institution was not to be actually, in all respects, a joint-stock company; but to be such as, without being a joint-stock company, should in some respects partake of the nature of such a company. If it be asked what

elements of a joint-stock company were more particularly contemplated by the Legislature, I should say these: First, the existence of a joint-stock or common property; secondly, the contributions of members as the source of such property; and thirdly, the holding of that property by numerous persons in transferable shares. All these ingredients exist in the constitution of the society; and although no doubt joint-stock companies are ordinarily formed for the purpose of profit, many institutions exist, which are not formed for that purpose, to which it is hard to deny the nature of a joint stock company.

Under the Companies Act of 1862 (25 & 26 Vict. c. 89, it appears to be clear that a joint-stock company may be formed for other purposes than those of profit. Section 6 of that Act provides that "any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company"; and section 21 provides that "no company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof shall" without certain sanction hold more than a certain quantity of land. Then in the Companies Act of 1867 (30 & 31 Vict. c. 131), section 23, it is provided, "Where any association is about to be formed under the principal Act as a limited company, if it proves to the Board of Trade that it is formed for the purpose of promoting commerce, art, science, religion, charity, or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association in promoting its objects and to prohibit the payment of any dividend to the members of the association, the Board of Trade may by licence under the hand of any of the secretaries or assistant secretaries direct such association to be registered with limited liability without the addition of the word 'limited' to its name."

Now, section 4 of this Act of 1862 prohibits the formation of any company consisting of more than twenty persons for the purpose of carrying on any business that has for its object the acquisition of gain by the company or by the individual members thereof unless registered as a company under the Act. Upon this section it has been repeatedly held that associations of more than twenty persons may exist which do not require to be registered, and are not made illegal by the Act of 1862: see for example, *Smith* v. *Anderson*, 29 W. R. 21, 15 Ch. D. 247; *Crowther* v. *Thorley*, 32 W. R. 330; and *In re Siddall*, 33 W. R. 509, 29 Ch. D. 1; and yet it would be difficult, as I think, to deny to those associations the nature of joint-stock companies.

The Joint-Stock Companies Registration Act of 1844 (7 & 8 Vict. c. 110) applies only to joint-stock companies established for the purpose of profit; and it was repeatedly held (see *Reg.* v. *Whitmarsh*, 15 Q. B. 600; *Bear* v. *Bromley*, 18 Q. B. 271; and *Moore* v. *Rawlins*, 6 C. B. N. S. 289, 7 W. R. C. L. Dig. 15) that associations which very closely resemble joint-stock companies did not require registration under that Act.

On behalf of the Attorney-General some observations of Kay, L.J. (then Kay, J.), in *In re Bristol Athenæum*, were properly relied on. The actual decision in that case was that the Bristol Athenæum, an association possessing a constitution somewhat similar to that of the Sheffield society, could not be wound up as an unregistered company under section 199 of the Companies Act, 1862. With that decision I do not differ. Incidentally, however, his lordship did express the opinion that the Bristol Athenæum was not a joint-stock company and not within the proviso of section 30 of the Act of 1854. No one can be more sensible than I am of the weight which is due to anything which fell from what the learned judge said; but I have, while preparing this judgment, been informed by North, J., that he has, in a case before him (*In re The Russell Institution*, [1898] 2 Ch. 72), independently arrived at a similar conclusion with regard to the construction of section 30 of the Act of 1854 to that which I have endeavoured to express. In my judgment, on the main question, the applicant is entitled to the order for which he asks.

There remains, however, a minor question, which is one entirely of form. By clause 24 it is provided that notice of every meeting of the members shall be given by advertisement in all the Sheffield newspapers. It is admitted that although notice has been given in all the morning Sheffield newspapers an evening paper was omitted and no notices were served. Having regard to the nature of the dealing with the property which is about to take place, it seems to me that this is a case in which I should require the rule to be strictly adhered to, and therefore I think before I make an order a meeting ought to be called properly in accordance with the directions in the rules.

Solicitors, *Pilgrim & Phillips*, for *Watson, Esam, & Barber*, Sheffield; *Treasury Solicitor*.

Q. B. Div. (Kennedy, J.) June. 7.

MARSHALL v. MACKINTOSH. (a.)

Contract—Building agreement—Default of builder—Re-entry of landowner—Damages.

A builder having made default under a building agreement, the landowner exercised the right reserved to him in such a case by the agreement to re-enter and take possession of the land and premises, with all the buildings, plant, and materials thereon.

Held, that an action would lie at the suit of the landowner against the builder to recover damages for the builder's breach of the agreement.

Action to recover damages for breach of contract.

The defendant, who was a builder, by an agreement dated the 10th of June, 1896, with the plaintiff undertook to pull down and re-erect "in carcase" before the 25th of December, 1896, a hotel in Dover street, Piccadilly, and to take a lease of the hotel from the plaintiff for eighty years from the 10th of June, 1896, at a peppercorn rent for the first year, and at the rent of £1,100 for the second and every subsequent year of the term.

The material provisions of the agreement were as follows: "(2) The lessee will at his own cost take down and clear away the old buildings, and before the 25th of December, 1896, erect in carcase (that is to say, the walls built and structure roofed in, the timbers of the floors and partitions fixed, and the gutters, rain-water pipes, and drains completed and made good in communication with the common sewer), the new buildings. . . . And in default by the lessee of the stipulation contained in this clause he shall forfeit all benefit under this agreement, which shall thereupon cease and be determined, and all the materials and buildings on the said premises shall be forfeited to, and become the

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

absolute property of, the lessor. (11) If the new buildings shall not be erected or completed within the time and in manner aforesaid before the 25th of December, 1896, or if the lessee shall fail to observe or perform any of the stipulations herein, . . . or if he shall not proceed with the works with proper diligence, then . . . the lessor shall be entitled to re-enter upon and to the immediate possession of the said piece of land and premises, with all the buildings, erections, plant, and materials therein without making to the lessee any allowance or compensation in respect thereof. . . ."

The defendant had possession of the site on the 10th of June, 1896, and removed from it materials worth £200, and commenced, but did not complete, the pulling down of the hotel, but did not rebuild it or any part, and, save as aforesaid, wholly neglected to perform the contract. In consequence of the default of the defendant the plaintiff took possession of the premises, and put an end to the contract on the 19th of January, 1897.

The action was tried by Kennedy, J., without a jury. The learned judge found there had been a breach of contract by the defendant and referred the case to an official referee to report what damage, if any, the plaintiff had sustained, having regard to all the facts, by reason of the defendant's breach of contract.

The official referee reported that the plaintiff after taking possession of the premises on the 19th of January, 1897, forthwith took every reasonable precaution to endeavour to relet without loss, and did relet for the best terms he could by an agreement of the 5th of May, 1897, for eighty years from the 24th of June, 1898, at a peppercorn rent for the first year, and at the rent of £900 for the second and subsequent years of the term; that the fair value at which to capitalize the rent was twenty-five years' purchase. The official referee found that the damages which the plaintiff sustained by reason of the defendant's breach of contract in this action were the loss of two year's rent of £1,100 from the 24th of June, 1897, to the 24th of June, 1899, amounting to £2,200, and the loss of £200 a year rent from the 24th of June, 1899, at twenty-five years' purchase, amounting to £5,000, making a total of £7,200. If the plaintiff was only entitled to recover damages caused by the removal of materials by the defendant and by the loss of possession from the 24th of June, 1896, to the 19th of January, 1897, then the official referee found that the amount of such damage was £200 and one years' rent of £900 from the 24th of June, 1896, to the 24th of June, 1897, the earliest date at which the plaintiff was able to relet the premises.

E. Morten, for the plaintiff.

G. A. Scott, for the defendant.

KENNEDY, J.—In this case the only point I have to decide is the question of damages which the plaintiff is entitled to recover. The damages assessed by the learned official referee under alternative heads are large, and, as Field, J., took occasion to say in the course of his judgment in *Wigsell* v. *School for the Indigent Blind*, 30 W. R. 474, 8 Q. B. D. 357, at p. 359, few questions as to the principle upon which damages ought to be assessed are free from difficulty. The defendant, by an agreement in writing of the 5th of June, 1896, contracted with the plaintiff (in substance) to pull down and remove certain buildings numbered 47 and 48, Dover-street, Piccadilly, and to build on the site a new structure according to certain approved plans, elevations, sections, and specifications. The plaintiff contracted that the new structures should, before the 25th of December, 1896, be erected "in carcase" to the satisfaction of the plaintiff's architect. Upon this being done, the plaintiff contracted with the defendant to give him a lease of the land and buildings for a term of eighty years from the 24th of June, 1896, at a peppercorn rent for the first year, and thereafter at the yearly rent of £1,100. The only other provisions of the building agreement to which I need specially refer are the latter part of clause 2 and clause 11. [His lordship read these clauses.] By clause 13 the defendant had an option, subject to the terms of the agreement, during the first year of the term granted by the agreement, to purchase the fee simple at the price of £28,600. The defendant, as stated in the report of the official referee, got possession of the site on the said 10th day of June, the date of the agreement, but, except that he took down and removed £200 worth of materials from the old buildings, he did nothing whatever towards the fulfilment of the contract. The fact evidently was that he had entered upon the undertaking as a speculation without the means of fulfilling it. He frankly stated in his evidence before me that the terms of the agreement were such that he could not raise the money to build. He added that shortly before the plaintiff took possession he thought there was just a prospect, and a very good prospect, of his being able to sell the freehold. So far as I can see in the evidence no communication of such a prospect was ever made to the plaintiff.

Finding nothing beyond the removal of the £200 worth of materials had been done, and no prospect of anything being further done by the defendant, the plaintiff re-entered on the 19th of January, 1897. There can be no question of his right under the agreement to do so; and, apart from the express terms of that document, I think that upon the facts in evidence the defendant had not only broken the agreement, as he admits he did, but that the breach was of such a nature that the plaintiff would be reasonably justified in treating the defendant's conduct as showing an intention on the defendant's part not further to perform the contract.

It is clear, in my view, that the mere fact of re-entry and forfeiture does not in itself exonerate the defendant from the liability to damages for breach of contract prior to re-entry. If authority was wanted, *Hartshorne* v. *Watson*, 4 Bing. N. C. 178, appears to be an authority in point. I do not think Mr. Scott contended for the contrary view; but he did contend on behalf of the defendant that the effect of the latter part of clause 2 and clause 11, which I have read, do in this contract limit the plaintiff to such compensation as may be afforded to him by taking possession of the materials, plant, and buildings on the premises at the time of re-entry without any allowance or compensation to the defendant, and that he cannot claim damages beyond. I cannot accept this view. It appears to me that this would be to read into these clauses "as and for liquidated damages" or words to the same effect, and this, I conceive, I am not entitled to do. It is common enough to find the insertion of such words where there is an intention of the parties to agreements so to limit the liability for a breach of the contract. Instances of this are to be found in *Reilly* v. *Jones*, 1 Bing. 302; *Lea* v. *Whitaker*, 21 W. R. 230, L. R. 8 C. P. 70; and in *Ex parte Newitt, In re Garrud*, 29 W. R. 344, 16 Ch. D. 522, which was, like the present, the case of a building agreement. In the last cited case Brett, L.J., in the course of the argument at p. 529 says, "the words 'as and for liquidated damages' are inserted in favour of the builder; if they were not there the landowner would also bring an action for damages for the breach of the agreement." James,

L.J., on the same page says, "'liquidated damages only means that the things seized are to be taken in full satisfaction," and in the course of his judgment, at p. 531, he adds, in reference no doubt to the stipulation "as and for liquidated damages," "the building agreement provides in effect that in a certain event certain property of the builder may be taken by the landowner in full satisfaction of the agreement." It appears to me that in the absence of some such words as "as and for liquidated damages" I cannot construe clauses 2 and 11 as depriving the landowner of the right to prove, if he can, actual damages for the defendant's failure to perform the contract. I may add I do not think that the words in clause 11, "without making to the lessee any allowance or compensation in respect thereof" would operate to prevent the builder, if the landowner after a breach re-enters and claims damages, from having considered in the damages any value which might exist in buildings, plant, or material seized by the landowner when he re-enters. The damages must be assessed *rebus sic stantibus*, and it might be the case, for example, that if the structure at the time of re-entry though not entirely completed "in carcase" was nearly so, or if very valuable plant and material were on the land, the landowner would fail to prove any substantial damage at all to flow from the breach on which he sues, as he failed in the case of *Oldershaw* v. *Holt*, 12 A. & E. 590, where after re-entry he made an advantageous lease with a new contractor.

The remaining question is, what are the damages to which the plaintiff here is entitled for the breach which is committed before the plaintiff re-entered on the 19th of January? The learned official referee, to whom I referred the question of damage, has given two alternative assessments. [His lordship read the report of the official referee.] The damages must be assessed, in my judgment, upon well-known and well-recognized principles. They must be such as flow naturally, and, in the cirumstances of the case necessarily, from the breach of contract; further, they must be such damages as may reasonably and properly be taken to have been in contemplation of the parties when they entered into the contract; subject to this, at all events, the plaintiff is to borrow the language of Field, J., in *Wigsell* v. *The School for Indigent Blind*, 8 Q. B. D., at p. 364, "entitled to have his damages assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract, and what it would have been if the contract had been performed." Now, what would have been the state here, if the defendant's contract had been performed before the date of the re-entry on the 19th of January? There would have been a complete removal of the old buildings, and upon this important site the "carcase" completely erected of a valuable building. If this had been the case, it may, I think, fairly and properly be assumed that if the defendant failed to further complete his contract and take his lease, there would have been no difficulty in the plaintiff getting someone to take up the undertaking on at least as profitable terms. As it is, not only, after seven months, is there no new building erected, or even begun, but the old building is still on the ground and substantially as it was on the 10th of June, except so far as it had been made, I suppose, less valuable by its having had £200 worth of materials removed from it by the defendant. It is shown by evidence to the satisfaction of the referee that the plaintiff forthwith took every reasonable precaution to endeavour to relet without loss, and did relet for the best terms he could obtain. Those terms, as was stated in the official referee's report, involved the heavy loss of £7,200. Looking at the largeness of the amount, I have most carefully considered if there is any fault of principle in this assessment, and I can find none. It appears to me to be fair to assume that if the defendant had not broken his contract before the plaintiff re-entered on the 19th of January, 1897, the state of the plaintiff would have been that which he had under the contract with the defendant; he would have got the value of the contract either from the defendant, if he completed it, or from a new contractor, if the defendant after performing the contract so far had subsequently incurred a forfeiture. *Oldershaw* v. *Holt*, which is the case most in point, of which I am aware, has never been disapproved; and in that case it was held by the Court of Queen's Bench in a very similar case of re-entry upon breach of a building lease, the breach being, as here, the neglect to build, that the jury might properly give their verdict on an estimate of the plaintiff's real damage, taking into consideration an increased rent secured by the agreement, which had been made with a new lessee after the re-entry. Upon the same reasoning the official referee might, as it seems to me, properly consider here in getting at the plaintiff's real damage the fact of the reduced rent which the plaintiff was practically obliged to accept from a new contractor, and come to the conclusion which he has come to, that the difference between that rent and what the plaintiff would have received under his contract with the defendant fairly represents the damage which flowed naturally and necessarily from the defendant's breach of contract before the plaintiff re-entered, as, under this agreement with the dedefendant, he was entitled to do on the 19th of January.

As to the second or alternative assessment, it is only necessary to say that I do not think that the damages could, according to legal principle, be assessed upon that basis. I understood in the course of the argument that it was inserted in the report in deference to the wish of counsel, in order that this method of assessment might be before me on the hearing of the arguments.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Tarry, Sherlock, & King.*

Solicitor for the defendant, *A. M. Bradley.*

Q. B. Div.
(Wills and Kennedy, JJ.) } May 16.

North-Eastern Railway Co. (*Appellant*) v. Overseers of Dalton (*Respondents*). (a.)

Highway—Liability to repair ratione tenurse—*Highway made a parish highway—Highway rate—Exemption—Highway Act*, 1862 (25 & 26 *Vict. c.* 61), *s.* 35—*Estoppel*—Res judicata—*Judgment of quarter sessions—Quashing previous rate.*

By an order of petty sessions made in April, 1881, *under section* 35 *of the Highway Act*, 1862, *a highway, for the repair of which the appellant company had previously, as occupier of certain land, been liable* ratione tenurse, *was declared to be a parish highway, and a sum was fixed to be paid in full discharge of all claims thereafter in respect of the repair and maintenance of the highway. In August*, 1881, *the appellant company was rated in respect of its occupation of the land to a highway rate for the district in which the highway was situate. On appeal the quarter sessions quashed the rate. In* 1897 *the appellant company was*

(a.) Reported by F. O. Robinson, Esq., Barrister-at-Law.

again rated to a rate for highway expenses in respect of its occupation of the land.

Held, that the appellant company was not, by reason of the order made under section 35 *of the Highway Act,* 1862, *exempted from liability to be rated for highway expenses, and that the question of the appellant company's liability was not* res judicata *by reason of the decision of the quarter sessions in* 1881 *that the rate then in question was invalid.*

Special case stated by quarter sessions for the North Riding of the County of York upon the hearing of an appeal by the North-Eastern Railway Co. against a rate made for the relief of the poor in the parish of Dalton and for other purposes chargeable thereon, on the 7th of June, 1897.

Prior to the making of an order by the quarter sessions for the North Riding at Michaelmas, 1880, constituting the hamlet of Islebeck a separate highway parish, and annexing such parish to the Bridforth highway district, that hamlet formed part of the township of Bagby in the said district, and was a place in which all the highways were repairable by the occupiers of land *ratione tenuræ*, and in which no highway rates were leviable by reason of the exemption contained in section 33 of the Highway Act, 1835. Islebeck continued to form part of the township of Bagby until June, 1886.

The appellant company was at all material times in occupation of lands in Islebeck, and was, prior to the 11th of April, 1881, liable *ratione tenuræ* to repair part of a highway in Islebeck.

On the 11th of April, 1881, an order was made at petty sessions under section 35 of the Highway Act, 1862, whereby it was ordered that all the highways within Islebeck should become, and for ever thereafter be, parish highways and be repaired and maintained by the Bridforth Highway Board, and the sums to be paid by the respective occupiers of lands in Islebeck previously liable to repair the highways in full discharge of all claims thereafter in respect of the repair and maintenance of the highways were fixed. Such sums were duly paid in accordance with the order.

On the 22nd of August, 1881, the appellant company was rated and assessed in respect of its lands in Islebeck, to a rate for the expenses incurred by the Bridforth Highway Board in repairing and maintaining the highways in its district, including the highways in Islebeck, and for other expenses legally incurred by the board. Such rate was appealed against by the company to quarter sessions upon the ground that the company was exempt from liability to contribute towards the repair and maintenance of the said highways, and upon proof of the foregoing facts the appeal against the rate was allowed.

In 1886 the hamlet of Islebeck was detached from the township of Bagby and amalgamated with the township of Dalton in the Bridforth highway district.

On the 7th of June, 1897, a rate for the relief of the poor in the parish of Dalton was made, in which the appellant company was rated and assessed in respect of its occupation of its lands in Islebeck. Such rate was levied (*inter alia*) in respect of expenses incurred or to be incurred by the Rural District Council of Thirsk (the successor of the Bridforth Highway Board) in respect of the repair and maintenance of the highways within the said rural district, including the portion of the parish of Dalton which was comprised in Islebeck.

The appellant company appealed against this rate to quarter sessions.

On behalf of the appellant company it was contended:

(*a*) That it having been decided on the appeal to the quarter sessions in 1881 that the company was not liable to contribute towards the repair and maintenance of the highways in that portion of Dalton which was formerly the hamlet of Islebeck, the question was *res judicata*, and the court of quarter sessions was precluded from deciding otherwise in the present appeal;

(*b*) That the company having been liable to maintain the highways in the hamlet of Islebeck *ratione tenuræ* was exempted by section 33 of the Highway Act, 1835, from liability to rates levied in respect of the repair and maintenance of such highways, and had continued to be exempt ever since;

(*c*) That the company, having complied with the requirements of the order of quarter sessions of the 11th of April, 1881, was by section 35 of the Highway Act, 1862, discharged of all claims thereafter in respect of the repairs and maintenance of any highways in Islebeck, and was, therefore, not liable to pay the rate in question.

On behalf of the respondents it was contended:

(*a*) That the decision of quarter sessions in 1881 was final only for its proper purpose and object, which was that the company was not liable to pay the particular rate then in question, and that that decision was not conclusive evidence of the matters referred to in paragraphs (*b*) and (*c*) of the appellant's contentions, which matters only came (if at all) collaterally in question before the quarter sessions, or were only incidentally cognizable, or were at most only matters to be inferred by argument from that decision;

(*b*) That the exemption from the payment of highway rates conferred by section 33 of the Highway Act, 1835, continued only so long as the liability of the company to repair the highway *ratione tenuræ* lasted, and that, therefore, the exemption determined on the 11th of August, 1881, when, by virtue of the order of that date, the highway became a parish highway;

(*c*) That the order of the 11th of August, 1881, only operated to discharge the appellant company from all claims from that date by the Bridforth Highway Board or its successors in respect of the repairs and maintenance of the highway then ordered to be made repairable by the parish, and in no way affected the liability of the appellant company in respect of its occupation of property within the district of the Thirsk Rural District Council, and otherwise by law liable to be rated, from paying rates for expenses incurred by the council in respect of the repair and maintenance of highways within its district.

The court of quarter sessions held that the question was not *res judicata*, and that the court was not bound by the decision on the appeal to quarter sessions in 1881, and that the appellant company was not exempt from payment of any portion of the rate. Accordingly the appeal was dismissed.

The questions for the opinion of the court were:

(1) Was the court of quarter sessions precluded by its previous decision in 1881 from holding that the appellant company was liable to be rated in respect of its occupation of land within the hamlet of Islebeck for expenses incurred by the rural district council of Thirsk in relation to the highways within its district?

(2) Was the appellant company exempt from payment of so much of the said rates as was levied in respect of the repair and maintenance of the highways in the hamlet of Islebeck?

The Highway Act, 1862, s. 35: Where any person or corporation is liable by reason of tenure of lands or otherwise to repair any highway situate in a

highway district, the person or corporation so liable may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate; . . . and the justices at petty sessions . . . shall, if they think fit, make an order . . . that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district in full discharge of all claims thereafter in respect of the repair and maintenance of such highway; . . . From and after the making of such order by the justices . . . such highway shall be repaired in like manner and at the like expense as highways which a parish is liable to repair.

Bethune (*R. Cunningham Glen* with him), for the appellants.

Macmorran, Q.C., and *Gawan Taylor*, for the respondents.

The following cases were cited in the course of the arguments: *Reg.* v. *Heath*, 14 W. R. 388, L. R. 1 Q. B. 218; *Heath* v. *Overseers of Weaverham*, 42 W. R. 478, [1894] 2 Q. B. 108; *Reg.* v. *Hutchings*, 29 W. R. 724, 6 Q. B. D. 300; *Wildes* v. *Russell*, 14 W. R. 796, L. R. 1 C. P. 722; *Reg.* v. *Inhabitants of Haughton*, 1 W. R. 164, 1 E. & B. 501; *Rex* v. *Wick St. Lawrence*, 5 B. & Ad. 526; *Reg.* v. *Inhabitants of Clint*, 11 A. & E. 624*n*.

WILLS, J.—This case raises two questions—the first as to the construction of section 35 of the Highway Act, 1862, and the second as to the estoppel. The first question is whether the latter part of section 35 operates to discharge from all future liability for highway expenses the person previously liable *ratione tenuræ*, or whether the operation of the section is confined simply to the extra cost which would fall upon the person so liable as compared with the other ratepayers. I think that the governing words of the section are "The highway shall thereafter be repaired and maintained by the parish." It would have been easy to have said that the person, in respect of whom the liability to repair *ratione tenuræ* previously existed, should continue to enjoy the exemption; but that was not said in so many words, and some of the consequences, which would follow if such a construction were adopted, are so startling that in my opinion the respondents' construction of the section is the right one. In this particular place there were formerly no highways which were not repairable *ratione tenuræ*, and if the appellants' contention is right the result might be that, the sum to be paid by way of composition having to be fixed once for all, there would, if the expenses of repair increased in course of time, be no method of providing for the increase. In the same way, the contribution of an individual towards the highway expenses might be fixed at a sum which might in course of time become utterly inadequate to represent the burden of the liability to repair the particular highway from the burden of repairing which he had been discharged, or utterly inadequate to represent a fair proportionate share of the general highway expenses. Take for example the case of a person liable *ratione tenuræ* to repair a country lane. The sum to be paid by him under section 35 would be fixed with reference to the then existing state of things, and would consequently be moderate in amount; suppose he turned his property into a building estate and thereby caused the traffic to increase, if he had remained liable *ratione tenuræ* the increased expense of maintaining the road would have fallen on him, but if the sum to be paid by him had been fixed once for all he would derive a benefit at the expense of the community on whom the whole of the increase would fall.

It may be said that the respondents' construction of the section may operate harshly and may impose additional and even unjust burdens on individuals, but enactments of this kind are for the general benefit, and although there may be occasional injustice or hardship such cases would be rare. It seems to me that the more reasonable conclusion is that where the Legislature says that the highway shall hereafter be maintained and repaired by the parish, it means what it says, and a highway cannot be a highway repairable by the parish if some of the parishioners are exempt from contribution to the expense. If, as in the present case, the burden in the shape of highway rates cast upon the person liable *ratione tenuræ* by reason of the extinction of that liability is the same in amount as that previously existing, the sum to be paid by way of composition would be fixed at a nominal amount, and so no injustice would be done.

The second question was whether the judgment of the quarter sessions on the appeal in 1881 operated as an estoppel in the present case. Questions of estoppel often raise difficulties, not as to the principle, but as to the application of the principle. In *Reg.* v. *Hutchings* Lord Selborne, quoting from the *Duchess of Kington's case*, said: "'The judgment,' said Chief Justice De Grey, 'of a court of concurrent' (or of exclusive) 'jurisdiction, directly upon the point, is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence' (that is, as I understand the meaning of the Chief Justice, conclusive evidence) 'of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.'" The judgment of the quarter sessions in 1881 was that the rate then in question must be quashed. It followed that that rate was bad, and as between the same parties that question could not again be discussed; but the construction of section 35 of the Highway Act of 1862 was not one of the things necessarily involved in the judgment of the quarter sessions in 1881. It seems to me that *Reg.* v. *Hutchings* is very near this case. Mr. Bethune, who argued this case as well as it could be argued, contended that *Reg.* v. *Hutchings* was distinguishable on the ground that there is a difference between the judgment of a court of quarter sessions, which is a court of record, and a decision of a magistrate. That is so, no doubt, for some purposes, but the decision in *Reg.* v. *Hutchings* proceeded on no such ground as that, and there is nothing in that case to support the contention that in cases of estoppel there is any difference between a decision of a court of record and a court of summary jurisdiction.

For these reasons I am of opinion that the respondents are entitled to judgment.

KENNEDY, J.—I am of the same opinion, and on the same grounds.

Appeal dismissed.

Solicitor for appellant, *A. Kaye Butterworth*, York.

Solicitor for respondents, *Swarbrecke*, Thirsk.

Q. B. Div.
(Wills and Kennedy, JJ.) April 22.

LEICESTER COUNTY COUNCIL v. LEICESTER ASSESSMENT COMMITTEE. (a.)

Poor law—Rating—Exemption—Buildings occupied for police purposes—Chief constable's residence—43 Eliz. c. 2, s. 1—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 64.

By section 64 *of the Local Government Act,* 1888, *the buildings used by the police at Leicester, then vested in the justices, became the property of the county council.*

The chief constable for the county, on his appointment to that office, had to reside in a certain part of the police premises, and the assessment committee assessed that portion of the police buildings to the poor rate.

Held, that such rate should be quashed, because that part of the police premises occupied by the chief constable was occupied by him for the purposes of the police, and the fact that he was permitted to keep his wife and family there also rendered his occupation thereof none the less an exclusive occupation of that part of the building for the purpose of the county police.

Special case under 12 & 13 Vict. c. 45, s. 11, after notice of appeal against a poor rate made on the chief constable's residence at Leicester. The question was whether a building used as the headquarters of the Leicester County Constabulary in the town of Leicester, part of which was used by the chief constable in his official capacity as a residence—the rest being admittedly occupied for ordinary police purposes—was liable to be rated.

In 1867 the police premises, including the chief constable's residence, had been assessed to the poor rate of St. Martin's Parish, Leicester. At that time the property was vested in the justices, and they appealed against the assessment, and a case (*Reg.* v. *St. Martin's, Leicester,* 15 W. R. 1036, L. R. 2 Q. B. 493) was stated for the opinion of the court of Queen's Bench, which court decided that the justices were not liable to poor rates for such premises. By virtue of the Local Government Act, 1888, the premises in question passed from the justices and vested in the county council. Since 1867 neither the justices nor the county council had been rated for the premises until in April, 1897, this rate was made in reference only to that part of the premises occupied rent-free by the chief constable, and it was not disputed that it was a condition of his appointment that he must reside there in his official capacity.

The defendants having made the rate, the Leicester County Council appealed to quarter sessions, and a case was stated for argument.

E. W. Garrett (*S. Everard* with him), for the appellants.—The question for the opinion of the court is whether this rate can be levied. We contend that no part of the building ought to be rated.

He referred to *Reg.* v. *St. Martin's, Leicester,* 15 W. R. 1036, L. R. 2 Q. B. 493.

Premises occupied for the purposes of the police are exempted, and quarters resided in by the chief constable come within that class of buildings. The fact that his wife and family live there also makes no difference: *Reg.* v. *Stewart,* 6 W. R. 35, 8 E. & B. 360; *Gambier* v. *Lydford Justices,* 2 W. R. 226, 3 E. & B. 346; *Martin* v. *West Derby Assessment Committee,* 31 W. R. 489, 11 Q. B. D. 145; and *Reg.* v. *Lancashire Justices,* 6 W. R. 74, 27 L. J. M. C. 220.

Hugo Young and *C. B. Marriott,* for the respondents.—The reason why the case was stated is that since the authorities that have been cited were decided the ownership of these premises has been transferred by virtue of section 64 of the Local Government Act, 1888, c. 41, from the justices to the Leicester County Council; and another fact that has altered the previous state of matters is that in two decisions in 1896 (*County Council of Middlesex* v. *Assessment Committee of St. George's Union,* 45 W. R. 215, [1897] 1 Q. B. 64, and *Worcestershire County Council* v. *Assessment Committee of St. Nicholas, Worcester,* 45 W. R. 309, [1897] 1 Q. B. 480) the Court of Appeal decided that the court in looking at a building used partly for Crown purposes and partly for county council purposes, might split up the building and consider whether a portion of it was rateable, although another portion of it was not. Prior to 1888 all these buildings were vested in the justices, who had always been regarded as the servants of the Crown. Now premises occupied by the county council for administrative purposes are liable to be rated, and the respondents claim that they are entitled to split up the building according to the purposes in respect of which each part was used by the county council, as had been done in other cases, such, for example, as the Shire-hall in the *Worcester case.* The question is whether this portion, used as a place of residence for the chief constable and his family, is exclusively occupied for Crown purposes. If it is not exclusively used for Crown purposes it is not exempt and the respondents' submission that part at any rate of it being used for the chief constable's private purposes is liable to the rate: *Greig* v. *University of Edinburgh,* L. R. 1 Sc. & Div. 348.

THE COURT allowed the appeal.

WILLS, J.—The case has been very clearly put by Mr. Young, and he has argued his point in the only way possible. It seems that this case is free from difficulty and it is very undesirable to encourage an attempt such as this to upset established authorities and privileges. The sole question raised is whether the occupation by the chief constable of the county is an occupation of that part of the police buildings exclusively for police purposes. The chief constable was required so soon as he was appointed to the office to live there in order that he might always be at hand and ready to discharge his duties. There is no doubt that the building generally was occupied by the police for the purposes of the police, and there is no doubt that premises so occupied are not liable to poor-rate. The only question was whether the residence of this officer being used by his family as well as himself could be treated as a part of the building set apart and used for private purposes—that is, for a purpose other than for the purposes of the police. Now, as he had to live there because it was the head office of the county constabulary and he, as the chief constable, was required to be there so as to be in immediate communication with all parts of his district, does it make a difference as to the rateability of this portion that his wife and family lived with him? It would be an absurdity to hold that it did. A wife and family have been held to be a kind of necessary appendage and must be provided for when a house or other quarters are allotted to a public servant. I appreciate the point taken that the old decisions have ceased to be conclusive authorities because of the change brought about by the Local Government Act, 1888, c. 41, and I feel that there may be cases in which premises formerly vested in the justices and then exempted from liability to rates may now when occupied by the county council no longer be exempted

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

because by the changes brought about by the Act of 1888 a new principle of severing a building into portions for the purposes of levying rates has sprung up which before was never thought of. In this case, however, it seems to me clear that the building was occupied by the chief constable for police purposes, and that he occupied them none the less exclusively for police purposes because he was allowed to keep his wife and family there. My judgment must therefore be for the appellants with costs.

KENNEDY, J., concurred.

Appeal allowed. Rate quashed.

Solicitors for the appellants, *Kingford, Dorman, & Co.*, for *William Jesse Freer*, Leicester.

Solicitors for the respondents, *Field, Roscoe, & Co.*, for *Whetstone & Frost*, Leicester.

Prob. Div. & Adm. Div. } Admiralty. } Feb. 9.

"THE RIPON CITY" OR "SILVIA." (a.)

Ship—Possession—Sale of ship by majority owners—Judgment by consent—Agreed damages—Meaning of "such deductions as the interveners may be able in law to establish as proper from the respective shares and interests of the plaintiffs."

The owners of fifty-two sixty-fourth shares in a ship—the ship having been arrested in an action in rem *for master's wages and disbursements—put in bail in the action and paid the amount found due by the court. They subsequently, without the consent of the owners or mortgagees of the remaining shares in the ship, entered into a contract for the sale of the whole ship to a foreign purchaser, and delivered her to him, receiving the total purchase-money. The mortgagees of eight of the remaining twelve sixty-fourth shares in the ship and the sequestrator of the mortgagee of those shares then arrested the ship in an action of possession, and the owners of the fifty-two sixty-fourth shares having intervened in that action, agreed to settle the suit by paying to the plaintiffs eight sixty-fourth parts of the purchase-money they had received for the ship, less such deductions as the interveners might be able to establish as proper from the respective shares and interests of the plaintiffs.*

Held, that a sum paid by the interveners for brokerage at 2½ per cent. was a deduction to be allowed within these words, but that the amount paid for wages and disbursements, and sums paid for cancelling an onerous charter-party entered into for the ship and for repairs to her not required by the purchasers, were not allowable deductions.

Motion by mortgagees in objection to registrar's report.

This was an action of possession carried on on behalf of Messrs. Green, Holland, & Co., the owners of one sixty-fourth share in the vessel *Ripon City;* of Thomas Ronaldson, the owner of one other sixty-fourth share in the same vessel; (and by amendment) of Elizabeth Balls and R. K. Donald, each the mortgagee of four sixty-fourth shares in her; and of T. McLintock, the sequestrator according to the Scotch law; and of M'Lean & Co., the mortgagors of the above last-mentioned mortgaged shares in the vessel against *The Ripon City*. The plaintiffs claimed in the action a declaration that a pretended sale of *The Ripon City* made by Sir Christopher Furness and Furness, Withy, & Co. (the owners of fifty-two sixty-fourth shares in her and her managing owners) on or about the 20th of April, 1897, to a foreign purchaser was null and void, a decree that possession of the ship should be given to the plaintiffs, and that all things might be done to give and restore to the plaintiffs a legal title to *The Ripon City* and their shares therein.

Sir Christopher Furness and Furness, Withy, & Co. appeared as interveners in the suit, and in their defence, after admitting that they had sold *The Ripon City* to Paolo Viale, an Italian subject, for £8,650, and that the British certificate of registry of the said vessel had been closed on the 20th of April, 1897, alleged that they had always been ready to account to the plaintiffs for their proportion of the said purchase-money, or alternatively to pay to the plaintiffs the fair market value of their shares, and brought into court the sum of £400 as sufficient to satisfy the claims of Messrs. Green, Holland, & Co. and Thomas Ronaldson in the action. This amount of money was taken out of court by the plaintiffs, Messrs. Green, Holland, & Co. and Thomas Ronaldson.

On the 7th of August, 1897, the action came on to be heard, and the court made a decree by consent of all parties that judgment should be entered for the remaining plaintiffs in one-eighth of £8,650, with interest thereon at 10 per cent. per annum from the 17th of April, 1897, to the 7th of August, 1897, and per cent. per annum on the amount of the judgment found due from the 7th of August, 1897, until payment, "less such deductions as the interveners might be able in law to establish as proper from the respective shares and interests of the plaintiffs; the question of such deductions to be referred to the registrar and merchants."

The registrar with regard to the deductions to be made in accordance with the above judgment reported as follows:

In the account filed by the interveners they claimed to deduct from the purchase-money various sums amounting in all to £6,943 1s. 8d., leaving a balance of only £1,490 13s. 4d., of which one-eighth would be payable to the plaintiffs. At the reference, however, this claim was reduced by the withdrawal of certain items to £5,541 7s. 11d. The deductions still claimed include a sum of £795 5s. which had been paid by the ship's broker before the sale of the vessel, £325 paid shortly before the sale to cancel a disadvantageous charter entered into by Neil M'Lean & Co. while the vessel was in their hands, and £400 which had been paid by Furness, Withy, & Co. to the master in settlement of an action of wages and disbursements instituted in his name against the vessel on the 17th of February, 1897. It was held by Barnes, J., at the trial of this action that this settlement of the action was illegal and void, and I do not see how the mortgagees can be held liable for any of the other payments above mentioned, none of which would confer a lien on the ship. As regards the plaintiff Elizabeth Balls, it was suggested that she, at least had become liable as mortgagee in possession for the ships' liabilities at that time, and it is true that in one of the letters from her solicitors to the solicitors for the interveners dated the 11th of February, 1897, she was described as a mortgagee now in possession of four shares, but I think it was rightly contended by her counsel that she was not really a mortgagee in possession as nothing really had been done by her to take possession of the shares until she was joined as a plaintiff in this action on the 21st of July, 1897, and that she could not as a mere mortgagee be liable for a share of the expenses of working the ship or of cancelling a charter. The next deduction claimed was for a sum of £1,281 0s. 2d. found due to the master in his action against the ship

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

for wages and disbursements, including his liability on certain bills of exchange which fell due and were dishonoured in August and October, 1896: see *The Ripon City*, [1897] P. 226, 45 W. R. Dig. 153. The amount was paid on behalf of Messrs. Furness, Withy, & Co. This was a debt for which there was an existing lien at the time of the sale of the ship in April, 1897, and it seems clear upon the authorities that it must take precedence of the mortgagees' claim. In fact it has been so decided by Barnes, J., in giving judgment in the master's action, where he said, "I may notice in passing that in the present case the eight sixty-fourth shares standing in the name of Neil M'Lean & Co., though mortgaged, are therefore subject to the plaintiffs' claim": *The Ripon City*, [1897] P. 226, at p. 244. This, I presume, will apply to the master's costs in the same action, but not to the costs of defending it. There remains the costs of the repairs which the vessel was undergoing at the time of her sale for which a total deduction is claimed of £2,171 18s. 2d. The general rule seems clear that a mortgagee not in possession is not liable for outlays incurred in improving the mortgaged property, but a question arises in this case on the following words in the contract for sale: "The sellers agree to complete No. 3 survey and hand certificate to purchaser." It was agreed on behalf of the managing owners that the contract price of the vessel was really not £8,650, but that sum less the cost of repairs, and that the plaintiffs are only entitled to one-eighth of the purchase-money after making that deduction. This would probably have been the case if, before commencing the repairs, the vessel had been sold in consideration of her being repaired by the vendors. But here the repairs had almost been completed before the date of the agreement for sale, and it did not even appear that they had been undertaken with a view to that particular sale. . . . It seems to me that the plaintiffs were entitled to one-eighth of the value of the vessel in her condition at the date of the agreement for sale, including so much of the repairs as had then been done, and it is evident from the dates that the cost of any repairs which then remained to be completed must have formed a very small portion of the total costs. The managing owners have claimed to deduct no less than £2,171 18s. 2d., including, it seems, the cost of repairing damage sustained by the vessel being on fire at Savannah during her last voyage. But the sum for which the contractors undertook to execute according to specification the necessary repairs for passing her No. 3 survey, the completion of which was a condition of the sale, was only £840, and there is nothing to show that the repairs still remaining to be done at the date of the contract for sale formed part of the classification repairs represented by that sum, nor that the costs of any such uncompleted repairs was not fully covered by insurance in respect of which it appears from the correspondence that the managing owners expected to recover about £1,400. In our judgment the managing owners have clearly failed to prove what, in our judgment, it clearly lay upon them to prove—namely, that any part of the cost of the repairs is properly chargeable to the mortgagees. The broker's commission of 2½ per cent. on the purchase-money appears to be a reasonable and proper deduction. I think the interveners ought to pay the costs of the reference.

Both the plaintiffs and interveners appealed against the report of the registrar, the plaintiffs asking that the report should be varied by the deduction of the 2½ per cent. brokerage made by the registrar being disallowed, and the interveners claiming that they were entitled to have the items disallowed by the registrar as above stated allowed them in account as deductions proper to be made under the decree in the action.

Jan. 17.—*F. Laing*, on behalf of the plaintiffs, brought on the appeal before the President (Sir F. Jeune) by way of motion, the hearing being continued on the 18th of January and the 19th of January.

Aspinall, Q.C., and *Dawson Miller*, appeared on behalf of the interveners.

The argument of counsel appear from the judgment.

The following authorities were cited as to equitable interests between owners and mortgagees of ships being recognized by the court and as to the power of the court to make a decree as to the plaintiffs' title: *The Innesfallen*, L. R. 1 Adm. & Ecc. 72, 14 W. R. Adm. Dig. 26; *Batthyany* v. *Rouch*, 29 W. R. 665, 44 L. T. Rep. 177; *The Rose*, 21 W. R. 511, L. R. 4 Adm. & Ecc. 6.

Cur. adv. vult.

Feb. 9. — JEUNE, P. — The questions in this case arise on objections to a report made by the learned registrar in pursuance of a judgment of the court given by consent, and relate to the distribution of the proceeds of a vessel called *The Ripon City*, called at the time of the sale *The Ripon City* or *Silvia*.

The deductions now in question which were claimed in argument before the registrar and before me are, I think, divisible under four heads; first the sum of £216 5s. claimed as brokerage at 2½ per cent. on the purchase-money. This sum has been allowed by the registrar, and I think rightly. The effect of the decree by consent was, in my opinion, that Mrs. Balls and Mr. R. K. Donald, whom I will speak of as the plaintiffs, are to be treated as acquiescing in the sale as a sale, but with the reservation of all rights as to distribution of the proceeds; the gross sum realized being £8,650. It was argued before me that the plaintiffs as mortgagees could on a sale add their costs of it to their claim on the purchase-money, and should be permitted to do so now. No doubt the plaintiffs could do this as against their mortgagors but not as against the owners of other shares in the ship. Secondly, the most important question in this case arises with regard to the maritime liens on the ship which were cleared off by the interveners. The registrar has allowed the deduction of the amounts secured by lien which were paid by the interveners to Messrs. Cory in consequence of the decision of Barnes, J. (see *The Ripon City*, [1897] P. 226), and also of Messrs. Cory's costs on the ground that this lien was in existence at the time of the sale of *The Ripon City* to the Italian purchaser. But there appears to me to be no difference between the different maritime liens imposed by the conduct of Neil M'Lean & Co., and the case is the same as if the interveners had, instead of giving bail, then paid all such liens.

There is, then, but one question of law involved, and to this counsel for the interveners addressed their main argument. They contended that on the true construction of the transaction between the interveners and Messrs. Neil M'Lean & Co. the interveners ceased to be owners, and became either mortgagees, or at least unpaid vendors, with a security for payment of the purchase-money; that they took possession in order to enforce their security; that they could not enforce their security for sale without clearing off the maritime liens on the ship; and so, having not indeed relieved the mortgagees of the eight shares from personal liability, but having relieved their property from a prior incumbrance,

they were entitled to deduct what they had paid in respect of the liens from the purchase-money before dividing it. I have considered the agreement of the 10th of October, as modified by the letters of the same date and of the 22nd of November, 1895 (see *The Ripon City*, [1897] P. 226, at p. 227), and it appears to me clear that the property in the vessel never passed to Neil M'Lean & Co., nor could specific performance ever have been enforced, as the interveners were never in a position to sell the whole ship. The position of things, I think, was that for the original intention of the whole ship being transferred to Neil M'Lean & Co., and the interveners becoming mortgagees for the unpaid purchase-money there was substituted an agreement under which the interveners, until Messrs. M'Lean & Co. acquired all the shares, remained the owners, except in so far as on proportionate payments there was a transfer of shares, Messrs. M'Lean & Co. being in the meantime allowed to work the vessel. It confirms this view to find that in their pleadings in the present action the interveners describe themselves as at all times owners of the vessel, and their argument before Barnes, J., in *The Ripon City* proceeded on the basis of their being the owners and not Messrs. M'Lean & Co. It was contended before me that Barnes, J., had held that the interveners were the mortgagees and Messrs. M'Lean & Co. the owners of the ship; but it is clear to me that the language of the learned judge has been misapprehended on this point. He held that a maritime lien would attach to the vessel by reason of the acts of Messrs. Neil M'Lean & Co. and without their being any personal liability on the part of the interveners, just as the act of a mortgagee left in possession of a vessel may impose a lien on her in priority to the rights of the mortgage. It was in this sense, and in this sense only, that the learned judge used the expression "So that practically the buyers were owners and the sellers were in a similar position to that of mortgagees in respect of the purchase-money remaining unpaid." For the purpose of this case it does not appear to me material whether the interveners are to be regarded as mortgagees or as owners in the position I have described. In one view they may be regarded as owners of the equity of redemption in regard to the plaintiffs' mortgagees because they had a claim against Neil M'Lean & Co. for any surplus after the discharge of those mortgagees. But they may also be regarded as having rights resembling those of a mortgagee, and so being in a somewhat similar position to that of the plaintiffs. Their legal position cannot, I think, be put higher than that. Further, it is clear that they were not personally liable on the liens discharged by them, and that to free their interests in the ship from those liens it was necessary to free the plaintiffs' interests as well, but that the plaintiffs did not expressly require them to discharge those liens. The question is, Have they, under these circumstances, on any legal principle a right to claim that the amount of the liens paid off by them shall be deducted from the purchase-money before division, and so have a proportion of the expense incurred by them thrown on the plaintiffs? The argument of counsel for the interveners was based on a contention that this payment might be treated as a payment at the implied request of the plaintiffs, and he relied on the cases of *Johnson* v. *Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38, 16 W. R. C. L. Dig. 100, and *The Orchis*, 38 W. R. 472, 15 P. D. 38. It was decided in the former of these cases that the mortgagee of a ship who in order to obtain her release from a maritime lien for wages paid was entitled to recover the same on a count for money paid against the owners by whom the ship was managed and who were personally liable for the wages. The ground of the decision was that the sum was paid by the plaintiff in that case under compulsion and in respect of a liability imposed on the defendants. The same principle was carried further in the case of *The Orchis*, where it was held by the late President and the Court of Appeal that a mortgagee of forty-eight sixty-fourth shares in a ship, who paid to the master a sum in respect of which he had a maritime lien, was entitled to recover such sum against the owners of the other sixty-fourth shares; the ground of the decision being the several liability for the amount both for the mortgagors and the other owners. But what was, I think, an essential feature in those cases, the personal liability of the defendants to pay the sum which the plaintiff was considered to be compelled to pay and did pay, is wanting in the present instance. It is true that by the satisfaction of a maritime lien the property of every mortgagee is relieved from what, so long as it remains, is a prior charge, but a request by the mortgagee for the payment off of the lien is not to be inferred for that reason. It may be reasonable enough if there be personal liability for a debt to infer that the person liable desires and impliedly requests its discharge. But it is a further step, and one I believe erroneous, to contend that where there is no liability, but only the bare fact of benefit to property, a similar request is to be implied. People cannot be forced to buy even certain benefits against their will. In the present case, too, the benefit was doubtful. If the ship had sold for enough to provide for the lien and the mortgagees, and there is evidence to show that this was at least contemplated as possible, the plaintiffs, as mortgagees, would have gained nothing by the discharge of the lien. I have considered whether the satisfaction of this lien might not be treated as money paid to keep the property in existence, like the payment of premiums on policies of insurance. That analogy, however, seems to me to be imperfect, because different considerations may arise in the case of a payment necessary to preserve a property in existence from one which only relieves it of a burden. But were the analogy more complete than it is I think the that decision of the Court of Appeal in *Falcke* v. *The Scottish Imperial Insurance Co.*, 35 W. R. 143, 34 Ch. D. 234, has finally dispelled the inferences connected with the employment of the term "salvage" in earlier cases, and decided that the payment of premiums by the owner of the equity of redemption in a mortgaged policy gives him no prior right, and that payment of premium confers such a right only on one or other of the principles enumerated by Fry, J., in the previous case of *In re Leslie*, 31 W. R. 561, 23 Ch. D. 552, principles which have no application in the present instance. Nor does the practice of the Admiralty Court appear to me to afford any guide in the matter. It has always been held that a person advancing money to the master to pay wages has been allowed to claim in priority for his advance, but this is, I think, because he is considered to be identified with the master. It is true also that a bottomry bond-holder who discharges a claim for wages becomes entitled to priority in respect of such payment; but this is only when he has been allowed by the court to make it. I have also endeavoured to see whether the present case may not be considered as analogous to that of the holder of an equity of redemption who pays off a first mortgage with the intention of keeping it alive, as against mesne incumbrances. I take the general principle of equity to be as laid down by Jessel, M.R., in *Adams* v. *Angell*, 25 W. R. 139, 5 Ch. D. 634, the decision of which case was afterwards approved

by the House of Lords in *Thorne* v. *Cann*, [1896] A. C. 11, 43 W. R. Dig. 121. "Now, in a court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive it is presumed that his intention was to keep it alive, but it is manifestly for his own benefit. On the other hand, when the owner of an estate in fee or in tort pays off a charge the presumption is the other way; but in either case the person paying off the charge can by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it, but if there is any reason for keeping it alive such as the existence of another incumbrance, equity will not destroy it." In the present case there was, no doubt, strong reason on the part of the interveners for keeping alive the charge enforceable by law, and no doubt also the interveners could have taken an assignment of the rights of the lien-holders when they paid off to a trustee or even perhaps to themselves. But is there enough or indeed anything beyond the fact of the payment off to show that the interveners, in giving bail, which I have treated as equivalent to paying off the maritime liens, intended to keep them alive for the purpose of maintaining a priority for such payment as against the mortgagees? I cannot think that there is. The interveners, when they gave bail, probably did not believe in the validity of the arrest; but in determining to put an end to it I think that their real object, or at least an obvious and sufficient object, was to keep the conduct of the sale of the ship in their own hands and so certainly obtain the brokerage and probably get a better price for the vessel instead of allowing her to run the risk of being condemned by the court and sold by auction, and they did this prudently enough for their own benefit partly as holders of at least fifty-two sixty-fourths of her, and partly as entitled to claim against Neil M'Lean & Co. anything their equity of redemption of the eight shares might produce. It would be, I think, a mere fiction to suppose that it was intended to keep the liens alive for any purpose, I can therefore discover no ground on which the interveners can claim a priority over the mortgagees for any of their payments in discharge of liens. Thirdly, when the interveners took possession of *The Ripon City* she was under a charter-party made by Neil M'Lean & Co. This charter-party was of an onerous kind, and accordingly the interveners on the 9th of April, 1897, paid £325 for its cancellation. It is contended that before that date both Mrs. Balls and Mr. R. K. Donald had become mortgagees in possession. This turns on certain correspondence which passed between the interveners, Mrs. Balls' solicitor, and Mrs. Balls herself. There is no doubt that in this correspondence Mrs. Balls' solicitor spoke of her as "mortgagee now in possession of four shares," and the interveners accepted that statement in their replies. But it is clear to me that on the side of Mrs. Balls there was misapprehension of the probable effect in law of the language employed, and on the side of the interveners there was misapprehension of the legal effect of Mrs. Balls becoming a mortgagee in possession, and on the whole I am of opinion that no act was done by or on behalf of Mrs. Balls which made her a mortgagee in possession. I come to the same conclusion as to Mr. Donald, the evidence with regard to his case being of the same character, but somewhat weaker than that with regard to Mrs. Balls. But whether they took possession or not neither Mrs. Balls nor Mr. Donald gave any express authority to pay anything for the cancellation of the charter, though Mrs. Balls was aware that the cancellation was intended and consented to it, and in the absence of any such authority I do not think that the interests of either of them can be held liable.

Fourthly, the remaining point turns on the claim to make deductions in respect of the repairs to the vessel. This clearly must be limited to the cost of any repairs done in consequence of the promise in the agreement for sale to the Italian purchaser. I think such costs should be deducted if it could be proved that they were incurred after and in pursuance of the agreement for sale. But I agree with the finding of the learned registrar that no such proof has been given, and I have no doubt that the repairs were practically completed before the agreement for sale.

I am of opinion, therefore, that the only deduction to be allowed is the claim for brokerage, and the account must be reformed accordingly. The plaintiffs, of course, cannot have more than the amount of their mortgages and interest. I think that the plaintiffs are entitled to the costs of the action, of the reference before the registrar, and of these objections.

Solicitors for plaintiffs, *Ince, Colt, & Ince.*

Solicitors for interveners, *William A. Crump & Son.*

House of Lords

From C. A. (England). March 18.

LIQUIDATION ESTATES PURCHASE CO. v. WILLOUGHBY AND OTHERS. (a.)

Mortgage—Assignment of fund—Notice—Purchase of mortgaged property—Payment off of incumbrance—Intention to keep alive.

Where a person in possession of a fund on which others have charges has received notice of an assignment of his rights by one of the persons entitled to a charge, and nevertheless makes payments to the assignor, the rights of the several persons entitled to the charge, to what remains of the fund, cannot in any way be affected by such payments.

Where neither the deed nor the circumstances under which an assignment is executed shew an intention to extinguish an incumbrance paid off, such incumbrance will not merge, but be considered as still existing.

This was an appeal from an order of the Court of Appeal (Lindley and A. L. Smith, L.JJ., Kay, L.J., dissenting), 44 W. R. 612, [1896] 1 Ch. 726.

The facts are set out in Lord Herschell's judgment, and in the report in the court below.

Swinfen Eady, Q.C., and *Dauney* (*Edward Ford* with them), for the appellants.

Cozens-Hardy, Q.C., and *Vernon Smith, Q.C.* (*W. C. Druce* with them), for the respondents.

Thorn v. *Cann*, [1895] A. C. 11, 43 W. R. Dig. 121; *Toulmin* v. *Steere*, 3 Mer. 210; *Adams* v. *Angell*, 25 W. R. 139, 5 Ch. D. 634; and *Shaw* v. *Foster*, 20 W. R. 907, L. R. 5 H. L. 321, were referred to.

The House took time for consideration.

EARL OF HALSBURY, L.C.—The facts out of

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

which this appeal arises may be very simply stated. The business and assets of a mercantile firm were for sale in the year 1888 and a Mr. Walker had procured the sale to himself of the business and assets for the sum of £502,000. He was, however, under the obligation of bringing into court the sum of £25,000. This he did not possess, and accordingly he procured the assistance of Lord Henry Paulet, who advanced £9,000; Sir John Willoughby, who advanced £10,000, and Mr. Arthur Kennedy, who advanced £6,000. This £25,000 was advanced under a bargain, among other things that the lenders should be repaid their advances rateably together with certain other advantages in proportion to the advances. The whole arrangement assumed that Walker was to manage the whole adventure and to be the recipient of the money paid and to distribute it in pursuance of the agreement when obtained.

Three months after the date of this agreement, Kennedy, who had advanced £6,000, charged his interest in the agreement to one Norton for the sum of £6,200. Of this charge Walker received due notice, and at the beginning of the following year Walker succeeded in re-selling the property for £850,000. In the April following Walker, notwithstanding Norton's notice, thought proper to hand over to Kennedy £5,122 and conveyed property to him which is assumed to be worth £5,000. I do not understand it to be denied that this payment, or, to speak more accurately, this handing over to Kennedy of what Walker had received, notwithstanding his knowledge of Norton's charge, was a breach of Walker's duty—something he had no right to do—and for which he had neither received any authority from Norton, and of which, indeed, Norton had no knowledge.

I desire to treat this part of the case as entirely independent of questions which arise upon further arrangements by Kennedy a year afterwards. But, stopping at this point, I am unable to understand in what way Walker's improper use of his possession of the property realized by the re-sale can effect Norton's rights or any person claiming under Norton. If instead of handing it over to Kennedy he had been robbed of it and all that remained of the property was insufficient to pay all the persons having rights under it why should Kennedy's assignee be in a less favourable position for receiving his proportionate amount because the whole fund had been diminished by the unlawful act of the robber? Can it make any difference that Walker in defiance of his duty thought proper to divert a certain sum of money from the gross fund in favour of Kennedy at a time when to his knowledge Kennedy had no right to receive it? What Norton, in right of Kennedy's previous rights, was entitled to was the amount of his debts from Kennedy; and why Norton should be selected as the victim of a loss to which he in no way contributed I am unable to understand.

Lindley, L.J., uses the phrase that he did not understand why Norton's loss should be thrown on the other adventurers. It appears to me that the words "Norton's loss" involve the fallacious assumption that in some way or another the share which had once belonged to Kennedy, and which by the hypothesis at the time of the handing over to Kennedy no longer belonged to him, must be so ear-marked as already Norton's that it becomes Norton's loss; but this, I think, is erroneous. If the whole fund created has been *pro tanto* diminished by an unlawful act of the person who by the agreement of all the parties was the custodian of the money, and the person through whose hands it was to be distributed, it appears to me that the observation to which I have referred might be retorted and it might with propriety be asked: Why should the part of the loss which was a loss to the whole fund be appropriated to one particular adventurer or the assignee of that adventurer? No one has ever yet explained what Norton did or what Norton omitted to do which made him more responsible to a loss of any part of the fund than any other one of the adventurers, and I am therefore of opinion that on this part of the case the judgment of the majority of the court below is erroneous.

So far, although I respectfully dissent from the conclusion, I understand the argument. The money and property handed over to Kennedy are assumed to be payments to Kennedy which he had a right to receive, and by that process Norton's claims were *pro tanto* defeated. I fear that with respect to the remaining part of the case I have some difficulty in understanding the ground of the decision. Kennedy, in 1890, executed a deed assigning to Lord Windsor whatever he was entitled to under the original bargain of 1888. As I have already said, I think he was entitled to nothing at the date of that assignment except what remained to him after discharging the debt due to Norton. By a subsequent deed through the medium of a company called the Capital and Finance Company (Limited) the present appellants purchased Lord Windsor's interest and Norton's interest under the original bargain of 1888. Lord Windsor took and could only take from Kennedy what Kennedy had left after his assignment to Norton. But the appellant company purchased for £1,000 Norton's interest which had been created by Kennedy on the 21st of September, 1888. Some litigation had arisen in which Norton's rights were held not to be capable of being enforced, and accordingly this action was brought to enforce those rights against the funds that had been deposited in court, the practical question in the cause being whether, in taking the account of what was due to Norton, the moneys and property handed over to Kennedy could be taken into account as being payment of Norton's claim.

I am unable to follow the reasoning for one or two grounds. In the first place, the thing assigned and of which title was conveyed to Lord Windsor was not the whole sum, and could not have been the whole sum which was due to Kennedy under the original bargain but only so much of it as remained after providing for £6,200 due to Norton. The thing assigned by Norton was that original sum, and I am unable to follow what merger is supposed to arise when Norton sold one sum of money, or the right to it, and Lord Windsor sold another sum of money, or the right to it. So far as the deed itself is concerned, I can see no indication of anything but an intention of two different vendors to sell two different things to the same vendee. Nor am I quite certain that I understand what is meant by extinguishing Norton's interest, or how, if such a thing could be done, there is any indication of any intention to do it. Norton's title to what he originally got seems to me to be untouched by anything disclosed in the course of the narrative. He has sold that interest to the appellant company for £1,000, and it appears to me therefore that the appellants are entitled to a decree for that interest, whatever that may be; and in arriving at that amount it is wholly impossible to treat the moneys handed over to Kennedy as moneys paid to Norton.

I am therefore of opinion that the judgment of the court below ought to be reversed and the account taken upon the basis I have described—namely, that up to the amount which is due to Norton the appellant company are entitled to obtain their proportionate amounts of what is due under the bargain of 1888; and I move your lordships accordingly. The respondents, of course, must pay the costs both here and below.

My noble and learned friend, Lord Shand, who is not able to be present to-day, asks me to say that he concurs.

Lord HERSCHELL.—In the year 1888 Edward Joshua Walker had contracted to purchase the business and assets of the firm of Walkers, Parker, & Co. for the sum of £502,000, and was required to pay into court a deposit of £25,000 on account of such purchase.

By an agreement made on the 20th of June, 1888, between E. J. Walker of the one part, and Lord Henry Paulet, Sir John Willoughby, and Arthur Kennedy of the other part, E. J. Walker charged all his present and future interest in his purchase contract with the payment of the moneys subscribed by the persons named, and the bonuses thereon. and it was further provided that the subscribers should, as between themselves, rank rateably and *pari passu* as against the property thereby charged for the sum subscribed by them respectively and the bonuses thereon. The sum of £25 000 required for the deposit was paid by the subscribers upon the terms of the agreement, and was applied in payment of the deposit. The amount paid by Kennedy was £6,000, in respect of which he became entitled to the benefit of the agreement of the 20th of June, as a security for the repayment of that sum with a bonus of equal amount, making together £12,000.

The amount subscribed by Sir John Willoughby was £10,000, and by Lord Henry Paulet £9,000. The agreement provided that nothing therein contained should render E. J. Walker personally liable to repay to the subscribers the sum of £25,000 or the bonus thereon, and further, that it should not be in his power to resell the business and property referred to in the agreement otherwise than with the consent of the subscribers, provided that such consent should not be withheld if E. J. Walker could obtain the sum of £800,000, nor should it be competent for the subscribers to compel him to sell the business and property for a less sum than £650,000.

On the 21st of September, 1888, by an agreement of that date, Kennedy charged all his interest under the agreement referred to and the money and bonuses thereby secured with the payment to John Norton of sums amounting altogether to £6,200, and the agreement recited that in respect of a portion of that sum John Norton had other securities. Notice in writing of this charge was on the 24th of October, 1888, duly given to E. J. Walker, and acknowledged by him.

In the month of January, 1889, E. J. Walker sold the greater part of the property which he had contracted to purchase from the firm of Walkers, Parker, & Co., to a company called Walkers, Parker, & Co. (Limited), for the sum of £850,000, payable as to £550,000 in cash and as to £300,000 in shares of the Walker company of £10 each fully paid up.

In April, 1889, £5,122 was paid to Kennedy by the Walker company by the direction of E. J. Walker, and in June, 1890, certain property at Gillt, in Wales, of the value of £5,000, included in the original purchase, was conveyed to Kennedy. This payment and conveyance must be taken, as both courts below have held, to have been made and accepted without the knowledge and concurrence of Norton.

By a deed dated the 7th of August, 1890, Kennedy assigned all moneys receivable or recoverable by him under the agreement of the 20th of June, 1888, to Lord Windsor, upon certain trusts therein declared for securing the payment of all moneys then owing to him by Kennedy.

By two other deeds, dated the 20th of December, 1890, and the 18th of June, 1891, all the interest of Kennedy under the agreement of June, 1888, and the benefit of the deed of the 7th of August, 1890, became vested in Robert Forrest upon trust to apply all moneys received or realized from the property comprised in the agreement in payment of all moneys then owing by Kennedy to Lord Windsor, and to pay any surplus to Kennedy.

I come now to the deed, as to the effect of which the controversy between the parties has arisen. It was made between Forrest of the first part, Norton of the second part, Lord Windsor of the third part, the Capital Finance Co. of the fourth part, and the appellant company of the fifth part. It recited a contract for sale to the Capital Finance Co., at the price of £6,000 of certain property, including all the interest of Lord Windsor or of Norton in the premises comprised in and charged by the agreement of the 20th of June, 1888, and that this contract so far as regarded Norton's rights was entered into by Lord Windsor with his privity and approbation, and upon the terms that he should receive £1,000, part of the purchase-money of £6,000. It further recited a contract of sub-purchase by the appellant company from the Capital Finance Co. The deed witnessed that John Norton, "at the request of Lord Windsor, and in respect of his rights, powers, benefits, and interests under the said agreement of the 21st of September, 1888, and as mortgagee" thereby assigned and Lord Windsor and Forrest also assigned "all the estate and interest of the said Lord Windsor, John Norton, or Robert Forrest of and in the interest formerly of the said Arthur John Clarke Kennedy in and under the said agreement of the 20th of June, 1888, and the moneys and bonuses thereby secured to hold the same unto the said Liquidation Estates Purchase Co. (Limited) absolutely." It was declared by the deed that if Norton and Lord Windsor or either of them had a power of sale over the premises the deed should operate as a conveyance upon a sale in exercise of such power.

Before discussing the terms of this deed it will be convenient to state the circumstances under which this action has been brought. The respondent, Sir John Willoughby, in June, 1889, instituted an action against Lord Henry Paulet, Kennedy, and others to realize his security under the agreement of the 20th of June, 1888. John Norton was not a party to that action. Certain funds having been brought into court representing the proceeds of the property charged by the agreement, a distribution of such funds was ordered upon the footing of Kennedy having already received the sum of £10,122 on account of his share. Further sums were subsequently brought into court and the appellants, who until that time had had no notice of the action, obtained leave to attend the proceedings. The respondent, Sir John Willoughby, and the persons claiming under Lord Henry Paulet contended that such further funds belonged to them inasmuch as they had not received an amount equal to that received by Kennedy, if he were bound to bring into account the sum of £10,122.

It being considered incompetent for the appellants to enforce their rights as transferees of Norton's security in that action, the present action was instituted and the defendants in this action were enjoined from obtaining the transfer or payment of the funds in *Willoughby* v. *Paulet* until this action could be disposed of.

At the trial of the action North, J., came to a conclusion adverse to the appellants, and this judgment was affirmed by a majority of the Court of Appeal, Kay, L.J., dissenting.

In delivering the judgment of the majority of the

court Lindley, L.J., said: "Why the other lenders are to suffer by reason of Walker's wrongful payments to Kennedy after notice of Norton's charge is by no means obvious. . . . I fail to understand how Norton could as against the other lenders claim more of the fund than Kennedy's share of it, after giving credit for the payments made to him. The other lenders had no notice of Norton's security, nor could they have prevented Walker from paying Kennedy. Under these circumstances the plaintiffs' contention that Norton had any such right as they allege does not commend itself to our sense of justice, nor to our notions of equity." Although the judgment of the Lords Justices was not founded on this point it is necessary in the view which I take of the case to deal with it, and the more so as it seems to me not to have been without its influence upon the Lords Justices when disposing of the other part of the case.

I find myself quite unable, with all deference, to concur with the view indicated by the Lords Justices in the part of the judgment which I have quoted. I do not understand what is meant by saying that Norton was not entitled to throw upon the other lenders any part of the loss sustained by him by reason of Walker's wrongful payments to Kennedy. Kennedy having assigned his interest to Norton and Norton having given notice of this assignment to Walker, any payment subsequently made by him to Kennedy could, as it seems to me, have no more effect as against Norton than if it had been made to a stranger. In that case I do not suppose that anyone would contend that such a payment could affect Norton or diminish in the least the sum which he was entitled to claim as his share of the payments to be made out of the purchase-money received by Walker. That sum was determined by the assignment by Kennedy to Norton of his entire charge upon the purchase-money as a security for £6,200. If any portion of the money charged was employed by Walker otherwise than in accordance with the rights which Norton or the lenders or their assignees possessed I fail to see how this can affect the respective claims of Norton and the other lenders. The notion that Norton's rights could be affected because a payment was wrongfully made to his mortgagor' does not appear to me to rest on any sound foundation. I can see nothing unjust or inequitable in holding that where a person in possession of a fund on which others have charges has received notice of an assignment of his rights by one of the persons entitled to a charge, and nevertheless makes payments to the assignor, the rights of the several persons entitled to the charge to what remains of the fund cannot in any way be affected by such payments. Indeed it seems to me that it would be quite unreasonable that the assignee of a charge who has given notice of the assignment should be held affected by transactions taking place behind his back with the assignor. To speak of Norton throwing on the other lenders the loss sustained by him by reason of Walker's wrongful payments assumes that the loss was Norton's. It is here that I differ. I do not think that it was, for I do not see how an assignee can be made responsible for a wrongful act of the assignor after notice of the assignment has been given.

Before considering the terms of the deed of the 17th of March, 1893, it will be well to point out what was the interest originally vested in Kennedy by the agreement of the 20th of June, 1888, and what were the rights which Norton possessed at the time of the execution of the deed which has to be construed, and also what were the rights which Lord Windsor and Forrest acquired under the assignment by Kennedy. I think this aspect of the case has a material bearing upon the construction of the deed, and has been somewhat lost sight of in the judgment of the Lords Justices. The right which Kennedy acquired by the original agreement was to receive £12,000 out of the surplus of the purchase-money coming to E. J. Walker beyond what was necessary to satisfy the original vendors. By the assignment to Norton he acquired this right to the extent of £6,200 or so much of that sum as from time to time remained unpaid. This was the right which he possessed when he executed the deed of March, 1893. For the reasons I have given I think his right was wholly unaffected by the payments wrongfully made to Kennedy. Lord Windsor, on the other hand, took from Kennedy by assignment on the 7th of August, 1890, all the moneys then receivable or recoverable by him under the original agreement. Kennedy having at that time received the £10,122 already referred to, the right which Lord Windsor acquired from Kennedy's assignment obviously extended only to such sums as Kennedy was entitled to receive from the fund charged after taking into account a receipt by him of £10,122.

Bearing in mind then that these were the respective rights of the parties to the deed who concurred in assigning their rights to the appellant company I pass to a consideration of the provisions of the deed. The terms of the assignment by Norton are unambiguous. In respect of his rights, powers, benefits, and interest under the agreement of the 21st of September, 1888, and as mortgagee he assigns to the appellants all his estate and interest of and in the interest formerly of Kennedy in or under the agreement of the 20th of June, 1888, and the moneys and bonuses thereby secured. These words are manifestly apt to vest in the appellant company the right which Norton then possessed, which was, as I have pointed out, to receive out of the fund charged so much as was necessary to satisfy the debt then due to Norton up to £6,200 *pari passu* with the other lenders under the original agreement, on the basis of no part of Kennedy's claim under it having been at that time satisfied. This is not denied. But the majority of the Lords Justices held that the interest transferred by Norton was transferred in order to be extinguished, so that the appellant company might obtain Kennedy's interest in the security of June, 1888, free from incumbrances. The Lords Justices thought that the intention of the parties to extinguish Norton's interest was to be found in the terms of the deed, and the circumstances under which it was executed, and they rested their decision on the law laid down by Jessel, M.R., in *Adams* v. *Angell*.

In that case the learned judge stated the effect of the doctrine originally enunciated in *Toulmin* v. *Steere*, that where the purchaser of an estate pays off an incumbrance upon it, the incumbrance paid off is merged unless the contrary intention appears, and he pointed out its application of the case of an owner in fee or in tail, or of a purchaser. It is to be observed that the doctrine referred to is founded on the principle of merger. The assignment of an incumbrance to an owner or purchaser of an estate does not transfer any new estate, it only frees from the incumbrance an estate already vested in him, or about to be vested in him by conveyance. Jessel, M.R., points out, the assignment to a purchaser of an estate of an equitable charge upon it really passes nothing. It may nevertheless be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances.

In view of the nature of the interests assigned by Norton and Lord Windsor respectively, to which I have called attention, I find it difficult to understand how the doctrine of merger, on which *Toulmin* v. *Steere* rested, can have any application to the present

case. Assuming the appellant company to be purchasers from Lord Windsor, what was the nature of the so-called "property" which they purchased? It could be no more than this: The right which Kennedy possessed on the 7th of August, 1890, under the agreement of June, 1888. What was vested in Norton, and what he assigned was the right which Kennedy possessed on the 21st of September, 1888, under the agreement just referred to, to the amount of the debt due to Norton. How could the right which Norton thus assigned merge in what the appellants bought from Lord Windsor? It seems to me that it can only be necessary to show an intention to keep alive that which would otherwise cease to exist by reason of merger. In any other case, the assignment of itself vests the right assigned in the assignee, and it remains in him unextinguished. But, further, I am unable to see any ground for the conclusion that Norton's interest was transferred in order to be extinguished. There is, in my opinion, nothing on the face of the deed, or in the nature of the transaction, to show such an intention. If this had been the intention, I think, having regard to the nature of the interests possessed by the parties to the conveyance, the instrument would have been differently framed. Reliance was placed by the majority of the judges in the court below on what was called "the speculative character of Norton's claim against the other lenders," and in another part of the judgment it was said that "the opportunity of making a very doubtful claim against third parties" was not such a benefit as to give rise to the presumption of an intention to keep alive Norton's charge. I think these expressions indicate an erroneous view of the nature of Norton's right. In my opinion no claim of Norton against third parties, by which is meant the other lenders, is in question. Nor do I think his rights are open to any doubt. He was entitled to claim payment to the amount due to him out of the fund in Walker's hands in respect of Kennedy's original charge *pari passu* with the other lenders who had a charge on that fund. If a part of this fund had been improperly applied by Walker, and the fund thus diminished, Norton was entitled, in virtue of the assignment of Kennedy, to a rateable proportion of what remained *pari passu* with the other lenders. He was no more affected by its improper application than they were, and there is no more reason in point of law, or, as it seems to me, in point of justice or equity either, why the loss should fall on him rather than on them. For these reasons I am unable to see any ground for holding that the assignment to the appellant company by Norton of all his rights in Kennedy's interest under the agreement of the 20th of June, 1888, and the moneys and bonuses thereby secured, did not vest that entire interest in them and give them precisely the rights which he possessed at the time of the conveyance. If it were necessary to hold that Norton's right was kept alive under the conveyance of 1893, there appears to me ample reason for so holding, inasmuch as it would be obviously for the benefit of the appellant company to keep alive Norton's interest so that they might not be affected by any transactions of Kennedy, subsequent to his assignment to Norton, and prior to his assignment to Lord Windsor.

For these reasons I think the judgment of the court below ought to be reversed, and that the order made by North, J., on the 10th of July, 1895, should be varied by stating that the payments to Kennedy are not to be taken into account in ascertaining the amounts to which the plaintiffs are entitled in respect of Kennedy's interest under the agreement of the 20th of June, 1888, until the plaintiffs have received an amount equal to the sum which was on the 17th of March, 1893, due to Norton. I think the respondents must pay the costs in this House and in the courts below.

Lord MACNAGHTEN.—I am of the same opinion. In support of the judgment under appeal the respondents relied upon two grounds. Either of the two, if established, would serve to defeat the appellants' claim. In the first place they contended that Norton had not given due notice of the equitable assignment in his favour, and that consequently, as against them, Norton's assignees could not be heard to say that the payment to Kennedy was an improper payment. In the second place they argued that the deed of the 17th of March, 1893, by which Norton assigned his interest to the appellants, destroyed that interest and extinguished Norton's security altogether. In both the courts below the first ground was rejected; in both the second was held good, though Kay, L.J., dissented.

On the first point it is not necessary to say much. The assignment to Norton by Kennedy of the moneys coming to him from Walker was dated the 21st of September, 1888. It is not disputed that notice of the assignment was given to Walker on the 24th of October following. What more ought Norton to have done? It was said that notice might have been given to the company, who were the ultimate purchasers, and who were bound to pay Walker the balance of their purchase-money after satisfying the original vendors. But such a notice would not have prevented the company paying Walker what was due to him. It would not have made Norton's position more secure in the event of the company paying Walker, nor would it have thrown any liability on the company in the event of Walker misapplying the money. It might or might not have led the company to hold their hand for a time in order to give Norton an opportunity of intervening by some application to the court if he were so advised. But everybody concerned was anxious that the money should come to Walker's hands. Everybody looked to Walker as the paymaster. Then it was said that notice might have been given to Kennedy's associates, the other two subscribers. I do not say that under the circumstances that might not have been a prudent precaution. It might perhaps have prevented the particular misapplication of the fund which is now complained of. I am not sure that it would. But Norton was not bound to give such a notice. By his notice to Walker he did all that lay in his power to perfect his title, to use a common phrase. He did what he could to lay hold of the fund, and to convert Walker into a trustee for him of Kennedy's share to the extent of his interest therein. Payment to Kennedy after that notice was a payment which Norton, so long as he had an interest in the fund, was not bound to recognize. As far as he was concerned it was no payment at all. Walker might just as well have given the money to an utter stranger, or thrown it into the sea. The appellants have obtained an assignment of Norton's rights and interest. If they have not renounced those rights or destroyed that interest, surely they are entitled to take up the position which Norton would have occupied and to say what Norton might have said. They are not asking the other subscribers or those who derive title from them to refund. They only say, "You have received so much on account. We have received nothing as yet. Before you receive anything more, this inequality must be redressed. To the extent of our interest derived from Norton we are entitled to be paid rateably and *pari passu*." That was the agreement between the subscribers. I

cannot see anything unjust or inequitable in the conduct of the appellants. They are merely endeavouring to enforce a bargain in which they have obtained a substantial interest. If the appellants are right in their facts, Walker as well as Kennedy wronged Norton and wronged the respondents too. The respondents were innocent of all blame; so was Norton; so are the appellants. There is no reason that I can see for altering the original arrangement to the advantage or detriment of the one party or of the other.

So much for the first point. I find more difficulty in dealing with the second, because I am not quite sure that I follow the reasoning on which the judgment of the Court of Appeal is founded. The judgment begins by stating the facts and circumstances which led up to the deed of assignment of March, 1893. Among other things, it refers to three instruments, Lord Windsor's title-deeds. "Under these instruments," says the Master of Rolls, "Forrest"—Forrest was trustee for Lord Windsor—"had a power of sale." I may observe in passing that all the judges in the Court of Appeal, following, I think, a statement by North, J., who, however, guards himself by saying that the deed had not been produced, take for granted that there was a power of sale in Lord Windsor's securities, and the argument at the bar proceeded on that assumption. I may also note that the deed of the 18th of June, 1891, which was one of Lord Windsor's three deeds, seems to have nothing to do with the interest assigned by Lord Windsor or Forrest to the appellants. The reference to it in the deed of the 17th of March, 1893, is, I think, a mistake.

After stating the facts the judgment under appeal goes on to deal with some of the more recent cases about the doctrines of equity as to the merger of securities. Those doctrines, however, appear to me to have little or no bearing on the question at issue. And then the following passage occurs: "The speculative character of Norton's claim against the other lenders, the absence of all allusion to the existence of any such claim, the absence of any assignment of his debt, the ignorance we are in even now of the amount due to him (for it is admitted that £6,200 is not), the recital of the agreement with Lord Windsor, and lastly, the unusual clauses which follow the *habendum*, lead us to the conclusion that it was intended to extinguish Norton's claim and not to keep it alive except in the event of the plaintiff's failing to obtain a good title under a valid power of sale. In that event, no doubt, as Kennedy would have a right to redeem, both Norton's and Lord Windsor's charges would have to be treated as subsisting. What the plaintiffs, however, wanted was to purchase Kennedy's interest free from incumbrances under a power of sale. The recitals show that the real transaction was a sale by Lord Windsor under his power; but £1,000 of the purchase-money was to be paid to Norton to get rid of his claim."

Now, I cannot help thinking that in dealing with the complicated facts before them the court has fallen into an error, an error which goes to the root of their decision. The charge in favour of Lord Windsor was in the form of a trust for realization and sale. It contains an assignment of the mortgaged property with a power of attorney in favour of the assignee. The trust is to receive the moneys receivable by Kennedy under the agreement of the 20th of June, 1888, and to receive and sell, or otherwise convert into money, all stocks, shares, and other things receivable or recoverable by Kennedy under that agreement. That, no doubt, is an authority to sell for the purpose of realization everything received or recovered under the agreement of June, 1888, not at the time in the shape of money. But it is not, as it seems to me, a power for the mortgagee to sell the mortgaged property before it comes into his hands. Lord Windsor could, of course, sell his security in any way he chose for any consideration he pleased, great or small, but without the mortgagor's concurrence such a sale as against the mortgagor would only be a transfer of the security, and not, as it is treated in the judgment, and as it was treated at the bar, a sale under a mortgagee's power of sale. This objection, if it is well founded, seems to me to dispose of the judgment of the Court of Appeal, or rather to convert it into a decision in favour of the appellants. But I must say I should have thought the judgment erroneous if Lord Windsor's securities had contained a special power of sale. "There is no doubt," says the Master of the Rolls in the judgment under appeal, "that this deed" (that is, the deed of March, 1893) "was intended to transfer to the plaintiffs all Norton's interest in the security of June, 1888, but the question is whether the interest so transferred was transferred in order to be extinguished so that the plaintiffs might obtain Kennedy's interest in the security of June, 1888, free from incumbrances, or whether Norton's interest was so transferred as to enable the plaintiffs to treat it as still subsisting so as to confer upon them rights against third parties which Lord Windsor and Forrest could not confer. The answer to this question depends upon the intention of the parties at the time, and that intention must be found from the terms of the deed and the circumstances under which it was executed."

To that proposition, as it seems to me, no exception can be taken. But what is the answer which the deed and the surrounding circumstances suggest? The best answer that can be given is, I think, to be found in the judgment of James, L.J., in a well-known case (*Locking* v. *Parker*, 21 W. R. 113, L. R. 8 Ch. App. 30). One Lysimachus Parker had been for forty years in possession of a mortgaged estate without any acknowledgment of the mortgagor's title. The mortgage was in fee and in the form of a trust for sale. After the mortgagor's death his devisees brought a suit for the execution of the trusts contained in the mortgage deed. The defence was twofold—(1) the transaction was nothing more than a mortgage; and (2) the defendant was entitled to the protection of two old mortgage terms which had not been surrendered when the mortgage in fee was executed. Lord Romilly, M.R., rejected both grounds of defence; he held that there was a trust which was an answer to the Statute of Limitations, and also that the terms had ceased to exist though not formally surrendered. They were, he said, "superseded by the provisions" of the mortgage in fee "which were inconsistent with the subsistence of those terms." The judgment, however, was reversed on both points in the Court of Appeal. As to the latter point, "It is quite clear," said James, L.J., "that in this deed there is no express surrender of the terms. They are not referred to as intended to be surrendered, and the gentleman who had the terms in him did not concur in conveying so as to merge them in the inheritance. It has been urged, however, that there is an implied surrender of them by virtue of the provisions of the deed. Now, it is always to be borne in mind that when the court implies from a deed anything that is not expressed in it, this is done for the purpose of getting rid of some technicality which interferes with what is obviously the plain intent and meaning of the parties to the transaction. Of course if we could see from the deed itself that it was the intention of the parties that the earlier securities should not be kept on foot we might give effect to that intention. To my mind Lysimachus

Parker would have been demented if he had surrendered his terms, and so lost the benefit of his old securities, all of which are referred to in this deed without any expression of an intention to merge. I am of opinion, therefore, that there was no surrender or merging of the existing terms, and that there was nothing in the deed which deprived the mortgagee under the earlier deed of his rights under them."

If in that case the court would have held Lysimachus Parker demented to have thrown away the benefit of his old securities, what would you say of the conduct of the appellants if they had deprived themselves of the advantage and protection of Norton's charge? What words would have adequately described such folly? Observe what they knew. They knew that the fund was £12,000 originally. So far as appears there were only two charges upon it, separated by an interval of nearly two years. Norton was content to take £1,000 for his security Lord Windsor asked no more for his though his debt was over £15,000. So that evidently somehow or other the fund had been melting away and there was all the more need for caution. They knew that charges of this sort rank according to priority of notice. For the deed recites the notice given by Norton with the particulars of its date and the acknowledgment of it by Walker—it is a separate recital apparently introduced for some purpose. Then the charge is duly assigned to the appellants. There was no reason for extinguishing it, there is no expression of any intention to extinguish it, and yet we are to presume that, without any reason, the appellants, who were paying £1,000 in hard cash, deliberately and intentionally threw their purchase away. I can understand the owner of an estate preferring to have it discharged from an incumbrance though the incumbrance be his own property, but I cannot understand a person entitled to several charges on a money fund, which must rank in priority according to date of notice, sweeping away the earlier charges and trusting to the last, though it might seem large enough to exhaust the fund and though there might be apparently nothing behind it.

Some stress was laid on the circumstance that Norton's debt is not assigned. There might, perhaps, be something in that point if the deed had contained an assignment of Lord Windsor's debt. There is no assignment of either the one or the other. They are both treated alike. I do not see why more weight should be given to the absence of an assignment in the one case than in the other. Some stress, too, was laid on the clauses at the end of the deed referring to the possible existence of a special power of sale in both or in one of the charges assigned. Those clauses are certainly unusual. I think they are nothing but a blunder. There was no power of sale in either charge. The draftsman of the deed does not seem to have thought there was really. There is no recital of any power of sale, nor do the assignors purport to assign under any power, nor is the assignment in the form which such a power would suggest. The assignment is only an assignment of the estate and interest of the incumbrancers. If the deed could operate as a conveyance under a power of sale in Norton's charge, the appellants would not be bound to bring into account the improper payments to Kennedy, so far as their interest derived from Norton is concerned. If it could operate as a conveyance on a sale under a power contained in Lord Windsor's charge, the sale could only take effect subject to the prior charge in favour of Norton, so that it would be just the same question over again. I do not think that these clauses have any bearing on the question at issue.

I am of opinion that the judgment under appeal must be reversed so far as it deprives the appellants of the benefit of Norton's charge, and I think that the respondents must pay the costs both here and below.

Lord MORRIS concurred.

Order appealed from reversed so far as it declared that the payments to Kennedy of £5,122 and £5,000 were good payments, with costs here and below: Cause remitted to the Chancery Division.

Solicitor for appellants, *Howard Rumney.*

Solicitors for respondents, *Dawson, Bennett, & Ryde.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — May 24, 25, 26; June 11.

In re PERKINS.
POYSER *v.* BEYFUS. (*a.*)

Lease—Assignment—Covenant to indemnify assignor—Bankruptcy of first assignee—Right to sue executors of deceased second assignee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 44, 50 (5), 56, 57, 168.

The lease of a house to A. contained a covenant that A. would pay rent and insure and perform other usual obligations. By deed A. subsequently assigned the lease to B., and B. subsequently assigned to C. Each assignment contained covenants by the assignees to perform the covenants contained in the original lease, and to indemnify the assignors. In June, 1895, *C. died. On the* 12*th of June,* 1897, *B. was adjudicated a bankrupt, and D. was appointed his trustee. A. was called upon to pay, and did pay, the arrears of rent under the lease, and tendered a proof against B.'s estate for the amount actually paid and the estimated amount of his future liability under the lease. A compromise was then effected between A. and the trustee by a deed, whereby the trustee sold to A. the full benefit of the covenant on the part of C. in consideration of the sum of £5, and of his executing a release whereby A.'s proof against the estate of B. was withdrawn, and all claims and demands under or in respect of the covenants by B. with A. were released and discharged. Under this deed A. carried in a claim against C.'s estate for payment out of his assets of what A. had paid for rent and insurance and for future indemnity against liability under the covenants in the original lease.*

Held, that the right of the trustee in bankruptcy to sue C. was property within the meaning of section 168 *of the Bankruptcy Act,* 1883, *and was assignable to A., and that the damages in an action by the trustee against C.'s executors would not be confined to the dividend payable to A. in respect of his proof against B.'s estate; and,* (2) *on the construction of the release, that, having regard to the terms of the deed and the release of B.'s estate, A. acquired a right to sue C.'s executors.*

Appeal of the defendants from North, J.

By a lease dated the 5th of October 1891, a certain house was leased to the plaintiff for a term still unexpired, and by this lease the plaintiff covenanted to pay rent and to insure the house and perform certain other obligations usual in leases.

On the 8th of May, 1893, Poyser, the plaintiff, assigned this lease to Plaistowe, and on the 1st of April, 1895, Plaistowe assigned it to Perkins. Each

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

of these assignments contained a covenant by the assignee with his assignor to pay the rent and perform the covenants reserved and contained in the lease of the 5th of October, 1891, and also to keep him, the assignor, indemnified against the same.

In June, 1895, Perkins died.

On the 12th of June, 1897, Plaistowe was adjudicated bankrupt, and Berry was appointed his trustee. The plaintiff Poyser was called on to pay, and did pay, the arrears of rent, which became due under the lease of the 5th of October, 1891, and he tendered a proof against Plaistowe's estate for £1,353, the amount paid by the plaintiff and the estimated amount of his liability under his covenants contained in such lease. Thereupon a compromise was agreed to between the plaintiff and the trustee in bankruptcy, and was carried out by a deed of the 31st of August, 1897, which gave rise to the present controversy. This deed was made between the trustee of the one part and the plaintiff of the other part. It recited the facts above stated, and then proceeded as follows: "Whereas the said Oscar Berry has, with the permission of the said committee of inspection, testified by a resolution passed at a meeting of the said committee of inspection, held the 31st day of August, 1897, at 8, Southwark-street, Borough, in the county of Surrey, and by way of compromise of the claim of the said E. J. Poyser against the estate of the said bankrupt, agreed to sell and dispose of to the said E. J. Poyser the full benefit of the said covenant on the part of the said G. F. Perkins with the rights and powers hereinafter assigned in consideration of the said E. J. Poyser paying to him the sum of £5, and executing such release as is hereinafter contained. Now this indenture witnesseth that, in pursuance of the said agreement and in consideration of the sum of £5 now paid by the said E. J. Poyser to the said Oscar Berry (the receipt of which is hereby acknowledged) and of the release hereinafter contained, the said O. Berry, as trustee, and with the permission testified as aforesaid of the said committee of inspection, doth hereby assign unto the said E. J. Poyser the full benefit of the covenants by the said G. F. Perkins with the said F. M. E. Plaistowe contained in the hereinafter recited indenture of the 1st of April, 1895, as aforesaid, with the right to recover and receive from the said G. F. Perkins, his heirs, executors, or administrators estate or effects, and to retain for the benefit of the said E. J. Poyser, his executors, administrators, and assigns all and every such damages, costs, or other sums of money, if any, and to enforce for the like benefit all such other relief by way of indemnity or otherwise as the said F. M. E. Plaistowe, his executors or administrators, but for his bankruptcy, or the said O. Berry or other the trustee for the time being in the bankruptcy might have been entitled now, or at any time or times hereafter to recover or to enforce for the benefit of the said F. M. E. Plaistowe or his estate for any breach or breaches committed or hereafter to be committed of the said covenants or any of them, or otherwise under or in respect of the liability of the said G. F. Perkins or his estate by virtue of such covenants or any of them, if these presents and the arrangement hereby entered into had not been executed or made and the right to bring, prosecute, carry, or compound, or release any action or proceeding for any such purpose, and all other rights, powers, privileges, and authorities which the said O. Berry, as such trustee, with such permission as aforesaid can lawfully transfer to the said E. J. Poyser in connection with the premises, to hold the premises unto the said E. J. Poyser, his executors, administrators, and assigns for his and their own benefit absolutely; and this indenture further witnesseth that in further pursuance of the said agreement and in consideration of the assignment hereinbefore contained the said E. J. Poyser hereby withdraws the said proof for the sum of £1,353 0s. 4d., and releases and discharges the estate of the said bankrupt and the said O. Berry as such trustee as aforesaid from all claims and demands under or in respect of the covenants by the said F. M. E. Plaistowe with the said E. J. Poyser contained in the hereinbefore recited indenture of the 8th of May, 1893, as aforesaid." Under this deed the plaintiff carried in a claim against Perkins's estate for payment out of his assets of what the plaintiff had paid for rent and insurance and for future indemnity against liability under the covenants contained in the lease of the 5th of October, 1891. It appeared that shortly after Plaistowe's bankruptcy Perkins's executors assigned the lease to a person named Jay, who, however, did not pay the rent or perform the covenants so as to relieve Perkins's estate from liability to Plaistowe, or, rather, to his trustee in bankruptcy.

The defendants were Perkins's executors, and they admitted assets.

North, J., made an order allowing the claim, and held the estate of Perkins, deceased, to be liable to the plaintiff in a sum of £215 4s. paid for rent and insurance, and to be liable to indemnify the plaintiff against future rent and insurance and damages for breaches of covenant contained in the lease.

The executors of Perkins appealed.

Everitt, Q.C., and *Edward Ford*, for the appellants.—A *chose in action* is assignable: *Seear* v. *Lawson*, 28 W. R. 929, 15 Ch. D. 426, 29 W. R. 45, 109, 16 Ch. D. 121; *Gay* v. *Churchill*, 37 W. R. 504, 40 Ch. D. 481. By section 50 (5) of the Bankruptcy Act, 1883, *choses in action* of the bankrupt shall be deemed to have been assigned to the trustee. Here the right of indemnity does not come within the definition of "property" in section 168 of the Act. It is merely a right to bring an action if something is not done. [LINDLEY, M.R., referred to *Spark* v. *Heslop*, 7 W. R. 312, 1 E. & B. 563.] The plaintiff could have proved in the bankruptcy for his indemnity: *Hardy* v. *Fothergill*, 37 W. R. 117, 13 App. Cas. 351. No right of action has arisen here, and even if Poyser had withdrawn his proof without any release, no damages could have been recovered by the trustee from Perkins.

They referred to the following cases: *Carr* v. *Roberts*, 5 B. & Ad. 78; *Hill* v. *Smith*, 12 M. & W. 618; *Ashdown* v. *Ingamells*, 5 Ex. D. 280, 28 W. R. Dig. 73; and *In re Russell, Russell v. Shoolbred*, 29 Ch. D. 254, 33 W. R. Dig. 170.

Vernon Smith, Q.C., and *Wace*, for the respondent.—The trustee in bankruptcy could have sued Perkins on his covenant. The fact that part of the consideration was a release is immaterial. The transaction, as a whole, must be looked at, and the covenantor is still liable on his covenant notwithstanding the release. The covenant was not merely a covenant to indemnify, it was a covenant to do certain things, such as pay rent and insurance. The covenant for indemnity does not control what preceded it: *Saward* v. *Anstey*, 2 Bing. 519; *Lethbridge* v. *Mytton*, 2 B. & Ad. 772; *Carr* v. *Roberts*. Poyser was to have whatever the trustee could recover from Perkins, and the whole document must be read together on that understanding. The clause cannot operate as an absolute release, and effect must be given to all its provisions: *Heritage* v. *Paine*, 2 Ch. D. 594, 24 W. R. Dig. 56. [LINDLEY, M.R., referred to *Hodgson* v. *Wood*, 2 H. & C. 649, 12 W. R. Dig. 44, 77, and *Holmes* v. *Rhodes*, 1 Bos. & P. E. 638.]

Everitt, Q.C., in reply, referred to *In re The Empress*

Engineering Co., 29 W. R. 342, 16 Ch. D. 125; *Lloyds* v. *Harper*, 28 W. R. 419, 29 *ib.* 452, 16 Ch. D. 290; and *Cruse* v. *Paine*, 17 W. R. 45, L. R. 6 Eq. 641, and on appeal 17 W. R. 1033, L. R. 4 Ch. App. 441.

Cur. adv. vult.

June 11.—The judgment of the Court was delivered by

LINDLEY, M.R., who stated the facts as above, and continued: The appeal raises two questions—viz., (1) whether the rights vested by the Bankruptcy Act in Plaistowe's trustee could be assigned by him to the plaintiff; and (2) whether, having regard to the terms of the deed and the release of Plaistowe's estate, the plaintiff acquired any right to sue Perkins's executors. The first of these questions turns on the Bankruptcy Act, 1883. The material sections are 20, 44, 50 (clause 5), 56, 57, and 168, which defines "property." It is plain from sections 20, 44, 50 (clause 5), and 168, and from the decision in *Hardy* v. *Fothergill* that the plaintiff Poyser had a right of proof against Plaistowe's estate not only for the sums paid by the plaintiff for rent and fire insurance, but also in respect of Plaistowe's future liability under his own covenants with the plaintiff. It is also plain from sections 56 and 57 that it was competent for the trustee in bankruptcy to compromise the claim made by the plaintiff, and to assign to the plaintiff any assignable asset vested in the trustee upon the terms that the plaintiff should accept such asset in satisfaction of all demands against Plaistowe's remaining assets. It is also plain that the right of the trustees to sue Perkins upon Perkins's covenant was an asset—*i.e.*, was property within the meaning of section 168, and was assignable to the plaintiff or to anyone else (see section 56 and *Seear* v. *Lawson*), and that the damages in an action by the trustee against Perkins's executors would not be confined to the dividend payable to the plaintiff in respect of his proof against Plaistowe's estate (see *Cruse* v. *Paine*). This disposes of the first ground of appeal. The second turns on the true effect of the release contained in the deed of August, 1897. If this release is to be construed as a release by the plaintiff of Plaistowe or of his estate from all liability under his covenants, then the effect will be to discharge Perkins's estate from all liability under his covenant to indemnify Plaistowe. A liability to indemnify against a liability which has no existence, and which can never arise, is a contradiction in terms. A distinction was attempted to be drawn between the covenant by Perkins to pay the rent and perform the covenant to insure on the one hand, and his covenant to indemnify Plaistowe on the other, and it was contended that although the release might extinguish all liability on the covenant to indemnify, it did not affect the covenant to pay the rent and to insure. Much time was spent in discussing these points and in examining such cases as *Saward* v. *Anstey*, *Carr* v. *Roberts*, and *Ashdown* v. *Ingamells*, and in considering the amount of damages which could be recovered if the distinction suggested could be drawn and had in fact to be made. But in the view we take of the true construction of the deed of the 31st of August, 1897, these questions do not arise. The release contained in the deed, although couched in very general terms, must, if possible, be so construed as not to defeat the object or purpose of the deed of which it forms part. The recitals and first witnessing part show that the release cannot be rationally construed as extending to all Plaistowe's estate, including the asset assigned to the plaintiff. The estate released must exclude that asset. Again, the claims and demands from which Plaistowe's estate is released cannot be rationally construed as all claims and demands in respect of Plaistowe's covenants. The claims and demands released must be confined to those against the released assets, and cannot be rationally held to include those the preservation of which is essential to the recovery by the plaintiff of the asset assigned to him, and which asset he is to take in satisfaction of all demands. In so construing the release the court is not departing from well-settled principles applicable to the construction of such documents. General words of release are always controlled by recitals and context which show that, unless the general words are restricted, the object and purpose of the document in which they occur must necessarily be frustrated. General words are always construed so as to give effect to, and not so as to destroy, the expressed intentions of those who use them. Good illustrations of this principle will be found in *Payler* v. *Homersham*, 4 M. & Sel. 423, and *Lindo* v. *Lindo*, 1 Beav. 496. In our opinion, therefore, the appeal fails on this ground also. It is to be observed that North, J., has merely given the plaintiff liberty to apply in respect of future breaches of covenant. He has not impounded assets to meet them, nor attempted to estimate damages in respect of them. The order is right both in substance and in form, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors, *Beyfus & Beyfus; E. & H. Landon.*

High Court of Justice.

Chan. Div. } Kekewich, J. } May 6, 7, 11, 24.

HEAD v. GOULD. (*a.*)

Trustee—Breach of trust—Liability of retired trustees for breach committed by new trustees—Right of trustees to return of unauthorized investment on making good loss.

Retiring trustees cannot be held liable for a breach of trust by their successors unless the actual breach committed is not merely the outcome of the retirement and new appointment, but is contemplated by the retiring trustees when the retirement and new appointment takes place.

A trustee who makes an unauthorized investment is not entitled to a return of the investment on making good the loss to the trust estate as against a cestui que trust *incompetent to assent to such investment.*

By a settlement made on the marriage of Mr. Head (who died in 1881) and Mrs. Head property was settled on the wife and husband for their lives, with remainder to the children. There were now surviving three children, a son and daughter of age and a son an infant.

In December, 1893, Messrs. Houlditch and Clapp, then trustees of the marriage settlement, improperly applied £1,500, part of the trust funds, in paying off a mortgage debt due from Mrs. Head, then tenant for life of the settled estate, to a Mr. Jerred. This debt was secured by a mortgage of Mrs. Head's life interest and certain policies of assurance on her life, of which the trustees took a transfer. This transaction was effected at the request of Mrs. Head, who with her daughter, Miss Head, by a deed of indemnity of the 8th of December, 1893, covenanted to indemnify the trustees in respect thereof. Messrs.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Houlditch and Clapp were at this time also trustees of a settlement made in 1868, by which Mr. Head settled, *inter alia*, a house at Seaton, in Devon, known as No. 1, West Cliff-terrace, on Mrs. Head for life, with remainder to the children of the marriage.

By a deed of the 12th of November, 1894, Mrs. Head appointed a Mr. Gould, a solicitor's clerk, and Miss Head, who had recently attained twenty-one, trustees of the marriage settlement in place of Messrs. Houlditch and Clapp, who handed over to the new trustees, *inter alia*, the securities they had taken for the advance of £1,500. By another deed of the same date Messrs. Houlditch and Clapp appointed Gould and Miss Head trustees of the settlement of 1868, and the house No. 1, West Cliff-terrace, Seaton, was accordingly conveyed to the new trustees.

In 1895 and 1896 the new trustees surrendered the policies of assurance and sold the house at Seaton and dissipated the proceeds. This was an action brought by the infant child of the marriage by his next friend, to which the old trustees, the new trustees, and Mrs. Head were made defendants, asking (1) to have the trusts of the two settlements carried into effect; (2) for a declaration that the old trustees were jointly and severally liable for, and might be decreed to make good, all loss occasioned by their advancing the £1,500; (3) for a declaration that all the defendants might be declared liable for, and be decreed to make good, the moneys which had arisen from the sale of the house at Seaton; and also for accounts, the appointment of new trustees, and in the interim for a receiver. The principal question which arose was whether the old trustees could be held liable for the breach of trust committed by the new trustees in selling the house at Seaton.

It was alleged for the plaintiff that Miss Head and Gould were not fit persons to be appointed trustees. Miss Head was only just twenty-one, and it was said was under the influence of her mother, while Gould was a person of no means, and a letter of his of the 4th of November, 1894, to Messrs. Clapp and Houlditch urging them to misapply £10 odd of the trust funds then in their hands to relieve Mrs. Head's immediate necessities was relied on as showing that he was not a proper person to appoint. Two letters of Mr. Clapp's to Mrs. Head were also relied on for the plaintiff as tending to show that a breach of trust was in contemplation on the retirement of the old trustees. The first letter, in reply to a letter of Mrs. Head suggesting the raising of money out of Miss Head's share of the house at Seaton when sold, dated the 12th of September, 1894, was as follows: "Dear Mrs. Head,— . . . You must remember that any sale of the Seaton houses would so reduce your life interest as to prevent enough being forthcoming to meet the policy premiums, and to this we cannot consent. The only way we can assist you is by handing over the trust to others, as we are most desirous of doing. . . .—Yours, C. R. M. Clapp." The other letter, in reply to a letter of Mrs. Head's asking Mr. Clapp to show how a change of trustees would enable certain debts to be paid off, dated the 14th of September, 1894, was as follows: "Dear Mrs. Head,—By getting new trustees to help you in the way you ask us to do—advance your daughter more money—we decline the risk and responsibility. Others may be induced to accept it and to assist you. . . .—C. R. M. Clapp."

Messrs. Houlditch and Clapp, by their defence, alleged that Miss Head and Gould were proper persons to be appointed trustees; that Miss Head had received her third share of the settlement funds and was not beneficially interested, and that she was a woman of business capacity; and that with respect to Gould it was believed by them from inquiries made that his professional position was satisfactory. They denied that they were parties to any scheme by which in order to commit a breach of trust new trustees were to be appointed. The defendant Gould did not appear, and his defence had been ordered to be struck out. There were also two third-party notices, one by Miss Head, claiming to be indemnified by Gould against all liability on the ground that the loss (if any) was occasioned entirely by his acts and defaults, and that he assumed to act as solicitor to the trust estates and as sole trustee thereof, and exercised exclusive control thereof, and that whatever was done by Miss Head in connection with the trusts was at his direction and in reliance on his advice. The other third-party notice was by Messrs. Houlditch and Clapp, who claimed to be indemnified by Gould and Miss Head in respect of the trusts on the ground that the loss (if any) of the trust funds occurred after their retirement from the position of trustees, and were caused by Gould and Miss Head; they also claimed to be indemnified by Mrs. Head and Miss Head under the deed of indemnity of the 8th of October, 1893, with respect to the £1,500.

P. O. Lawrence, Q.C., and *Methold*, for the plaintiff.—As to the liability of the old trustees for the breach of trust committed by the new trustees, the authorities are: *Webster* v. *Le Hunt*, 8 W. R. 534, and on appeal 9 *ib.* 918; *Palairet* v. *Carew*, 11 W. R. 449, 32 Beav. 564, 568; *Clark* v. *Hoskins*, 15 W. R. 1161, 36 L. J. Ch. 689, and on appeal 16 W. R. 1159, 37 L. J. Ch. 561; Lewin on Trusts, 9th ed., p. 752.

Warrington, Q.C., and *Rowden*, for Houlditch and Clapp.—If we are held liable for the loss of the £1,500 we are entitled to the return of the securities on which we advanced it: *In re Salmon, Priest* v. *Uppleby*, 38 W. R. 150, 42 Ch. D. 351. We are not liable for the breach of trust committed by the new trustees.

They also referred to the authorities above mentioned.

G. M. Gover, for Mrs. and Miss Head.—Under the circumstances the court will not impound Mrs. Head's interest under the powers given it by section 45 of the Trustee Act, 1893. Miss Head asks for relief under the Judicial Trustee Act, 1896, s. 3. She ought to be indemnified by Gould: *In re Turner, Barker* v. *Ivimey*, 45 W. R. 495, [1897] 1 Ch. 536.

Cur. adv. vult.

May 24.—KEKEWICH, J.—It is beyond dispute and it is in truth not disputed that breaches of trust have been committed alike by the former and present trustees of the settlements of 1865 and 1868, and there is too much reason to fear that the infant plaintiff will be disappointed in a large measure of the provision intended to be made for him by those settlements. The main question falling for decision is to what extent the several defendants can be held responsible towards the plaintiff and as between themselves for the loss thus occasioned. It matters little in what order the points necessary to be determined for this purpose are taken, but there is some convenience in dealing first with the defendants who stand first on the record, and the logical though not chronological order of events points in the same direction. When the defendants George Donnett Gould and Adelaide Caroline Head were appointed trustees of the settlements in 1894, the trust property consisted of a house, No. 1, West Cliff-terrace, Seaton, £1,500 secured by policies on Mrs. Head's life (the premiums being payable out of her life income), and an interest by way of charge on another house, No. 6, West Cliff-terrace, Seaton. This property has wholly disappeared. What has happened to the third item has

not been in any way explained and I must leave that to be ascertained, if it usefully can be, by inquiries to be directed by this judgment. The house No. 1, West Cliff-terrace has been sold, the policies have been surrendered, and the proceeds of such sale and surrender have been received by the trustees and dissipated. It may be that on prosecuting the inquiries some justification for the expenditure of some part of these moneys will be discovered, and I do not intend to preclude the trustees from availing themselves of any justification which the facts when ascertained permit, but for aught that yet appears they have been squandered on Mrs. and Miss Head, and at any rate they are gone and no account is forthcoming. Under these circumstances it is a matter of course to make the trustees G. D. Gould and A. C. Head liable as on breach of trust for the sale and surrender and for the proceeds which they have received. They must also be removed from the trust, though for the present at least there is no possible advantage in appointing new trustees in their place. It will be convenient here at once to deal with the claim made by Miss Head against her co-trustee Gould. [His lordship then considered the charge made by Miss Head in her third-party notice against Gould, and said that according to the principles laid down in *Re Turner, Barker* v. *Ivimey*, and *Lockhart* v. *Reilly*, 4 W. R. 438, 25 L. J. Ch. 697, the charge, if substantiated, would entitle her to be indemnified by him, but that there was no evidence before the court substantiating the charge and that her claim for relief therefore failed, and continued:] We may now approach the question of the liability of the former trustees, the defendants Houlditch and Clapp. It obviously divides itself into two parts entirely distinct in point of law and connected only by some facts common to both. Again, it is beyond dispute that a breach of trust was committed. It may be said that the application of £1,500, part of the trust property, in discharging Mrs. Head's debt to Jerred was of itself a breach of trust, but what is complained of is the advance of that sum on the security of policies of insurance and the life interest of Mrs. Head in the trust property. That this was not justified by the terms of the settlements is abundantly clear, and unless it can be defended on other grounds the trustees must account for this £1,500 as having been received by them and improperly applied. Any discharge which they can establish will necessarily come out on taking the accounts, and they will still have an opportunity of establishing any discharge not negatived by this judgment, but so far as points have been argued on facts not requiring further investigation, it is desirable in the interest of all parties concerned that I should dispose of them once for all. As already noticed, the policies have been surrendered and the property which yielded the income intended to maintain those policies has been disposed of, and it is urged that Messrs. Houlditch and Clapp cannot now in fairness be made liable for the £1,500 when the security for that sum which, on making the sum good they would be entitled to have transferred to themselves, is beyond reach. For this reference is made to *In re Salmon, Priest* v. *Uppleby*, and it is urged that the equity in favour of trustees, which was the ground of my decision, is not affected by the judgment of the Court of Appeal, depending as it did on the fact that the investment in question in that case was of an authorized character. Certainly Cotton and Fry, L.JJ., based their judgments on this fact and did not express any disagreement with my views if applied to unauthorized securities, and if that were all I should deem myself at liberty to apply those views to the present case. But can it be said that the equity referred to can properly be invoked to relieve a trustee as against one who has never assented to the improper investment or done anything to put it out of the power of the trustee to obtain the benefit of such investment if he makes the loss good to the trust estate? The plaintiff is an infant and has been incompetent to do one or the other. Put the case somewhat differently. As against a trustee who, on the accounts being taken, is shown to have improperly applied part of the trust estate, the right of a *cestui que trust* is to have those accounts set straight—that is, to compel the trustee to pay such a sum as will make them balance. Can it be an answer to his demand to say that some other persons or some other trustees have been parties to dealings with the trust estate which make it inequitable to enforce the claim? I am not deciding any point between the former trustees and other persons, but I hold that as against the infant plaintiff they are bound to make good so much of the trust property as appears on taking the accounts to have been improperly applied by them.

Before passing on to the other charge against Messrs. Houlditch and Clapp I may conveniently notice their request for directions that on taking their accounts they be allowed sums applied for the benefit of the infant plaintiff. I think Mr. Lawrence was right in insisting that no opinion should now be expressed on the question what ought to be allowed, but that this question should remain open on further consideration. I will, however, direct an inquiry couched in appropriate, but wide, terms, intended to bring out on the face of the certificate what, if any, sums have been from time to time applied by Messrs. Houlditch and Clapp, or either of them, for the benefit of the plaintiff. I pointed out during the argument that it was necessary to limit the inquiry to moneys applied by the trustees (which would, of course, include applications by their agents) so as to avoid any inference that money paid to Mrs. or Miss Head, though intended for the benefit of the plaintiff, would, without more, be regarded as attributable to the plaintiff's share of the estate. While on this subject I may as well mention that it will be right to extend this inquiry, or rather to make a like inquiry respecting applications by the present trustees. This was not asked for, and I do not know that it is likely to prove useful, but the direction may as well be given.

This brings me to the large and important question whether Messrs. Houlditch and Clapp can be held responsible for the breach of trust committed by the present trustees in selling the house, surrendering the policies, and spending, it matters not how, the produce of the two transactions. To the parties concerned the question is both large and important. As regards those not concerned in the particular case the amount involved is immaterial, but the alleged liability of the former trustees is of vast importance, affecting as it does not only the two large classes, to one or both of which most men belong—trustees and *cestui que trustent*—but also all members of the legal profession to which the positions and duties of trustees are a course of constant anxiety. The case made against Messrs. Houlditch and Clapp may be thus fairly stated. You had exhausted all the trust property except this house at Seaton and the policies. You knew that this remaining property was barely sufficient to provide the plaintiff's portion, even assuming that the policies were maintained, and you further knew that the income derived from the house was not more than sufficient to maintain those policies. You were urgently pressed to make further advances to Mrs. and Miss Head, and you asserted with perfect truth that no further advances could properly be made—that is to say, could not be made

at all without a breach of trust far more serious in fact and in consequences than any that had yet been committed. In order to relieve yourselves and to indirectly assist Mrs. and Miss Head you suggested, or if you did not suggest, assented, to the appointment of new trustees who you knew would be more accommodating and contemplated, if they did not actually intend, that which you had properly declined to do. I have no doubt that if this charge can be regarded as proved against Messrs. Houlditch and Clapp the responsibility insisted on must follow, and that they must be held liable to make good the loss to the trust estate occasioned by the breach of trust which they did not themselves commit. This doctrine, to the authorities in support of which I will presently refer, is based, according to a passage in Lewin on Trusts, p. 752, on agency, and the retiring trustee is treated as actually doing what he does not do in person because his successor is treated as his agent for this purpose. This view is also taken by Stuart, V.C., in one of the cases to which I have to refer. Far be it from me to say that it is not a sound and satisfactory view, but I venture to think a different and equally satisfactory explanation of the doctrine can be given. It is the duty of trustees to protect the funds entrusted to their care and to distribute those funds themselves, or hand them over to their successors intact—that is, properly invested and without diminution, according to the terms of the mandate contained in the instrument of trust. This duty is imposed on them as long as they remain trustees, and must be their guide in every act done by them as trustees. On retiring from the trust and passing on the trust estate to their successors, and whether they appoint those successors or merely assign the property to the nominees of those who have the power of appointment, they are acting as trustees, and it is equally incumbent on them in this ultimate act of office to fulfil the duty imposed on them as at any other time. If, therefore, they neglect that duty and part with the property without due regard to it, they remain liable and will be held by the court responsible for the consequences traceable to that neglect. This explanation will, I think, be found consistent with all judicial utterances on the subject, and, haply aid to make them consistent with themselves.

It is strange that so little authority should be forthcoming on a point of such importance, especially as no one presumes to cast doubt on the doctrine which may be regarded as an integral part of legal lore. In former days when students learned law and practice not only by reading books and attending lectures (means, of course, which cannot safely be neglected), but at least equally as much from the precept and example of a master and an animated discussion in the pupil-room, doctrines such as this not calling for frequent practical application were passed from one generation to another and became engraved in the minds of practitioners without being formulated in reported cases unless a precise question was raised between litigants in a concrete form. This possibly explains why for a doctrine in substance undisputed there is so little authority to be found. It is right that I should say a word on the few cases cited which are admitted to be all that can be discovered in the books.

The case of *Webster* v. *Le Hunt* is of material use only by reason of a general statement of law by the Lord Chancellor (Lord Westbury). The judgment of Kindersley, V.C., may be regarded as valuable in applying the law to the particular facts before him, but it is to be observed that his judgment proceeded on the basis of an affidavit which had not been answered, and bearing in mind that this affidavit was entirely disbelieved by the Lord Chancellor, who reversed the decision of the court below, it would be dangerous to quote the judgment as illustrating any principle. One must, however, note the language of the Lord Chancellor which is expressed by him to be in agreement with the judge whom he was overruling. This is the passage in the report: "Trustees denuding themselves of trust funds if they did so under circumstances that warranted any reasonable belief of the insecurity of the trust funds in the hands of those to whom they committed them should not be considered in this court as having validly discharged themselves of the custody of the trust funds or released themselves from responsibility. About the principle of the court there would be no doubt." The next case in order of date is *Palaird* v. *Carew*, which would not at all be relevant to the matter in hand but for the observations of Lord Romilly. Having noticed that the defendant declined to accede to a certain request on the ground that if a trustee surrendered up a trust to a person who committed a breach of trust he might be made liable for the consequences arising from the misconduct of the new trustee, he adds: "That no doubt is correct to this extent: If a trustee is called upon to commit a breach of trust and refuses and his *cestui que trust* say, 'There is A. B. who will; will you resign and surrender your trust to him?' and the old trustee accede to that proposal and transfers the property to the new trustee for the purpose of enabling him to commit a breach of trust, in that case the old trustee would probably be visited very severely by the court."

The only remaining case is *Clark* v. *Hoskins*, reported before Stuart, V.C., and before the Lords Justices. This is a more useful case with reference to the one in hand because, as will be seen, there are passages in the judgments more nearly approaching to it, but it is to be observed that what was there charged against the trustees both past and present was deliberate fraud in the suppression of a document, and this goes to the foundation of the decision of the Vice-Chancellor, and renders a detailed examination of the facts unnecessary here. The Vice-Chancellor there laid down the law as follows: "Where a trustee entrusted with property for the benefit of others resigns the trusteeship after he has been requested to deal improperly with the property, and after he has refused to comply with that request because he knew that to have acceded to it would have been to commit a breach of trust, he is placed in a position of the gravest peril," and he gives as the reason for this that already mentioned to be stated in Lewin on Trusts. The Vice-Chancellor decided against the former trustees but the Lords Justices reversed him, and it is their statement, or, rather, the statement of Lord Hatherley (then Wood, L.J.), who delivered the judgment of the court, of the reasons for their conclusions which has a direct application to the present case. He notices the charge and says that the former trustees were charged with complicity in the scheme, and the advice that trustees should be found who would hand over the deeds to the defendant Hester Brown in order to enable her to perpetrate the fraud by suppressing the settlement and obtaining money on the property as if unaffected by the settlement. He says that was entirely denied by the former trustees and then proceeds to inquire whether the denial is well founded. I conclude from the language of the Lord Justice that he did not consider the former trustees to have acted wisely or prudently, but he takes special care to point out that he is dealing with questions of a different character. He speaks of them as acting unadvisedly in retiring from the trust and letting some other more accom-

modating trustees raise the money which was required in their place, but he adds that this had no similarity to the fraud which had been perpetrated. The little which I have said about the case will make intelligible the passage which follows these observations containing the gist of the decision: "These new trustees so appointed might do that which was very improper, and raise for her purposes moneys which they were not entitled to raise and give receipts to the intended mortgagees, but at the same time these trustees were not asked to assist in committing this fraud and I conceive it would go far beyond anything which has ever been done in this court to fix these gentlemen with the consequences when it was not in their contemplation that such a fraud was to be perpetrated; but it was in their contemplation simply that a sum was to be raised as against *cestui que trustent* which it would be improper for the trustees in the execution of their duty to raise." These being the authorities to guide me it will be as well first to inquire whether Messrs. Houlditch and Clapp can be brought within Lord Westbury's rule. Did they denude themselves of the trust funds under circumstances which warranted any reasonable belief of the insecurity of the trust funds in the hands of those to whom they committed them? Messrs. Houlditch and Clapp were anxious to be relieved of the trust. That can surprise no one who has studied even slightly the facts of this case and no possible objection could be taken to their retirement if it was properly effected. I do not see what they could do towards that end but appoint or concur in the appointment of new trustees in their place. There was nothing on which they could properly apply to the court, and at that time the appointment of a judicial trustee was unknown. There was, of course, great difficulty in finding new trustees, and this is a cogent factor in the solution of the question whether the appointment of G. D. Gould and Miss Head was justifiable. They ought to have avoided the appointment of Miss Head if possible, not merely because she was a beneficiary but because she was known to be under the influence of her mother, and mainly perhaps, and to some extent certainly by reason of that influence she had taken an active part in the importunities which had already led to a breach of trust, and in that breach of trust itself. But was it possible? They succeeded in finding, or rather Mrs. Head found a gentleman who was a solicitor ready to undertake the trust out of kindness to the family, to which he seems to have owed a debt of gratitude, and although their inquiries respecting him were perhaps somewhat slight having regard to the serious position of the trust I cannot say that they were not reasonably justified in approving him. It is urged that they could not completely discharge themselves without appointing two competent trustees. That may be admitted but I cannot hold Miss Head to be an incompetent trustee when linked with another whose professional position was of itself a security that the trust funds would be properly administered. I cannot blame Messrs. Houlditch and Clapp for the appointment which they made nor do I think that they had any reasonable ground for believing that the trust would be otherwise than secure in the hands of their successors. One suspicious fact however deserves special notice. There was in the hands of Messrs. Houlditch and Clapp a small balance of £10 6s. 7d. which ought to have been invested or applied in payment of costs or in some other manner conformable to the trusts of the settlements. At the request of G. D. Gould they used this sum to meet the urgent necessities of Mrs. Head. That of course was wrong and the sum must be charged against them in taking the trust accounts. But it would, I think, be giving this fact far too great weight if it induced me to say that from Mr. Gould's request made under such circumstances as I have mentioned the trustees ought to have concluded that he was likely to apply or contemplated applying the rest of the trust property in like manner. As regards the rule laid down by the Master of the Rolls in *Palairet* v. *Carew*, and supported, I think, in both judgments in *Clark* v. *Hoskins*, the case is still clearer in favour of Messrs. Houlditch and Clapp. What their successors did was to convert the whole remaining trust property and improperly to spend it. Messrs. Houlditch and Clapp knew that G. D. Gould was reflecting on some possible mode of assisting Mrs. Head, and he had told them that he was turning his attention to some means of doing this (see his letter of the 2nd of November, 1894). But apparently he was as conscious as Messrs. Houlditch and Clapp themselves of the difficulty of doing this, and he certainly never hinted at doing it in the manner ultimately adopted. On reflective study of the evidence and correspondence, and notwithstanding suspicious criticism of some unhappy expressions in Mr. Clapp's letters, I do not believe that Messrs. Houlditch and Clapp contemplated any breach of trust at all, and I am convinced that they never contemplated that actually committed. With the judgment of the Court of Appeal in *Clark* v. *Hoskins* before us, it is easy to understand the Master of the Rolls as meaning what he probably intended to express, that in order to make a retiring trustee liable for a breach of trust committed by his successor you must show, and show clearly, that the very breach of trust which was in fact committed was not merely the outcome of the retirement and new appointment but was contemplated by the former trustees when such retirement and appointment took place. That is clearly the doctrine of *Clark* v. *Hoskins*. It will not suffice to prove that the former trustees rendered easy or even intended a breach of trust if it was not in fact committed. They must be proved to be guilty as accessories before the fact of the impropriety actually perpetrated. There are two third-party notices, one of which, Miss Head's, has been already disposed of, and on that there will be no order. The other is that of Messrs. Houlditch and Clapp. So far as it relates to the alleged responsibility for the acts of their successors it falls to the ground, but it relates also to their own breach of trust concerning the £1,500, against which they claim to be indemnified by Mrs. and Miss Head under the deed of the 8th of December, 1893. To this they are clearly entitled, and if there should eventually be anything coming to either Mrs. or Miss Head out of the trust property it must be impounded to answer this indemnity, which, of course, will cover costs. It would be useless now to give detailed directions on this subject, but a declaration of right should be inserted in the judgment. Costs must now be dealt with. It is plain that but for the breach of trust of the present trustees G. D. Gould and Miss Head, this action would never have been commenced, and they must be ordered to pay the plaintiff's costs up to and including trial. There will be no order now respecting the costs of the former trustees Houlditch and Clapp, which must wait for further consideration. Whether I shall be able to allow them any costs out of any fund recovered is questionable, and it may be my duty to order them to pay some costs. But, while intending to preserve an open mind, I desire to approach this question, when ripe for decision, kindly. These gentlemen committed a breach of trust, and in the eye of the law they cannot be said to have acted reasonably; but they yielded to the importunity of two ladies backed by an appeal for assistance from the

son of the one and the brother of the other and representations that the required advances were needed not so much to aid a struggle as to ensure comfort and a good position. And now they are attached in the name of the infant plaintiff, whose interests must, of course, be protected even as against these trustees, but really I have no doubt at the instigation of those whom they honestly though unwisely endeavoured to assist. Their liability ought not to be pushed beyond the limit which the law imperatively demands. On the subject of costs there is no more to be said on the present occasion. It had occurred to me to frame minutes of judgment, but having dealt with every point requiring to be noticed I may safely and properly leave the formal details in other hands, though, of course, I am ready to assist for that purpose or hear any suggestion or discussion. It is reasonably clear from the materials before me that the utmost practical result of the litigation will be to secure the plaintiff's share under the settlements, the other beneficiaries having apparently been paid in full. Nevertheless the judgment must in form be for the execution of the trusts of the settlements generally and for the ascertainment of proper enquiries and accounts of all the parties interested and their respective interests, and although I have found it convenient to speak of the settlements as if there were only one, the distinction between the two of 1865 and 1868 must be mentioned, and the judgment must proceed on that footing.

Solicitors, *Dangerfield, Blyth, & Hodgson; Gibbs, White, & Strong.*

Chan. Div. }
Bigham, J. } May 18, 19, 23.

BOILEAU *v.* HEATH. (*a.*)

Landlord and tenant—Part of the freehold—Chattels thrown in heaps upon the land—Intention—Mines and minerals—"Tap-cinder"—Artificial product.

Mounds of "tap-cinder," the refuse arising from the puddling of pig-iron, thrown upon land held on a tenancy by the tenant, with the intention of its once more forming part of the earth out of which it was produced, become part of the land and belong to the owner of the freehold.

In a lease of mines of coal and ironstone and "all mines, seams, veins, and beds as well opened as unopened, of all other minerals and clay lying within and under the lands from the surface down to" a certain mine named, these words do not include such mounds of tap-cinder as above mentioned.

Action.

This action was brought by Sir F. G. Manningham Boileau and others, the trustees of the Norwich Union Fund of the Norwich Union Life Insurance Society, and that society against Messrs. R. Heath, J. Heath, and A. H. Heath, the lessees of Clough Hall Ironworks and Collieries, in the county of Stafford, for an injunction to restrain the defendants from dealing with certain heaps or mounds of mineral refuse lying on the surface of the land leased by the defendants as aforesaid. The defendants claimed the mounds either as chattels which they had bought from the plaintiffs or as part of the mines which they were entitled to work under their lease. The plaintiffs were the owners of the Clough Hall property, and in June, 1888, they leased it to the Kidsgrove Steel, Iron, and Coal Co. (Limited). This company got into difficulties and was wound up. On the 16th of December, 1892, there being then rent in arrear, the plaintiffs obtained an order of the court for re-entry, and took possession on that date, and so the old lease to the company terminated. The mounds came into existence during the tenancy of the Kidsgrove Co., and were produced in the course of the ordinary working of the ironstone of the mine. The ironstone was worked as follows: It was first raised from the earth and then calcined by being placed in heaps and fired by means of a mixture of slack, this causing a considerable reduction in the weight. It was after this process that the weight was taken for the purpose of ascertaining the amount of the royalty payable to the landlords. The calcined ore was then liquefied in a blast furnace by means of coal and limestone, the metallic fluid sinking to the bottom and the cinders and refuse, which floated on the top, being drawn off and cast on spoil heaps as being of no value. These were not the heaps in question. The fluid was drawn off into moulds and formed pig-iron. The pigs were then put into puddling furnaces, and during the process of puddling large quantities of "tap-cinder" were produced, which were drawn off from the furnaces in small wagons and thrown into heaps on the ground, and in course of time made up the mounds now in dispute. This tap-cinder, of which there was said to be about 100,000 tons on the works, consisted chiefly of protoxide of iron and silica. When the plaintiffs re-entered the mounds were on the ground, and apparently no claim to them was made by the outgoing company. The plaintiffs, having re-entered, kept the mines going on their own account for a few weeks, and on the 11th of February, 1893, entered into an agreement for a lease of the premises to the defendants. By this agreement it was provided that a lease should forthwith be granted to the defendants "of the mines of coal and ironstone, and all other minerals and clay and lands usually known as the Clough Hall Ironworks and Collieries for a term of 42 years" at a *minimum* rent of £2,000 a year, that the royalties should be the same as those payable under the Kidsgrove lease, with the addition of 1d. per ton for slack, and that the lease "should include all mines comprised in the said lease of the 22nd of June, 1888, from the surface down to" (what was called) "the silver mine." It was, however, expressly provided that the defendants should not be bound to work the ironworks, it being expressed to be their intention to remove and dispose of "the plant and machinery connected therewith." By an agreement of even date the plaintiffs sold to the defendants "the plant and machinery" then on the premises for £25,000. The money was duly paid, and the defendants entered into possession on the 1st of February, 1893. They had since worked the mines, but only for coal, and therefore they had not added to the mounds of tap-cinder. The lease, which was not executed until the 28th of August, 1897, after the close of the pleadings, contained the demise set out in the judgment. Soon after the defendants had entered into possession the plaintiffs put forward a claim for nearly £3,000 for tools, stores, and other similar chattels on the premises when the defendants entered, and which, it was contended, did not pass under the sale of "plant and machinery," and cross-claims were made by the defendants. The claims formed the subject of a settlement, made in February, 1895, the terms of which were reduced into writing and provided, *inter alia*, that the defendants should pay the plaintiffs £1,000 in full and final settlement of all their claims to "stores and all other effects upon the premises." The tap-cinder had formerly been worthless, and his lordship held that it had

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

been so as long as the Kidsgrove Co. occupied the property. In consequence, however, of certain scientific discoveries made since the date when the defendants entered into possession of the mines this refuse had become valuable and saleable. Consequently the defendants began to sell and remove the mounds, and had already sold about 20,000 tons of tap-cinder at from 4s. to 6s. per ton, and they claimed to be entitled to the whole mounds as their own property.

On the other hand the plaintiffs appear to have thought that they were entitled to a royalty from the defendants on the assumption that the mounds formed part of the leased mines. Subsequently, however, they thought that the defendants were not entitled to work those mounds at all, and they asked in the action for a declaration that they were entitled to them and not the defendants, and for an injunction to restrain the defendants removing or selling the said tap-cinder or any part thereof.

Warmington, Q.C., H. Terrell, Q.C., and *Younger*, for the plaintiffs.—The mounds of tap-cinder form part of the freehold, being deposited there with the intention of being permanently left there: *Elwes* v. *Brigg Gas Co.*, 35 W. R. 192, 33 Ch. D. 562. They became part of the soil by their own weight just as a load of gravel or manure becomes so. Even if they were chattels they would belong to us as being left on our land, and not to the defendants, who are merely lessees. They are not "other minerals" mentioned in the lease, being artificial products: *Glasgow (Provost of)* v. *Farie*, 37 W. R. 327, 13 App. Cas. 657; *Scott* v. *Midland Railway Co.*, 13 Times L. R. 398.

Cozens-Hardy, Q.C., R. Bray, Q.C., and *P. S. Hokes*, for the defendants.—The heaps were chattels thrown on the ground, and if they were not "plant and machinery" under the agreement of February, 1893, they were "stores and effects" under that of February, 1895. In any event they came under the lease which included "all mines from the surface down to the silver mine" and "all minerals" on the land.

Cur. adv. vult.

May 23.—BIGHAM, J.—[After holding that the heaps in question were not included in the term "stores and other effects":] The conclusion I have come to is that these mounds are not chattels at all. No doubt when the material was first formed it would have been competent for the Kidsgrove Co. to have treated it as their own, and to have sold it if they could for their own benefit. But they could not sell it, and did not want it, and when they piled it on the earth their intention was that it should once more form part of the earth out of which it was produced, and should no longer be of the nature of a chattel. These mounds are not chattels, and even if they are, the property in them never, in my opinion, passed to the defendants. The defendants began to work them in March, 1894. When the plaintiffs first heard of this they apparently thought that the defendants ought to pay a royalty on them as forming part of the leased mines. If, however, the defendants are entitled to work the mounds as part of the demised premises, I am of opinion that they may do so without paying any royalty. The royalties are payable only in respect of "calcined ironstone, coal slack, and cannel," and tap-cinder is, in my opinion, none of these. But are the defendants entitled under their lease to work the mounds at all? Mr. Cozens-Hardy says they are. His contention is that if the mounds are not chattels, but form part of the soil, they pass to the defendants under the lease, and may be removed by them for their own profit. I do not think this contention is sound. What is leased is, first, the coal, then the ironstone, then "all mines, seams, veins, and beds, as well opened as unopened, of all other minerals and clay lying and being within and under the lands from the surface down to and including the silver mine." In my opinion this description applies only to what may be called natural formations in and on the land, not to artificial formations such as these mounds. These mounds are not iron or ironstone, nor are they coal, slack, mines, seams, veins, or beds, either opened or unopened, or any other minerals within the meaning of the lease. For these reasons I give judgment for the plaintiffs, with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs, *Hartcup, Davis, & Cobbold*, for *W. T. Hartcup*, Norwich.

Solicitors for defendants, *W. S. Fiske*, for *Knight & Sons*, Newcastle-under-Lyme.

Q. B. Div.
(Ridley and Channell, JJ.) May 17, 24.

WHITE (*Respondent*) v. THE ASSESSMENT COMMITTEE OF BRADFORD-ON-AVON (*Appellants*). (*a.*)

Poor law—Rating—"Tied" public-house—Market value above rent actually paid—Brewers as hypothetical tenants—Exclusion of personal contracts between publican and brewers—Parochial Assessment Act, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

The occupier of a tied public-house appealed to quarter sessions against an increased assessment on his licensed premises.

The quarter sessions reduced the assessment subject to a case being stated, and the question raised was on what basis the tied house—the rent paid for which by the occupier to his brewers being admittedly less than the market value of the house—ought to be estimated at for the purposes of the poor rate.

Held, that the statute required the assessment to be based on the value of the hereditament itself, but that in estimating that value the quarter sessions were right in taking into consideration the fact that rival brewers would give a price in the market for the house above that which would support a rent given by a publican who merely took the premises for the purposes of his own retail trade as a yearly tenant; but that any special value which brewers might for reasons connected with their own brewery be willing to give for the premises ought to be excluded, since a publican had a right, like an ordinary tenant, to have his premises rated apart from any personal contract existing between himself and his landlord.

Special case stated by the quarter sessions of the county of Wilts on an appeal by the occupier against a rate on a public-house.

The ground of the appeal was that the premises were overrated, and the question for the decision of the High Court was whether the assessment committee were right in taking into consideration, in estimating the rateable value of the premises, the fact that brewers were willing to give a price or rent higher than the ordinary publican would be willing to pay as a yearly tenant in order to make a profit by letting the premises as a "tied" house.

The facts were these:

The respondent White was rated as occupier of a

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

elements of a joint-stock company were more particularly contemplated by the Legislature, I should say these: First, the existence of a joint-stock or common property; secondly, the contributions of members as the source of such property; and thirdly, the holding of that property by numerous persons in transferable shares. All these ingredients exist in the constitution of the society; and although no doubt joint-stock companies are ordinarily formed for the purpose of profit, many institutions exist, which are not formed for that purpose, to which it is hard to deny the nature of a joint stock company.

Under the Companies Act of 1862 (25 & 26 Vict. c. 89, it appears to be clear that a joint-stock company may be formed for other purposes than those of profit. Section 6 of that Act provides that "any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company"; and section 21 provides that "no company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof shall" without certain sanction hold more than a certain quantity of land. Then in the Companies Act of 1867 (30 & 31 Vict. c. 131), section 23, it is provided, "Where any association is about to be formed under the principal Act as a limited company, if it proves to the Board of Trade that it is formed for the purpose of promoting commerce, art, science, religion, charity, or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association in promoting its objects and to prohibit the payment of any dividend to the members of the association, the Board of Trade may by licence under the hand of any of the secretaries or assistant secretaries direct such association to be registered with limited liability without the addition of the word 'limited' to its name."

Now, section 4 of this Act of 1862 prohibits the formation of any company consisting of more than twenty persons for the purpose of carrying on any business that has for its object the acquisition of gain by the company or by the individual members thereof unless registered as a company under the Act. Upon this section it has been repeatedly held that associations of more than twenty persons may exist which do not require to be registered, and are not made illegal by the Act of 1862: see for example, *Smith* v. *Anderson*, 29 W. R. 21, 15 Ch. D. 247; *Crowther* v. *Thorley*, 32 W. R. 330; and *In re Siddall*, 33 W. R. 509, 29 Ch. D. 1; and yet it would be difficult, as I think, to deny to those associations the nature of joint-stock companies.

The Joint-Stock Companies Registration Act of 1844 (7 & 8 Vict. c. 110) applies only to joint-stock companies established for the purpose of profit; and it was repeatedly held (see *Reg.* v. *Whitmarsh*, 15 Q. B. 600; *Bear* v. *Bromley*, 18 Q. B. 271; and *Moore* v. *Rawlins*, 6 C. B. N. S. 289, 7 W. R. C. L. Dig. 15) that associations which very closely resemble joint-stock companies did not require registration under that Act.

On behalf of the Attorney-General some observations of Kay, L.J. (then Kay, J.), in *In re Bristol Athenæum*, were properly relied on. The actual decision in that case was that the Bristol Athenæum, an association possessing a constitution somewhat similar to that of the Sheffield society, could not be wound up as an unregistered company under section 199 of the Companies Act, 1862. With that decision I do not differ. Incidentally, however, his lordship did express the opinion that the Bristol Athenæum was not a joint-stock company and not within the proviso of section 30 of the Act of 1854. No one can be more sensible than I am of the weight which is due to anything which fell from what the learned judge said; but I have, while preparing this judgment, been informed by North, J., that he has, in a case before him (*In re The Russell Institution*, [1898] 2 Ch. 72), independently arrived at a similar conclusion with regard to the construction of section 30 of the Act of 1854 to that which I have endeavoured to express. In my judgment, on the main question, the applicant is entitled to the order for which he asks.

There remains, however, a minor question, which is one entirely of form. By clause 24 it is provided that notice of every meeting of the members shall be given by advertisement in all the Sheffield newspapers. It is admitted that although notice has been given in all the morning Sheffield newspapers an evening paper was omitted and no notices were served. Having regard to the nature of the dealing with the property which is about to take place, it seems to me that this is a case in which I should require the rule to be strictly adhered to, and therefore I think before I make an order a meeting ought to be called properly in accordance with the directions in the rules.

Solicitors, *Pilgrim & Phillips*, for *Watson, Esam, & Barber*, Sheffield; *Treasury Solicitor*.

Q. B. Div. (Kennedy, J.) June. 7.

MARSHALL v. MACKINTOSH. (a.)

Contract—Building agreement—Default of builder—Re-entry of landowner—Damages.

A builder having made default under a building agreement, the landowner exercised the right reserved to him in such a case by the agreement to re-enter and take possession of the land and premises, with all the buildings, plant, and materials thereon.

Held, that an action would lie at the suit of the landowner against the builder to recover damages for the builder's breach of the agreement.

Action to recover damages for breach of contract.

The defendant, who was a builder, by an agreement dated the 10th of June, 1896, with the plaintiff, undertook to pull down and re-erect "in carcase" before the 25th of December, 1896, a hotel in Dover-street, Piccadilly, and to take a lease of the hotel from the plaintiff for eighty years from the 10th of June, 1896, at a peppercorn rent for the first year, and at the rent of £1,100 for the second and every subsequent year of the term.

The material provisions of the agreement were as follows: "(2) The lessee will at his own cost take down and clear away the old buildings, and before the 25th of December, 1896, erect in carcase (that is to say, the walls built and structure roofed in, the timbers of the floors and partitions fixed, and all gutters, rain-water pipes, and drains completed and made good in communication with the common sewer), the new buildings. . . . And in default by the lessee of the stipulation contained in this clause he shall forfeit all benefit under this agreement, which shall thereupon cease and be determined, and all the materials and buildings on the said premises shall be forfeited to, and become the

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

absolute property of, the lessor. (11) If the new buildings shall not be erected or completed within the time and in manner aforesaid before the 25th of December, 1896, or if the lessee shall fail to observe or perform any of the stipulations herein, . . . or if he shall not proceed with the works with proper diligence, then . . . the lessor shall be entitled to re-enter upon and to the immediate possession of the said piece of land and premises, with all the buildings, erections, plant, and materials therein without making to the lessee any allowance or compensation in respect thereof. . . ."

The defendant had possession of the site on the 10th of June, 1896, and removed from it materials worth £200, and commenced, but did not complete, the pulling down of the hotel, but did not rebuild it or any part, and, save as aforesaid, wholly neglected to perform the contract. In consequence of the default of the defendant the plaintiff took possession of the premises, and put an end to the contract on the 19th of January, 1897.

The action was tried by Kennedy, J., without a jury. The learned judge found there had been a breach of contract by the defendant and referred the case to an official referee to report what damage, if any, the plaintiff had sustained, having regard to all the facts, by reason of the defendant's breach of contract.

The official referee reported that the plaintiff after taking possession of the premises on the 19th of January, 1897, forthwith took every reasonable precaution to endeavour to relet without loss, and did relet for the best terms he could by an agreement of the 5th of May, 1897, for eighty years from the 24th of June, 1898, at a peppercorn rent for the first year, and at the rent of £900 for the second and subsequent years of the term; that the fair value at which to capitalize the rent was twenty-five years' purchase. The official referee found that the damages which the plaintiff sustained by reason of the defendant's breach of contract in this action were the loss of two year's rent of £1,100 from the 24th of June, 1897, to the 24th of June, 1899, amounting to £2,200, and the loss of £200 a year rent from the 24th of June, 1899, at twenty-five years' purchase, amounting to £5,000, making a total of £7,200. If the plaintiff was only entitled to recover damages caused by the removal of materials by the defendant and by the loss of possession from the 24th of June, 1896, to the 19th of January, 1897, then the official referee found that the amount of such damage was £200 and one years' rent of £900 from the 24th of June, 1896, to the 24th of June, 1897, the earliest date at which the plaintiff was able to relet the premises.

E. Morten, for the plaintiff.

G. A. Scott, for the defendant.

KENNEDY, J.—In this case the only point I have to decide is the question of damages which the plaintiff is entitled to recover. The damages assessed by the learned official referee under alternative heads are large, and, as Field, J., took occasion to say in the course of his judgment in *Wigsell* v. *School for the Indigent Blind*, 30 W. R. 474, 8 Q. B. D. 357, at p. 359, few questions as to the principle upon which damages ought to be assessed are free from difficulty.

The defendant, by an agreement in writing of the 10th of June, 1896, contracted with the plaintiff (in substance) to pull down and remove certain buildings numbered 47 and 48, Dover-street, Piccadilly, and to build on the site a new structure according to certain approved plans, elevations, sections, and specifications. The plaintiff contracted that the new structures should, before the 25th of December, 1896, be erected "in carcase" to the satisfaction of the plaintiff's architect. Upon this being done, the plaintiff contracted with the defendant to give him a lease of the land and buildings for a term of eighty years from the 24th of June, 1896, at a peppercorn rent for the first year, and thereafter at the yearly rent of £1,100. The only other provisions of the building agreement to which I need specially refer are the latter part of clause 2 and clause 11. [His lordship read these clauses.] By clause 13 the defendant had an option, subject to the terms of the agreement, during the first year of the term granted by the agreement, to purchase the fee simple at the price of £28,600. The defendant, as stated in the report of the official referee, got possession of the site on the said 10th day of June, the date of the agreement, but, except that he took down and removed £200 worth of materials from the old buildings, he did nothing whatever towards the fulfilment of the contract. The fact evidently was that he had entered upon the undertaking as a speculation without the means of fulfilling it. He frankly stated in his evidence before me that the terms of the agreement were such that he could not raise the money to build. He added that shortly before the plaintiff took possession he thought there was just a prospect, and a very good prospect, of his being able to sell the freehold. So far as I can see in the evidence no communication of such a prospect was ever made to the plaintiff.

Finding nothing beyond the removal of the £200 worth of materials had been done, and no prospect of anything being further done by the defendant, the plaintiff re-entered on the 19th of January, 1897. There can be no question of his right under the agreement to do so; and, apart from the express terms of that document, I think that upon the facts in evidence the defendant had not only broken the agreement, as he admits he did, but that the breach was of such a nature that the plaintiff would be reasonably justified in treating the defendant's conduct as showing an intention on the defendant's part not further to perform the contract.

It is clear, in my view, that the mere fact of re-entry and forfeiture does not in itself exonerate the defendant from the liability to damages for breach of contract prior to re-entry. If authority was wanted, *Hartshorne* v. *Watson*, 4 Bing. N. C. 178, appears to be an authority in point. I do not think Mr. Scott contended for the contrary view; but he did contend on behalf of the defendant that the effect of the latter part of clause 2 and clause 11, which I have read, do in this contract limit the plaintiff to such compensation as may be afforded to him by taking possession of the materials, plant, and buildings on the premises at the time of re-entry without any allowance or compensation to the defendant, and that he cannot claim damages beyond. I cannot accept this view. It appears to me that this would be to read into these clauses "as and for liquidated damages" or words to the same effect, and this, I conceive, I am not entitled to do. It is common enough to find the insertion of such words where there is an intention of the parties to agreements so to limit the liability for a breach of the contract. Instances of this are to be found in *Reilly* v. *Jones*, 1 Bing. 302; *Lea* v. *Whitaker*, 21 W. R. 230, L. R. 8 C. P. 70; and in *Ex parte Newitt, In re Garrud*, 29 W. R. 344, 16 Ch. D. 522, which was, like the present, the case of a building agreement. In the last cited case Brett, L.J., in the course of the argument at p. 529 says, "the words 'as and for liquidated damages' are inserted in favour of the builder; if they were not there the landowner would also bring an action for damages for the breach of the agreement." James,

L.J., on the same page says, "'liquidated damages only means that the things seized are to be taken in full satisfaction," and in the course of his judgment, at p. 531, he adds, in reference no doubt to the stipulation "as and for liquidated damages," "the building agreement provides in effect that in a certain event certain property of the builder may be taken by the landowner in full satisfaction of the agreement." It appears to me that in the absence of some such words as "as and for liquidated damages" I cannot construe clauses 2 and 11 as depriving the landowner of the right to prove, if he can, actual damages for the defendant's failure to perform the contract. I may add I do not think that the words in clause 11, "without making to the lessee any allowance or compensation in respect thereof" would operate to prevent the builder, if the landowner after a breach re-enters and claims damages, from having considered in the damages any value which might exist in buildings, plant, or material seized by the landowner when he re-enters. The damages must be assessed *rebus sic stantibus*, and it might be the case, for example, that if the structure at the time of re-entry though not entirely completed "in carcase" was nearly so, or if very valuable plant and material were on the land, the landowner would fail to prove any substantial damage at all to flow from the breach on which he sues, as he failed in the case of *Oldershaw* v. *Holt*, 12 A. & E. 590, where after re-entry he made an advantageous lease with a new contractor.

The remaining question is, what are the damages to which the plaintiff here is entitled for the breach which is committed before the plaintiff re-entered on the 19th of January? The learned official referee, to whom I referred the question of damage, has given two alternative assessments. [His lordship read the report of the official referee.] The damages must be assessed, in my judgment, upon well-known and well-recognized principles. They must be such as flow naturally, and, in the cirumstances of the case necessarily, from the breach of contract; further, they must be such damages as may reasonably and properly be taken to have been in contemplation of the parties when they entered into the contract; subject to this, at all events, the plaintiff is to borrow the language of Field, J., in *Wigsell* v. *The School for Indigent Blind*, 8 Q. B. D., at p. 364, "entitled to have his damages assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract, and what it would have been if the contract had been performed." Now, what would have been the state here, if the defendant's contract had been performed before the date of the re-entry on the 19th of January? There would have been a complete removal of the old buildings, and upon this important site the "carcase" completely erected of a valuable building. If this had been the case, it may, I think, fairly and properly be assumed that if the defendant failed to further complete his contract and take his lease, there would have been no difficulty in the plaintiff getting someone to take up the undertaking on at least as profitable terms. As it is, not only, after seven months, is there no new building erected, or even begun, but the old building is still on the ground and substantially as it was on the 10th of June, except so far as it had been made, I suppose, less valuable by its having had £200 worth of materials removed from it by the defendant. It is shown by evidence to the satisfaction of the referee that the plaintiff forthwith took every reasonable precaution to endeavour to relet without loss, and did relet for the best terms he could obtain. Those terms, as was stated in the official referee's report, involved the heavy loss of £7,200. Looking at the largeness of the amount, I have most carefully considered if there is any fault of principle in this assessment, and I can find none. It appears to me to be fair to assume that if the defendant had not broken his contract before the plaintiff re-entered on the 19th of January, 1897, the state of the plaintiff would have been that which he had under the contract with the defendant; he would have got the value of the contract either from the defendant, if he completed it, or from a new contractor, if the defendant after performing the contract so far had subsequently incurred a forfeiture. *Oldershaw* v. *Holt*, which is the case most in point, of which I am aware, has never been disapproved; and in that case it was held by the Court of Queen's Bench in a very similar case of re-entry upon breach of a building lease, the breach being, as here, the neglect to build, that the jury might properly give their verdict on an estimate of the plaintiff's real damage, taking into consideration an increased rent secured by the agreement, which had been made with a new lessee after the re-entry. Upon the same reasoning the official referee might, as it seems to me, properly consider here in getting at the plaintiff's real damage the fact of the reduced rent which the plaintiff was practically obliged to accept from a new contractor, and come to the conclusion which he has come to, that the difference between that rent and what the plaintiff would have received under his contract with the defendant fairly represents the damage which flowed naturally and necessarily from the defendant's breach of contract before the plaintiff re-entered, as, under this agreement with the dedefendant, he was entitled to do on the 19th of January.

As to the second or alternative assessment, it is only necessary to say that I do not think that the damages could, according to legal principle, be assessed upon that basis. I understood in the course of the argument that it was inserted in the report in deference to the wish of counsel, in order that this method of assessment might be before me on the hearing of the arguments.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Tarry, Sherlock, & King.*

Solicitor for the defendant, *A. M. Bradley.*

Q. B. Div.
(Wills and Kennedy, JJ.) May 16.

NORTH-EASTERN RAILWAY CO. (*Appellant*) v. OVERSEERS OF DALTON (*Respondents*). (*a.*)

Highway—Liability to repair ratione tenuræ—*Highway made a parish highway—Highway rate—Exemption—Highway Act*, 1862 (25 & 26 *Vict. c.* 61), *s.* 35—*Estoppel*—Res judicata—*Judgment of quarter sessions—Quashing previous rate.*

By an order of petty sessions made in April, 1851, *under section* 35 *of the Highway Act*, 1862, *a highway, for the repair of which the appellant company had previously, as occupier of certain land, been liable* ratione tenuræ, *was declared to be a parish highway, and a sum was fixed to be paid in full discharge of all claims thereafter in respect of the repair and maintenance of the highway. In August*, 1881, *the appellant company was rated in respect of its occupation of the land to a highway rate for the district in which the highway was situate. On appeal the quarter sessions quashed the rate. In* 1897 *the appellant company was*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

again rated to a rate for highway expenses in respect of its occupation of the land.

Held, that the appellant company was not, by reason of the order made under section 35 *of the Highway Act,* 1862, *exempted from liability to be rated for highway expenses, and that the question of the appellant company's liability was not* res judicata *by reason of the decision of the quarter sessions in* 1881 *that the rate then in question was invalid.*

Special case stated by quarter sessions for the North Riding of the County of York upon the hearing of an appeal by the North-Eastern Railway Co. against a rate made for the relief of the poor in the parish of Dalton and for other purposes chargeable thereon, on the 7th of June, 1897.

Prior to the making of an order by the quarter sessions for the North Riding at Michaelmas, 1880, constituting the hamlet of Islebeck a separate highway parish, and annexing such parish to the Bridforth highway district, that hamlet formed part of the township of Bagby in the said district, and was a place in which all the highways were repairable by the occupiers of land *ratione tenuræ*, and in which no highway rates were leviable by reason of the exemption contained in section 33 of the Highway Act, 1835. Islebeck continued to form part of the township of Bagby until June, 1886.

The appellant company was at all material times in occupation of lands in Islebeck, and was, prior to the 11th of April, 1881, liable *ratione tenuræ* to repair part of a highway in Islebeck.

On the 11th of April, 1881, an order was made at petty sessions under section 35 of the Highway Act, 1862, whereby it was ordered that all the highways within Islebeck should become, and for ever thereafter be, parish highways and be repaired and maintained by the Bridforth Highway Board, and the sums to be paid by the respective occupiers of lands in Islebeck previously liable to repair the highways in full discharge of all claims thereafter in respect of the repair and maintenance of the highways were fixed. Such sums were duly paid in accordance with the order.

On the 22nd of August, 1881, the appellant company was rated and assessed in respect of its lands in Islebeck, to a rate for the expenses incurred by the Bridforth Highway Board in repairing and maintaining the highways in its district, including the highways in Islebeck, and for other expenses legally incurred by the board. Such rate was appealed against by the company to quarter sessions upon the ground that the company was exempt from liability to contribute towards the repair and maintenance of the said highways, and upon proof of the foregoing facts the appeal against the rate was allowed.

In 1886 the hamlet of Islebeck was detached from the township of Bagby and amalgamated with the township of Dalton in the Bridforth highway district.

On the 7th of June, 1897, a rate for the relief of the poor in the parish of Dalton was made, in which the appellant company was rated and assessed in respect of its occupation of its lands in Islebeck. Such rate was levied (*inter alia*) in respect of expenses incurred or to be incurred by the Rural District Council of Thirsk (the successor of the Bridforth Highway Board) in respect of the repair and maintenance of the highways within the said rural district, including the portion of the parish of Dalton which was comprised in Islebeck.

The appellant company appealed against this rate to quarter sessions.

On behalf of the appellant company it was contended:

(*a*) That it having been decided on the appeal to the quarter sessions in 1881 that the company was not liable to contribute towards the repair and maintenance of the highways in that portion of Dalton which was formerly the hamlet of Islebeck, the question was *res judicata*, and the court of quarter sessions was precluded from deciding otherwise in the present appeal;

(*b*) That the company having been liable to maintain the highways in the hamlet of Islebeck *ratione tenuræ* was exempted by section 33 of the Highway Act, 1835, from liability to rates levied in respect of the repair and maintenance of such highways, and had continued to be exempt ever since;

(*c*) That the company, having complied with the requirements of the order of quarter sessions of the 11th of April, 1881, was by section 35 of the Highway Act, 1862, discharged of all claims thereafter in respect of the repairs and maintenance of any highways in Islebeck, and was, therefore, not liable to pay the rate in question.

On behalf of the respondents it was contended:

(*a*) That the decision of quarter sessions in 1881 was final only for its proper purpose and object, which was that the company was not liable to pay the particular rate then in question, and that that decision was not conclusive evidence of the matters referred to in paragraphs (*b*) and (*c*) of the appellant's contentions, which matters only came (if at all) collaterally in question before the quarter sessions, or were only incidentally cognizable, or were at most only matters to be inferred by argument from that decision;

(*b*) That the exemption from the payment of highway rates conferred by section 33 of the Highway Act, 1835, continued only so long as the liability of the company to repair the highway *ratione tenuræ* lasted, and that, therefore, the exemption determined on the 11th of August, 1881, when, by virtue of the order of that date, the highway became a parish highway;

(*c*) That the order of the 11th of August, 1881, only operated to discharge the appellant company from all claims from that date by the Bridforth Highway Board or its successors in respect of the repairs and maintenance of the highway then ordered to be made repairable by the parish, and in no way affected the liability of the appellant company in respect of its occupation of property within the district of the Thirsk Rural District Council, and otherwise by law liable to be rated, from paying rates for expenses incurred by the council in respect of the repair and maintenance of highways within its district.

The court of quarter sessions held that the question was not *res judicata*, and that the court was not bound by the decision on the appeal to quarter sessions in 1881, and that the appellant company was not exempt from payment of any portion of the rate. Accordingly the appeal was dismissed.

The questions for the opinion of the court were:

(1) Was the court of quarter sessions precluded by its previous decision in 1881 from holding that the appellant company was liable to be rated in respect of its occupation of land within the hamlet of Islebeck for expenses incurred by the rural district council of Thirsk in relation to the highways within its district?

(2) Was the appellant company exempt from payment of so much of the said rates as was levied in respect of the repair and maintenance of the highways in the hamlet of Islebeck?

The Highway Act, 1862, s. 35: Where any person or corporation is liable by reason of tenure of lands or otherwise to repair any highway situate in a

highway district, the person or corporation so liable may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate; . . . and the justices at petty sessions . . . shall, if they think fit, make an order . . . that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district in full discharge of all claims thereafter in respect of the repair and maintenance of such highway; . . . From and after the making of such order by the justices . . . such highway shall be repaired in like manner and at the like expense as highways which a parish is liable to repair.

Bethune (*R. Cunningham Glen* with him), for the appellants.

Macmorran, Q.C., and *Gawan Taylor*, for the respondents.

The following cases were cited in the course of the arguments: *Reg.* v. *Heath*, 14 W. R. 388, L. R. 1 Q. B. 218; *Heath* v. *Overseers of Weaverham*, 42 W. R. 478, [1894] 2 Q. B. 108; *Reg.* v. *Hutchings*, 29 W. R. 724, 6 Q. B. D. 300; *Wildes* v. *Russell*, 14 W. R. 796, L. R. 1 C. P. 722; *Reg.* v. *Inhabitants of Haughton*, 1 W. R. 164, 1 E. & B. 501; *Rex* v. *Wick St. Lawrence*, 5 B. & Ad. 526; *Reg.* v. *Inhabitants of Clint*, 11 A. & E. 624*n*.

WILLS, J.—This case raises two questions—the first as to the construction of section 35 of the Highway Act, 1862, and the second as to the estoppel. The first question is whether the latter part of section 35 operates to discharge from all future liability for highway expenses the person previously liable *ratione tenuræ*, or whether the operation of the section is confined simply to the extra cost which would fall upon the person so liable as compared with the other ratepayers. I think that the governing words of the section are "The highway shall thereafter be repaired and maintained by the parish." It would have been easy to have said that the person, in respect of whom the liability to repair *ratione tenuræ* previously existed, should continue to enjoy the exemption; but that was not said in so many words, and some of the consequences, which would follow if such a construction were adopted, are so startling that in my opinion the respondents' construction of the section is the right one. In this particular place there were formerly no highways which were not repairable *ratione tenuræ*, and if the appellants' contention is right the result might be that, the sum to be paid by way of composition having to be fixed once for all, there would, if the expenses of repair increased in course of time, be no method of providing for the increase. In the same way, the contribution of an individual towards the highway expenses might be fixed at a sum which might in course of time become utterly inadequate to represent the burden of the liability to repair the particular highway from the burden of repairing which he had been discharged, or utterly inadequate to represent a fair proportionate share of the general highway expenses. Take for example the case of a person liable *ratione tenuræ* to repair a country lane. The sum to be paid by him under section 35 would be fixed with reference to the then existing state of things, and would consequently be moderate in amount; suppose he turned his property into a building estate and thereby caused the traffic to increase, if he had remained liable *ratione tenuræ* the increased expense of maintaining the road would have fallen on him, but if the sum to be paid by him had been fixed once for all he would derive a benefit at the expense of the community on whom the whole of the increase would fall.

It may be said that the respondents' construction of the section may operate harshly and may impose additional and even unjust burdens on individuals, but enactments of this kind are for the general benefit, and although there may be occasional injustice or hardship such cases would be rare. It seems to me that the more reasonable conclusion is that where the Legislature says that the highway shall hereafter be maintained and repaired by the parish, it means what it says, and a highway cannot be a highway repairable by the parish if some of the parishioners are exempt from contribution to the expense. If, as in the present case, the burden in the shape of highway rates cast upon the person liable *ratione tenuræ* by reason of the extinction of that liability is the same in amount as that previously existing, the sum to be paid by way of composition would be fixed at a nominal amount, and so no injustice would be done.

The second question was whether the judgment of the quarter sessions on the appeal in 1881 operated as an estoppel in the present case. Questions of estoppel often raise difficulties, not as to the principle, but as to the application of the principle. In *Reg.* v. *Hutchings* Lord Selborne, quoting from the *Duchess of Kington's case*, said: "'The judgment,' said Chief Justice De Grey, 'of a court of concurrent' (or of exclusive) 'jurisdiction, directly upon the point, is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence' (that is, as I understand the meaning of the Chief Justice, conclusive evidence) 'of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.'" The judgment of the quarter sessions in 1881 was that the rate then in question must be quashed. It followed that that rate was bad, and as between the same parties that question could not again be discussed; but the construction of section 35 of the Highway Act of 1862 was not one of the things necessarily involved in the judgment of the quarter sessions in 1881. It seems to me that *Reg.* v. *Hutchings* is very near this case. Mr. Bethune, who argued this case as well as it could be argued, contended that *Reg.* v. *Hutchings* was distinguishable on the ground that there is a difference between the judgment of a court of quarter sessions, which is a court of record, and a decision of a magistrate. That is so, no doubt, for some purposes, but the decision in *Reg.* v. *Hutchings* proceeded on no such ground as that, and there is nothing in that case to support the contention that in cases of estoppel there is any difference between a decision of a court of record and a court of summary jurisdiction.

For these reasons I am of opinion that the respondents are entitled to judgment.

KENNEDY, J.—I am of the same opinion, and on the same grounds.

Appeal dismissed.

Solicitor for appellant, *A. Kaye Butterworth*, York.

Solicitor for respondents, *Swarbrecke*, Thirsk.

Q. B. Div.
(Wills and Kennedy, JJ.) April 22.

LEICESTER COUNTY COUNCIL v. LEICESTER ASSESSMENT COMMITTEE. (a.)

Poor law—Rating—Exemption—Buildings occupied for police purposes—Chief constable's residence—43 Eliz. c. 2, s. 1—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 64.

By section 64 *of the Local Government Act,* 1888, *the buildings used by the police at Leicester, then vested in the justices, became the property of the county council.*

The chief constable for the county, on his appointment to that office, had to reside in a certain part of the police premises, and the assessment committee assessed that portion of the police buildings to the poor rate.

Held, that such rate should be quashed, because that part of the police premises occupied by the chief constable was occupied by him for the purposes of the police, and the fact that he was permitted to keep his wife and family there also rendered his occupation thereof none the less an exclusive occupation of that part of the building for the purpose of the county police.

Special case under 12 & 13 Vict. c. 45, s. 11, after notice of appeal against a poor rate made on the chief constable's residence at Leicester. The question was whether a building used as the headquarters of the Leicester County Constabulary in the town of Leicester, part of which was used by the chief constable in his official capacity as a residence—the rest being admittedly occupied for ordinary police purposes—was liable to be rated.

In 1867 the police premises, including the chief constable's residence, had been assessed to the poor rate of St. Martin's Parish, Leicester. At that time the property was vested in the justices, and they appealed against the assessment, and a case (*Reg.* v. *St. Martin's, Leicester,* 15 W. R. 1036, L. R. 2 Q. B. 493) was stated for the opinion of the court of Queen's Bench, which court decided that the justices were not liable to poor rates for such premises. By virtue of the Local Government Act, 1888, the premises in question passed from the justices and vested in the county council. Since 1867 neither the justices nor the county council had been rated for the premises until in April, 1897, this rate was made in reference only to that part of the premises occupied rent-free by the chief constable, and it was not disputed that it was a condition of his appointment that he must reside there in his official capacity.

The defendants having made the rate, the Leicester County Council appealed to quarter sessions, and a case was stated for argument.

E. W. Garrett (*S. Everard* with him), for the appellants.—The question for the opinion of the court is whether this rate can be levied. We contend that no part of the building ought to be rated.

He referred to *Reg.* v. *St. Martin's, Leicester,* 15 W. R. 1036, L. R. 2 Q. B. 493.

Premises occupied for the purposes of the police are exempted, and quarters resided in by the chief constable come within that class of buildings. The fact that his wife and family live there also makes no difference: *Reg.* v. *Stewart,* 6 W. R. 35, 8 E. & B. 360; *Gambier* v. *Lydford Justices,* 2 W. R. 226, 3 E. & B. 346; *Martin* v. *West Derby Assessment Committee,* 31 W. R. 489, 11 Q. B. D. 145; and *Reg.* v. *Lancashire Justices,* 6 W. R. 74, 27 L. J. M. C. 220.

Hugo Young and *C. B. Marriott,* for the respondents.—The reason why the case was stated is that since the authorities that have been cited were decided the ownership of these premises has been transferred by virtue of section 64 of the Local Government Act, 1888, c. 41, from the justices to the Leicester County Council; and another fact that has altered the previous state of matters is that in two decisions in 1896 (*County Council of Middlesex* v. *Assessment Committee of St. George's Union,* 45 W. R. 215, [1897] 1 Q. B. 64, and *Worcestershire County Council* v. *Assessment Committee of St. Nicholas, Worcester,* 45 W. R. 309, [1897] 1 Q. B. 480) the Court of Appeal decided that the court in looking at a building used partly for Crown purposes and partly for county council purposes, might split up the building and consider whether a portion of it was rateable, although another portion of it was not. Prior to 1888 all these buildings were vested in the justices, who had always been regarded as the servants of the Crown. Now premises occupied by the county council for administrative purposes are liable to be rated, and the respondents claim that they are entitled to split up the building according to the purposes in respect of which each part was used by the county council, as had been done in other cases, such, for example, as the Shire-hall in the *Worcester case.* The question is whether this portion, used as a place of residence for the chief constable and his family, is exclusively occupied for Crown purposes. If it is not exclusively used for Crown purposes it is not exempt and the respondents' submission that part at any rate of it being used for the chief constable's private purposes is liable to the rate: *Greig* v. *University of Edinburgh,* L. R. 1 Sc. & Div. 348.

THE COURT allowed the appeal.

WILLS, J.—The case has been very clearly put by Mr. Young, and he has argued his point in the only way possible. It seems that this case is free from difficulty and it is very undesirable to encourage an attempt such as this to upset established authorities and privileges. The sole question raised is whether the occupation by the chief constable of the county is an occupation of that part of the police buildings exclusively for police purposes. The chief constable was required so soon as he was appointed to the office to live there in order that he might always be at hand and ready to discharge his duties. There is no doubt that the building generally was occupied by the police for the purposes of the police, and there is no doubt that premises so occupied are not liable to poor-rate. The only question was whether the residence of this officer being used by his family as well as himself could be treated as a part of the building set apart and used for private purposes—that is, for a purpose other than for the purposes of the police. Now, as he had to live there because it was the head office of the county constabulary and he, as the chief constable, was required to be there so as to be in immediate communication with all parts of his district, does it make a difference as to the rateability of this portion that his wife and family lived with him? It would be an absurdity to hold that it did. A wife and family have been held to be a kind of necessary appendage and must be provided for when a house or other quarters are allotted to a public servant. I appreciate the point taken that the old decisions have ceased to be conclusive authorities because of the change brought about by the Local Government Act, 1888, c. 41, and I feel that there may be cases in which premises formerly vested in the justices and then exempted from liability to rates may now when occupied by the county council no longer be exempted

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

because by the changes brought about by the Act of 1888 a new principle of severing a building into portions for the purposes of levying rates has sprung up which before was never thought of. In this case, however, it seems to me clear that the building was occupied by the chief constable for police purposes, and that he occupied them none the less exclusively for police purposes because he was allowed to keep his wife and family there. My judgment must therefore be for the appellants with costs.

KENNEDY, J., concurred.

Appeal allowed. Rate quashed.

Solicitors for the appellants, *Kingford, Dorman, & Co.*, for *William Jesse Freer*, Leicester.

Solicitors for the respondents, *Field, Roscoe, & Co.*, for *Whetstone & Frost*, Leicester.

Prob. Div. & Adm. Div. } Admiralty. } Feb. 9.

"THE RIPON CITY" OR "SILVIA." (a.)

Ship—Possession—Sale of ship by majority owners—Judgment by consent—Agreed damages—Meaning of "such deductions as the interveners may be able in law to establish as proper from the respective shares and interests of the plaintiffs."

The owners of fifty-two sixty-fourth shares in a ship—the ship having been arrested in an action in rem *for master's wages and disbursements—put in bail in the action and paid the amount found due by the court.*

They subsequently, without the consent of the owners or mortgagees of the remaining shares in the ship, entered into a contract for the sale of the whole ship to a foreign purchaser, and delivered her to him, receiving the total purchase-money. The mortgagees of eight of the remaining twelve sixty-fourth shares in the ship and the sequestrator of the mortgagee of those shares then arrested the ship in an action of possession, and the owners of the fifty-two sixty-fourth shares having intervened in that action, agreed to settle the suit by paying to the plaintiffs eight sixty-fourth parts of the purchase-money they had received for the ship, less such deductions as the interveners might be able to establish as proper from the respective shares and interests of the plaintiffs.

Held, that a sum paid by the interveners for brokerage at 2½ per cent. was a deduction to be allowed within these words, but that the amount paid for wages and disbursements, and sums paid for cancelling an onerous charter-party entered into for the ship and for repairs to her not required by the purchasers, were not allowable deductions.

Motion by mortgagees in objection to registrar's report.

This was an action of possession carried on on behalf of Messrs. Green, Holland, & Co., the owners of one sixty-fourth share in the vessel *Ripon City*; of Thomas Ronaldson, the owner of one other sixty-fourth share in the same vessel; (and by amendment) of Elizabeth Balls and R. K. Donald, each the mortgagee of four sixty-fourth shares in her; and of T. McLintock, the sequestrator according to the Scotch law; and of M'Lean & Co., the mortgagors of the above last-mentioned mortgaged shares in the vessel against *The Ripon City*. The plaintiffs claimed in the action a declaration that a pretended sale of *The Ripon City* made by Sir Christopher Furness and Furness, Withy, & Co. (the owners of fifty-two sixty-fourth shares in her and her managing owners) on or about the 20th of April, 1897, to a foreign purchaser was null and void, a decree that possession of the ship should be given to the plaintiffs, and that all things might be done to give and restore to the plaintiffs a legal title to *The Ripon City* and their shares therein.

Sir Christopher Furness and Furness, Withy, & Co. appeared as interveners in the suit, and in their defence, after admitting that they had sold *The Ripon City* to Paolo Viale, an Italian subject, for £8,650, and that the British certificate of registry of the said vessel had been closed on the 20th of April, 1897, alleged that they had always been ready to account to the plaintiffs for their proportion of the said purchase-money, or alternatively to pay to the plaintiffs the fair market value of their shares, and brought into court the sum of £400 as sufficient to satisfy the claims of Messrs. Green, Holland, & Co. and Thomas Ronaldson in the action. This amount of money was taken out of court by the plaintiffs, Messrs. Green, Holland, & Co. and Thomas Ronaldson.

On the 7th of August, 1897, the action came on to be heard, and the court made a decree by consent of all parties that judgment should be entered for the remaining plaintiffs in one-eighth of £8,650, with interest thereon at 10 per cent. per annum from the 17th of April, 1897, to the 7th of August, 1897, and per cent. per annum on the amount of the judgment found due from the 7th of August, 1897, until payment, "less such deductions as the interveners might be able in law to establish as proper from the respective shares and interests of the plaintiffs; the question of such deductions to be referred to the registrar and merchants."

The registrar with regard to the deductions to be made in accordance with the above judgment reported as follows:

In the account filed by the interveners they claimed to deduct from the purchase-money various sums amounting in all to £6,943 1s. 8d., leaving a balance of only £1,490 13s. 4d., of which one-eighth would be payable to the plaintiffs. At the reference, however, this claim was reduced by the withdrawal of certain items to £5,541 7s. 11d. The deductions still claimed include a sum of £795 5s. which had been paid by the ship's broker before the sale of the vessel, £325 paid shortly before the sale to cancel a disadvantageous charter entered into by Neil M'Lean & Co. while the vessel was in their hands, and £400 which had been paid by Furness, Withy, & Co. to the master in settlement of an action of wages and disbursements instituted in his name against the vessel on the 17th of February, 1897. It was held by Barnes, J., at the trial of this action that this settlement of the action was illegal and void, and I do not see how the mortgagees can be held liable for any of the other payments above mentioned, none of which would confer a lien on the ship. As regards the plaintiff Elizabeth Balls, it was suggested that she, at least, had become liable as mortgagee in possession for the ships' liabilities at that time, and it is true that in one of the letters from her solicitors to the solicitors for the interveners dated the 11th of February, 1897, she was described as a mortgagee now in possession of four shares, but I think it was rightly contended by her counsel that she was not really a mortgagee in possession as nothing really had been done by her to take possession of the shares until she was joined as a plaintiff in this action on the 21st of July, 1897, and that she could not as a mere mortgagee be liable for a share of the expenses of working the ship or of cancelling a charter. The next deduction claimed was for a sum of £1,281 0s. 2d. found due to the master in his action against the ship

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

for wages and disbursements, including his liability on certain bills of exchange which fell due and were dishonoured in August and October, 1896: see *The Ripon City*, [1897] P. 226, 45 W. R. Dig. 153. The amount was paid on behalf of Messrs. Furness, Withy, & Co. This was a debt for which there was an existing lien at the time of the sale of the ship in April, 1897, and it seems clear upon the authorities that it must take precedence of the mortgagees' claim. In fact it has been so decided by Barnes, J., in giving judgment in the master's action, where he said, "I may notice in passing that in the present case the eight sixty-fourth shares standing in the name of Neil M'Lean & Co., though mortgaged, are therefore subject to the plaintiffs' claim": *The Ripon City*, [1897] P. 226, at p. 244. This, I presume, will apply to the master's costs in the same action, but not to the costs of defending it. There remains the costs of the repairs which the vessel was undergoing at the time of her sale for which a total deduction is claimed of £2,171 18s. 2d. The general rule seems clear that a mortgagee not in possession is not liable for outlays incurred in improving the mortgaged property, but a question arises in this case on the following words in the contract for sale: "The sellers agree to complete No. 3 survey and hand certificate to purchaser." It was agreed on behalf of the managing owners that the contract price of the vessel was really not £8,650, but that sum less the cost of repairs, and that the plaintiffs are only entitled to one-eighth of the purchase-money after making that deduction. This would probably have been the case if, before commencing the repairs, the vessel had been sold in consideration of her being repaired by the vendors. But here the repairs had almost been completed before the date of the agreement for sale, and it did not even appear that they had been undertaken with a view to that particular sale. . . . It seems to me that the plaintiffs were entitled to one-eighth of the value of the vessel in her condition at the date of the agreement for sale, including so much of the repairs as had then been done, and it is evident from the dates that the cost of any repairs which then remained to be completed must have formed a very small portion of the total costs. The managing owners have claimed to deduct no less than £2,171 18s. 2d., including, it seems, the cost of repairing damage sustained by the vessel being on fire at Savannah during her last voyage. But the sum for which the contractors undertook to execute according to specification the necessary repairs for passing her No. 3 survey, the completion of which was a condition of the sale, was only £840, and there is nothing to show that the repairs still remaining to be done at the date of the contract for sale formed part of the classification repairs represented by that sum, nor that the costs of any such uncompleted repairs was not fully covered by insurance in respect of which it appears from the correspondence that the managing owners expected to recover about £1,400. In our judgment the managing owners have clearly failed to prove what, in our judgment, it clearly lay upon them to prove—namely, that any part of the cost of the repairs is properly chargeable to the mortgagees. The broker's commission of 2½ per cent. on the purchase-money appears to be a reasonable and proper deduction. I think the interveners ought to pay the costs of the reference.

Both the plaintiffs and interveners appealed against the report of the registrar, the plaintiffs asking that the report should be varied by the deduction of the 2½ per cent. brokerage made by the registrar being disallowed, and the interveners claiming that they were entitled to have the items disallowed by the registrar as above stated allowed them in account as deductions proper to be made under the decree in the action.

Jan. 17.—*F. Laing*, on behalf of the plaintiffs, brought on the appeal before the President (Sir F. Jeune) by way of motion, the hearing being continued on the 18th of January and the 19th of January.

Aspinall, Q.C., and *Dawson Miller*, appeared on behalf of the interveners.

The argument of counsel appear from the judgment.

The following authorities were cited as to equitable interests between owners and mortgagees of ships being recognized by the court and as to the power of the court to make a decree as to the plaintiffs' title: *The Inneafallen*, L. R. 1 Adm. & Ecc. 72, 14 W. R. Adm. Dig. 26; *Batthyany* v. *Rouch*, 29 W. R. 665, 44 L. T. Rep. 177; *The Rose*, 21 W. R. 511, L. R. 4 Adm. & Ecc. 6.

Cur. adv. vult.

Feb. 9. — JEUNE, P. — The questions in this case arise on objections to a report made by the learned registrar in pursuance of a judgment of the court given by consent, and relate to the distribution of the proceeds of a vessel called *The Ripon City*, called at the time of the sale *The Ripon City* or *Silvia*.

The deductions now in question which were claimed in argument before the registrar and before me are, I think, divisible under four heads; first the sum of £216 5s. claimed as brokerage at 2½ per cent. on the purchase-money. This sum has been allowed by the registrar, and I think rightly. The effect of the decree by consent was, in my opinion, that Mrs. Balls and Mr. R. K. Donald, whom I will speak of as the plaintiffs, are to be treated as acquiescing in the sale as a sale, but with the reservation of all rights as to distribution of the proceeds; the gross sum realized being £8,650. It was argued before me that the plaintiffs as mortgagees could on a sale add their costs of it to their claim on the purchase-money, and should be permitted to do so now. No doubt the plaintiffs could do this as against their mortgagors but not as against the owners of other shares in the ship. Secondly, the most important question in this case arises with regard to the maritime liens on the ship which were cleared off by the interveners. The registrar has allowed the deduction of the amounts secured by lien which were paid by the interveners to Messrs. Cory in consequence of the decision of Barnes, J. (see *The Ripon City*, [1897] P. 226), and also of Messrs. Cory's costs on the ground that this lien was in existence at the time of the sale of *The Ripon City* to the Italian purchaser. But there appears to me to be no difference between the different maritime liens imposed by the conduct of Neil M'Lean & Co., and the case is the same as if the interveners had, instead of giving bail, then paid all such liens.

There is, then, but one question of law involved, and to this counsel for the interveners addressed their main argument. They contended that on the true construction of the transaction between the interveners and Messrs. Neil M'Lean & Co. the interveners ceased to be owners, and became either mortgagees, or at least unpaid vendors, with a security for payment of the purchase-money; that they took possession in order to enforce their security; that they could not enforce their security for sale without clearing off the maritime liens on the ship; and so, having not indeed relieved the mortgagees of the eight shares from personal liability, but having relieved their property from a prior incumbrance,

fully-licensed house known as the Rising Sun Inn, Bradford-on-Avon.

Prior to March, 1897, the premises were rated at £18 15s. gross and rateable value at £15. In January of that year Messrs. Wilkins Brothers, brewers, purchased them at public auction for £2,810, and they were the present owners. The premises were let by them to White as a tied house on an annual tenancy of £27 10s., and he is at the present time their tenant.

In March, 1897, a new valuation list was made, and the gross rental and rateable value appeared as £85 and £70 respectively. In September of that year these assessments on appeal by White were reduced by the assessment committee to £70 and £58. White then appealed from that assessment to quarter sessions, and at the hearing evidence was given that in recent years there had been great competition among rival firms of brewers in the district for the purchase or renting on lease of licensed houses in order to sub-let them as tied houses, the brewers looking for a return on the capital not merely to the rent charged, but to the increased profits made by the sale of their beer to the tied tenant. It was proved that for this reason if the licensed premises had been in the market to be let on a tenancy for a term of years, brewers intending to convert them into a "tied" house would be willing to give a rent sufficiently high to support the assessment appealed against, but that if the house was let on a yearly tenancy as a free house brewers would probably give a rent higher by £10 or £15 a year than the rent of £27 10s. paid by White as an ordinary tenant, but that such an increased rent would not be sufficiently high to support the assessment appealed against.

The quarter sessions held that in arriving at the value for rating purposes of the premises it was the hereditament, independently of and without reference to any personal contract with the brewers, that had to be assessed, in fact the free house, not excluding the competition of brewers as hypothetical tenants, but excluding any personal contract made between the publican and his brewers. They therefore put the rateable value of the premises in question at £35.

The assessment committee appealed.

Foote, Q.C. (*Radcliffe* and *T. H. Parr* with him), for the appellants, contended that the net annual value of such licensed premises within the meaning of the Parochial Assessment Act, 1836, s. 1, was the full value to the owner and not their value to the tenant in fact occupying the same. The rent in the present instance was admittedly less than the market value of the premises: *Reg.* v. *Wells*, 15 W. R. 1059, L. R. 2 Q. B. 542.

T. T. Bucknill, Q.C., and *Hon. H. L. Lopes*, for the respondent, argued that the true test of the net annual value of such licensed premises was the rent that an ordinary tenant would give intending to occupy from year to year the premises as a "free" house for the purpose of carrying on there his own retail business as a publican; not what the brewers in competition with other brewers would give for the purpose of converting the premises into a "tied" house: *Dodds* v. *The Assessment Committee of South Shields*, 43 W. R. 532, [1895] 2 Q. B. 133 (see also *London County Council* v. *City of London Breweries*, [1898] 1 Q. B. 387, at p. 393, per Wright, J., as to principle laid down in *Dodd's case*).

Cur. adv. vult.

May 24.—RIDLEY, J., read the following judgment: This was a case stated by the quarter sessions for the county of Wilts upon an appeal by the occupier of a public-house in the parish of Bradford-on-Avon against the assessment of such house to the poor rate. The assessment committee had assessed the house at £85 gross estimated rental and £70 net rateable value, but the quarter sessions reduced the assessment to £35 gross estimated rental and £28 net rateable value. It was not contended before us that the value put on the house by the assessment committee could be maintained, but it was contended that the gross estimated rental should be £45, and not £35. The point arose in the following way: The house in January, 1897, was purchased by a firm of brewers for a large sum and by them let to the appellant as a tied house on a rental of £27 10s. per annum. It was not argued that this figure furnished the proper rental on which to base the rateable value, nor, since the decision of *Overseers of the Poor of Sunderland-near-the-Sea* v. *Sunderland Poor Law Union*, 13 W. R. 943, 34 L. J. M. C. 121, was it possible to do so with success. The rental must be estimated according to the statute 6 & 7 Will. 4, c. 96, which statute requires it to be based on the corporeal hereditament, taking into account the more permanent elements of value to be found therein, but without allowing for the effect of temporary contracts and other such accidents. It is the rent at which the premises may reasonably be expected to let on a yearly tenancy, not that at which they may let when certain contracts of a personal nature affecting the rental are in existence between the landlord and tenant. The hypothetical tenant is to be a tenant supposed to take the hereditament as it stands and used as it is, so far as the nature of the premises goes—that is to say, as a public-house, as ironworks, or dwelling-house, as the case may be; but, while that is true, the value of the hereditament is not to be affected by contracts or conditions not directly bearing on the occupation or use of the property, but of a personal and collateral character. Now, in this present case the contention of the respondent is set out in paragraph 11 of the case as follows: "The true test was the rent an ordinary tenant intending to occupy the premises from year to year, as a 'free' house for the purpose of carrying on his own retail business as a publican would give, not what a brewer in competition with other brewers would give for the purpose of converting the premises into a tied house for the exclusive sale of his (the brewer's) beers, thereby increasing the profits of his own business." This appears to me to be correct according to the rules above stated. The "ordinary tenant intending to occupy the premises as a free house from year to year" is in the same position as the hypothetical tenant of the statute; he is willing to give the rent for the premises, not for the business carried on upon them. The rent so estimated is found by the case to be £30 to £35. What, on the other hand, was the contention of the appellants? It is set out in paragraph 12, and was that the net annual value of the premises was "their value to the owner, and not their value to the tenant in fact occupying the same, and that the premises should be assessed at the value at which they would let to a hypothetical tenant from year to year (all possible competitors who would be willing to take the premises from the owner being taken into account as possible hypothetical tenants), and that therefore the competition of brewers ought to be taken into consideration, although they did not in fact themselves intend to occupy the premises, and that the area of competition ought not to be restricted to such intending tenants as would themselves occupy the premises in question." This can hardly be understood without reference to paragraph 10, from which

by the House of Lords in *Thorne* v. *Cann*, [1896] A. C. 11, 43 W. R. Dig. 121. "Now, in a court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive it is presumed that his intention was to keep it alive, but it is manifestly for his own benefit. On the other hand, when the owner of an estate in fee or in tort pays off a charge the presumption is the other way; but in either case the person paying off the charge can by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it, but if there is any reason for keeping it alive such as the existence of another incumbrance, equity will not destroy it." In the present case there was, no doubt, strong reason on the part of the interveners for keeping alive the charge enforceable by law, and no doubt also the interveners could have taken an assignment of the rights of the lien-holders when they paid off to a trustee or even perhaps to themselves. But is there enough or indeed anything beyond the fact of the payment off to show that the interveners, in giving bail, which I have treated as equivalent to paying off the maritime liens, intended to keep them alive for the purpose of maintaining a priority for such payment as against the mortgagees? I cannot think that there is. The interveners, when they gave bail, probably did not believe in the validity of the arrest; but in determining to put an end to it I think that their real object, or at least an obvious and sufficient object, was to keep the conduct of the sale of the ship in their own hands and so certainly obtain the brokerage and probably get a better price for the vessel instead of allowing her to run the risk of being condemned by the court and sold by auction, and they did this prudently enough for their own benefit partly as holders of at least fifty-two sixty-fourths of her, and partly as entitled to claim against Neil M'Lean & Co. anything their equity of redemption of the eight shares might produce. It would be, I think, a mere fiction to suppose that it was intended to keep the liens alive for any purpose, I can therefore discover no ground on which the interveners can claim a priority over the mortgagees for any of their payments in discharge of liens. Thirdly, when the interveners took possession of *The Ripon City* she was under a charter-party made by Neil M'Lean & Co. This charter-party was of an onerous kind, and accordingly the interveners on the 9th of April, 1897, paid £325 for its cancellation. It is contended that before that date both Mrs. Balls and Mr. R. K. Donald had become mortgagees in possession. This turns on certain correspondence which passed between the interveners, Mrs. Balls' solicitor, and Mrs. Balls herself. There is no doubt that in this correspondence Mrs. Balls' solicitor spoke of her as "mortgagee now in possession of four shares," and the interveners accepted that statement in their replies. But it is clear to me that on the side of Mrs. Balls there was misapprehension of the probable effect in law of the language employed, and on the side of the interveners there was misapprehension of the legal effect of Mrs. Balls becoming a mortgagee in possession, and on the whole I am of opinion that no act was done by or on behalf of Mrs. Balls which made her a mortgagee in possession. I come to the same conclusion as to Mr. Donald, the evidence with regard to his case being of the same character, but somewhat weaker than that with regard to Mrs. Balls. But whether they took possession or not neither Mrs. Balls nor Mr. Donald gave any express authority to pay anything for the cancellation of the charter, though Mrs. Balls was aware that the cancellation was intended and consented to it, and in the absence of any such authority I do not think that the interests of either of them can be held liable.

Fourthly, the remaining point turns on the claim to make deductions in respect of the repairs to the vessel. This clearly must be limited to the cost of any repairs done in consequence of the promise in the agreement for sale to the Italian purchaser. I think such costs should be deducted if it could be proved that they were incurred after and in pursuance of the agreement for sale. But I agree with the finding of the learned registrar that no such proof has been given, and I have no doubt that the repairs were practically completed before the agreement for sale.

I am of opinion, therefore, that the only deduction to be allowed is the claim for brokerage, and the account must be reformed accordingly. The plaintiffs, of course, cannot have more than the amount of their mortgages and interest. I think that the plaintiffs are entitled to the costs of the action, of the reference before the registrar, and of these objections.

Solicitors for plaintiffs, *Ince, Colt, & Ince.*

Solicitors for interveners, *William A. Crump & Son.*

House of Lords

From C. A. (England). March 18.

LIQUIDATION ESTATES PURCHASE CO. v. WILLOUGHBY AND OTHERS. (a.)

Mortgage—Assignment of fund—Notice—Purchase of mortgaged property—Payment off of incumbrance—Intention to keep alive.

Where a person in possession of a fund on which others have charges has received notice of an assignment of his rights by one of the persons entitled to a charge, and nevertheless makes payments to the assignor, the rights of the several persons entitled to the charge, to what remains of the fund, cannot in any way be affected by such payments.

Where neither the deed nor the circumstances under which an assignment is executed shew an intention to extinguish an incumbrance paid off, such incumbrance will not merge, but be considered as still existing.

This was an appeal from an order of the Court of Appeal (Lindley and A. L. Smith, L.JJ., Kay, L.J., dissenting), 44 W. R. 612, [1896] 1 Ch. 726.

The facts are set out in Lord Herschell's judgment, and in the report in the court below.

Swinfen Eady, Q.C., and *Dauney* (*Edward Ford* with them), for the appellants.

Cozens-Hardy, Q.C., and *Vernon Smith, Q.C.* (*W. C. Druce* with them), for the respondents.

Thorn v. *Cann*, [1895] A. C. 11, 43 W. R. Dig. 121; *Toulmin* v. *Steere*, 3 Mer. 210; *Adams* v. *Angell*, 25 W. R. 139, 5 Ch. D. 634; and *Shaw* v. *Foster*, 20 W. R. 907, L. R. 5 H. L. 321, were referred to.

The House took time for consideration.

EARL OF HALSBURY, L.C.—The facts out of

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

brewers might for reasons connected with their own business be willing to give were to be treated as the gross estimated rental of the premises because those sums might be got from brewers, then it was wrong. The decision of the quarter sessions was right in principle. They did not appear to have adopted that part of White's contention which was erroneous. They had not "excluded brewers as competitors," as they were invited to do, but they had for some purpose considered the effects of that competition. Their order must be affirmed.

Appeal dismissed.

Solicitors for the appellants, *Berkeley, Calcott, Holloway, & Tudor*, for *Beaven & Compton*, Bradford-on-Avon.

Solicitors for the respondent, *Eyre, Dowling, & Co.*, for *C. J. Jones*, Trowbridge.

(1902, 2 K.B. 746

Q. B. Div.
(Wills and Kennedy, JJ.) May 13.

MILLER v. JUSTICES OF DUDLEY. (a.)

Licensing Acts—Serving reputed prostitutes—Reasonable time for refreshments—Affirmative evidence of offence alone will support conviction—Licensing Act, 1872 (c. 94), s. 14—*Summary Jurisdiction Act*, 1879 (c. 49), s. 39.

M. was convicted under section 14 *of the Licensing Act*, 1872, *of having permitted a reputed prostitute to remain on licensed premises longer than a reasonable time for the woman to take refreshments.*

Held, that the conviction must be quashed because the evidence of the offence having been committed given by the prosecution was in fact circumstantial; and before a publican could be convicted affirmative evidence in every case must be given by the prosecution;

Held, also, that under the Summary Jurisdiction Act, 1879, s. 39, *the onus of proving the offence rests on the prosecutor, and that the defendant was right in not calling evidence to rebut the charge.*

Case stated by the justices for the county of Worcester.

The appellant, Mary Miller, had been convicted before the justices at sessions of an offence under section 14 of the Licensing Act, 1872, and the question for the decision of the court was whether that conviction ought to stand.

The appellant was the occupier of a beerhouse known as the "Mountain Ash," in the borough of Dudley, and was summoned for having on the 29th of September, 1897, permitted reputed prostitutes to frequent her licensed premises and remain there longer than was necessary for the obtaining of reasonable refeshments contrary to section 14 of the Licensing Act, 1872.

The facts proved before the magistrates were that a woman named Higgins of the unfortunate class on the night in question was found upon the appellant's premises by the informant, a police-constable. As soon as he entered the appellant spoke to the woman, who immediately left. No evidence was offered as to whether the woman had gone to the house for the purpose of obtaining refreshment or not, nor how long she had been upon the premises, and all that the case stated was that at the time the informant saw Higgins she was not partaking of any refreshment.

The appellant called no witnesses and contended that the evidence offered by the prosecution was not sufficient to justify a conviction under the section, since the prosecution was bound to prove, not only that the publican knowingly permitted reputed prostitutes to resort to his premises, but also that he allowed women of that class to remain there longer than was necessary for the purpose of refreshment—the mere serving of such persons being in itself no offence—and that the prosecution had offered no evidence at all to prove that she had allowed Higgins to remain on the premises longer than the woman was entitled to be there.

The majority of the magistrates were of opinion that upon the evidence the appeal should be dismissed with costs, subject to the decision of the High Court whether, on the facts, the conviction could be maintained.

Hon. A. Lyttelton (*T. R. V. Merchant* with him), for the appellant.—The onus of proving that an offence has been committed rests on the prosecution. It is not sufficient for the prosecution to state facts from which the inference may be drawn that an offence was committed. There is no evidence here that Higgins had been served with any refreshment, nor as to the length of time she was on the premises, or that the appellant knew she was there at all until, seeing the constable enter, she saw her for the first time and at once asked her to leave. [He was stopped.]

Horace Avory, for the justices.—The prosecution gave all such evidence as it was possible for them to put forward, and it rested on the defendant to show that the charge was ill-founded. Under the Act of 9 Geo. 4 it was an offence to permit such a person as Higgins to frequent licensed premises at all. Then case after case was decided in which if the reputed prostitute was merely supplied with refreshment and left so soon as she had partaken of it no penalty was imposed. This case law became statute law by the passing of this 14th section of the Act of 1872. It was true that the constable said he did not see the woman take any refreshment, and the inference was that either she had not gone there to get refreshment or, having finished whatever she had ordered, she had remained on after the time when she ought to have left. [WILLS, J.—There is a third inference. The time that the constable entered was the time that the woman ought to leave the premises.] When a charge was lodged against a person under a statute it was for the person accused to prove that he came within some exception in his favour under that statute, not for the prosecution to prove that the exception or proviso did not assist the defendant.

WILLS, J.—I think this conviction cannot be supported. I should be most reluctant indeed to give a decision which would throw any real difficulty in the way of administering the law under this section; I am bound to consider the evidence from both sides, and it is clear, whatever may be the real facts—and I admit I have a very strong suspicion of what they really were—that the evidence offered by the prosecution as stated in the case will not support the charge. There is no evidence to prove that the innkeeper knew Higgins was on the premises—she might have been there an hour, or she might have only just come in—or that Higgins went there except for refreshments, or had remained longer than a reasonable time to take refreshments. A conviction ought not to be obtained on mere suspicion, however strong the circumstantial evidence might appear to be. During the argument our attention was called to the changes the Summary Jurisdiction Act, 1879,

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

s. 39, has made in the procedure under the Act of 1872. It was contended that the onus of proving that reputed prostitutes had not remained beyond the time reasonably required for them to take refreshments now rested on the innkeeper. The charge, Mr. Avory contended, having been made against the defendant, the onus of disproving it rested on him. That, in my opinion, is a wrong contention. It rests with a prosecution in every case to prove the charge made. For the prosecution to succeed the party alleging the offence must make out an affirmative case. The appeal will therefore be allowed, and the conviction quashed.

KENNEDY, J., concurred.

Lyttelton.—Will your lordships allow the appeal with costs?

WILLS, J.—I think there should be no order for costs made against the justices, although they have opposed this appeal, since in doing so they have assisted the court very much.

Solicitors for the appellant, *G. S. Warmington & Co.*, for *Warmington, Thompson, & Warmington, Dudley.*

Solicitors for the respondent justices, *Emmett & Co.*, for *A. W. Barradale*, clerk to the said justices.

Q. B. Div.
Wills and Kennedy, JJ.) May 5.

HORTON & CO. (LIMITED) (*Appellants*) *v.* THE GUARDIANS OF WALSALL UNION (*Respondents*). (*a.*)

Poor rates—Gross estimated rental—Rateable value—Appeal against rateable value—Right of rating authority to adduce evidence to increase gross value in rate-book—Parochial Assessments Act, 1836 (6 *&* 7 *Will.* 4, *c.* 96), *s.* 1.

On a ratepayer's appeal to quarter sessions against a poor rate on the ground that, though the estimated gross rental in the rate-book is correct, the rateable value is too high in consequence of a sufficient sum not having been allowed for deductions, the rating authority are bound to accept the gross value as appearing in the rate-book, and cannot, in order to show that the rateable value is not too high, give any evidence to show that in fact the gross estimated rental as appearing in the rate-book is too low.

Case stated by the court of quarter sessions for the County of Stafford.

Upon the hearing of an appeal by the quarter sessions on the 17th of November, 1897, against a poor rate whereby the appellants were rated in respect of certain premises known as the Alma Works occupied by the appellants, in which rate the appellants were described as the owners and occupiers of the premises, and in which rate the gross estimated rental was put down at £750, the rateable value at £600, and the amount of the rate was 2s. in the pound, it was ordered that the rateable value be reduced to £415, and the appeal allowed subject to this case.

The appellants were the owners and occupiers of premises which comprise an area of about four and a-half acres of land upon which are erected buildings, machinery, and fixed plant.

Upon objection by the appellants to the assessment committee of the Walsall Union the gross estimated rental was reduced to £725, and the rateable value to £544. The appellants appealed to the quarter sessions, thinking the reductions made by the assessment committee insufficient.

On the hearing of the appeal the appellants accepted the above gross estimated rental of £725 as correct, and claimed, in order to arrive at the correct net annual value, to deduct from the said sum of £725 the sum of £310 at the least, which the appellants alleged represented the average annual expenditure upon repairs, insurance, and other expenses necessary to maintain the premises in a state to command the rent at which the same might reasonably be expected to let from year to year.

The respondents having made a re-survey of the premises, admitted that the annual average sum of £310 at least was required for insurance, repairs, and other expenses necessary to maintain the premises in a state to command the rent at which the same might reasonably be expected to let from year to year, but they said that such rent was in fact more than that shown in the rate as the gross annual value.

The respondents for the purpose of satisfying the court that the true net annual or rateable value of the premises upon which the rate was made according to the statute of 6 & 7 Will. 4, c. 96, section 1, was not less than £544, and that the appellants were not aggrieved by the gross estimated rental being underestimated in the rate, proposed to prove that the gross estimated rental and rateable value were in fact understated in the rate-book and valuation list, and for that purpose proposed to give evidence of the total present structural value of the buildings and such of the plant and machinery as was properly to be taken into account as enhancing the annual value, and to take a percentage upon such structural value which would give the true rateable value, and to such true rateable value the respondents agreed that the sum of not less than £310 should be added to arrive at the true estimated rental; and the respondents also proposed to show that the apparently insufficient deduction from the gross estimated rental to rateable value arose from both these items being considerably underestimated.

The respondents did not claim that either the gross estimated rental of £725, or the rateable value of £544, should be increased, but that the real point at issue was the net annual or rateable value of the premises, and they claimed the right to call the above evidence to show that the rate of £54 8s. (being the rate on the reduced rateable value of £544) was not made upon a higher sum than the true net annual value; and they also contended that in manufactories where the wear and tear of buildings and plant is great it is impracticable to enter a high gross estimated rental in the poor rate.

The appellants contended that the amount appearing in the valuation list as the gross estimated rental was conclusive, and that as that amount was admitted by the appellants the only question which the court had power to decide was what were the proper deductions and the amount thereof to be made from such gross estimated rental in order to arrive at the rateable value.

The respondents contended that, specifically disclaiming as they did any application to increase the gross estimated rental, they were entitled to adduce evidence which would show that the true net annual or rateable value of the premises had not been exceeded in the assessment, notwithstanding that they would thereby incidentally show that the gross estimated rental had been estimated at too low a figure.

The justices in quarter sessions were of opinion that the evidence offered by the respondents was, in

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

the circumstances, and having regard to the admissions of the respondents, inadmissible, and they accordingly rejected the same, and ordered the rateable value to be reduced as aforesaid to £415, and allowed the appeal.

The question for the opinion of the court was: Whether in the circumstances aforesaid, and having regard to the admissions of the respondents, the justices rightly rejected the said evidence.

Alfred Young and *G. C. Lewis*, for the respondents.—The court of quarter sessions were wrong in rejecting the evidence tendered by the respondents. The real point at issue was the net annual or rateable value, and the evidence rejected was to show that the net rateable value was not too high. Admitting that the amount of the deductions was £310, we were still entitled to show that the gross and rateable values were understated, and that therefore, although the deduction of £310 was made, the net rateable value would not have been less than £544. In most cases it is impossible to arrive at the gross value first, but you must arrive at the rateable first and then from that get the gross. That was the procedure adopted by the respondents here, as the evidence was to show that the net value was not less than £544. That evidence was admissible, although the effect of it may have been to show that the gross value also ought to be increased: *Reg.* v. *Wells*, 15 W. R. 1059, L. R. 2 Q. B. 542; *Reg.* v. *Fordham* (*Inhabitants of*), 11 A. & E. 73; *Reg.* v. *London School Board*, 55 L. J. M. C. 33, at p. 37; *Denaby and Cadeby Colliery Co.* v. *Assessment Committee of the Doncaster Union*, 78 L. T. 388.

A. T. Lawrence, Q.C., and *Disturnal*, for the appellants.—The quarter sessions were right in excluding this evidence. The gross estimated rental of £725 was accepted by the appellants, and the quarter sessions were bound to take that figure as settled. The deduction of £310 was admitted by the respondents, and if that sum be taken from the gross of £725, which must be taken to be fixed, then the net rateable value would stand at £415 as settled by the quarter sessions. When the gross value has once been fixed, then all that has to be done to arrive at the net is to make the necessary deductions. Section 1 of the Act 6 & 7 Will. 4, c. 96, shows how this is to be done. Under that section you have to consider what a hypothetical tenant from year to year would give for the premises; then that rent "free of all usual tenant's rates and taxes" is the gross estimated rental, and from that there has to be deducted the "probable average annual cost of the repairs," and the result would be the net or rateable value. The present case is really concluded by the decision of Day and Phillimore, JJ., in the case of *The Denaby and Cadedy Colliery Co.* v. *Assessment Committee of the Doncaster Union.*

Alfred Young in reply.

WILLS, J.—The difference in question in this case is small; it applies to only one rating, and any mistake may be corrected in the next rating. The question, however, is one of very considerable importance in the administration of the law as regards rating. Though the case is one of very considerable difficulty, and one on which much may be said on both sides, I have come to the conclusion that the view taken by the quarter sessions was right. The real substantial subject in dispute, and the thing that in almost every case is the only one that is of the slightest importance to the parties, is the net rateable value and what it ought to stand at. I am not in the least impressed by the argument urged for the appellants that if this decision were against them they would have lost an additional chance of disturbing this rate on the ground of inequality in the assessment of the gross rateable value. That is inevitable, but I confess that that hardship does not affect my mind in the least.

What I am impressed with is that the whole of this apparatus for rating and for appeals in respect of rating is statutory, and we have to look at the statutes alone to say what ought to be done or what ought not to be done. There are very elaborate provisions in these statutes for enabling the rating authorities to arrive at a just conclusion and to get their figures right. There are also elaborate provisions for enabling appellants to appeal, which may lead to many of the figures in the rate-book being altered upon an appeal; but, as it seems to me, there is no machinery by which the correct figure for the estimated gross value can be increased after the rate is once made up. No appellant will claim to be rated higher than he is rated; but if one could conceive such a case then it might fall within the section—namely, section 1 of 41 Geo. 3, c. 23, which would give power to amend it in such a case by raising it. I do not, however, think that the parish rating authority can ever claim the benefit of that section, which enables the quarter sessions to amend a rate instead of quashing it to get the figure amended by way of increase. The rating authorities, where there is an appeal against the rates, although it involves a question as to the gross rateable value, cannot, under that section, get the figure altered in their favour or for their benefit, because the power to give relief and save the rate from being quashed only applies in cases in which, but for the Act of Parliament, the rate would have been liable to be quashed. Therefore it does not apply in a case in which there is either no appeal against the gross rateable value, or in which, there having been an appeal, it has been dropped, and no question arises in respect of it, or indeed in any case in respect of the gross estimated value being too low, because the rate would not be quashed simply because that was not high enough. Therefore there was no power under the circumstances of this case to alter the figure of the gross estimated rental, and that figure in the rate-book consequently stands, and it would be wrong to say that the magistrates are to embark upon an inquiry which might lead to a second figure—namely, the net rateable value, being altered in such a way that the relations between these two figures of gross and net values would be disregarded and violated.

I think, therefore, that it is not within the functions of the court of quarter sessions to make such an alteration—that is to say, they cannot have power to alter a rate which they may know to be wrong; and if they cannot do so, they must be confined to seeing that the proper deductions are made and to bringing the net rateable value into harmonious relation with the initial figure of the gross estimated value. This view is in consonance with the view lately expressed in the case of the *Denaby and Cadeby Colliery Co.* v. *Doncaster Union*, which expression of opinion we think was right. I may also add that there is no machinery provided for doing that which would be necessary to be done in this case in order to make the rate an harmonious and consistent one, and it is obvious that there is great convenience in insisting upon the finality of figures which have once been entered in the rate-book. A case was put during the argument in which there might be a real wrong growing out of a contrary decision to that we are now giving, because it might be, and very likely would be, that an appellant who was satisfied with the gross estimated rental, but who was dissatisfied with the amount of the deductions, might come into court with a very good case as to the amount of the deductions, might

and if he were then to be met with a wholly new case of which he had no notice, as to the gross estimated rental not being sufficient, it would involve either an adjournment of the case or his having to embark upon a long inquiry of an expensive kind for which he may not be prepared, and which, in many cases, he would never have accepted if he had known that the gross estimated rental itself was going to be attacked. The view we are expressing is more consonant than the contrary view would be with the language of the first section of this Act of Will. 4, which is the starting-point in all these matters. That section starts with the gross estimated value as the thing from which deductions are to be made in order to arrive at the net; and however the gross value is to be arrived at, the Act seems upon the whole to indicate, as was said in the *Denaby and Cadeby Colliery Co.* v. *Doncaster Union*, that the gross value is the starting-point, and that the deductions are to be made from that. I think the court of quarter sessions were right in refusing to embark upon this inquiry, and that this appeal, therefore, must be dismissed.

KENNEDY, J.—I am of the same opinion and for the same reasons.

Order of quarter sessions affirmed.

Solicitors for the appellants, *E. Flux & Leadbitter*, for *Slater & Co.*, Darlaston.

Solicitors for the respondents, *Smiles & Co.*, for *L. W. Lewis & Sons*, Walsall.

House of Lords.

From C. A. (England). April 25.

LONDON TRAMWAYS CO. *v.* LONDON COUNTY COUNCIL. (*a.*)

House of Lords—Decision on question of law final.

A decision of the House of Lords once given upon a question of law is conclusive upon the House afterwards.

This was an appeal from an order of the Court of Appeal affirming that of the Queen's Bench Division, whereby an application of the appellants that a certain award of Sir Frederick Bramwell made in an arbitration between the parties should be set aside or remitted to the arbitrator for further consideration was dismissed with costs.

The question before the House involved a reconsideration of previous decisions of this House—viz., *Edinburgh Street Tramways Co.* v. *Lord Provost and Magistrates of Edinburgh*, [1894] A. C. 456, and *London Street Tramways Co.* v. *London County Council*, [1894] A. C. 489, 43 W. R. Dig. 182.

Sir R. T. Reid, Q.C., and *Seward Brice, Q.C.* (*J. R. Paget* with them), for the appellants.

Freeman, Q.C., and *A. T. Lyttelton*, for the respondents, were not heard.

EARL OF HALSBURY, L.C.—I think your lordships are very much indebted to Sir Robert Reid and his learned junior for the candour with which this question has been raised. It would undoubtedly have been extremely inconvenient if, after hearing the case argued for a considerable time, the fact had been pointed out to us that there was a decision of this House which was conclusive upon the point. By the candour of the learned counsel, who very properly raised the question in the first instance, it has now been admitted that there is upon this very question a decision of this House.

For my own part I am prepared to say that I adhere in terms to what has been said by Lord Campbell and assented to by Lord Wensleydale, Lord Cranworth, Lord Chelmsford, and others, that a decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was *res integra*, and could be re-argued, and so the House be asked to reverse its own decision. That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries, and I am therefore of opinion that in this case it is not competent for us to re-hear, and for counsel to re-argue, a question which has been recently decided.

The only trace of authority for the proposition submitted to us by the learned counsel is that of Lord St. Leonards, and I give full effect to the argument of the learned counsel when I say no doubt that Lord St. Leonards did in the most unqualified manner lay down the proposition for which he contends. Whether that noble and learned lord was altogether satisfied with his own reasoning, I am not prepared to say. When I find the proposition coupled with such qualifications and such a preamble as Lord St. Leonards has introduced in his judgment, I entertain some doubt whether the noble and learned lord was perfectly satisfied in his own mind as to the logic of his reasoning. Whether he was or was not, the main point is that this House has on more than one occasion acted upon the principle to which I have referred. No more conspicuous case could arise, I think, than what occurred in the case of *Beamish* v. *Beamish*, 9 H. L. Cas. 274, 10 W. R. H. L. Dig. 3. In that case some of the learned lords were of opinion that *Reg.* v. *Millis* 10 Cl. & F. 534 (in error) was wrongly decided, but nevertheless they acquiesced in that decision; that is to say, they held themselves bound by that decision in the subsequent case of *Beamish* v. *Beamish*, and treated that decision of your lordships' House as conclusive upon the question then under appeal.

It is totally impossible, as it appears to me, to disregard the whole current of authority upon this subject, and to suppose that what some people call an "extraordinary case," an "unusual case," a case somewhat different from the common, in the opinion of each litigant in turn is sufficient to justify the re-hearing and re-arguing before the final Court of Appeal of a question which has been already decided. Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is, perhaps, abstract justice, as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being re-argued, and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal. It is interest *rei publicæ* that there should be *finis litium* at some time, and there could be no *finis litium* if it were possible to suggest in each case that it might be re-argued, because it is "not an ordinary case," whatever that may mean. Under these circumstances I am of opinion that we ought not to allow this question to be re-argued.

I only wish to say one word in answer to a very ingenious argument which the learned counsel set before your lordships. It is said that this House

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

might have omitted to notice an Act of Parliament or might have acted upon an Act of Parliament which was afterwards found to have been repealed. It seems to me that the answer to that ingenious suggestion is a very manifest one—namely, that that would be a case of a mistake of fact. If the House were under the impression that there was an Act when there was not such an Act as was suggested, of course they would not be bound when the fact was ascertained that there was not such an Act, or that the Act had been repealed, to proceed upon the hypothesis that the Act existed. They would then have ascertained whether it existed or not as a matter of fact, and in a subsequent case they would act upon the law as they then found it to be, although before they had been under the impression, on the hypothesis I have put, either on the one hand that an Act of Parliament did not exist, or, on the other hand, that an Act had not been repealed (either case might be taken as an example) and acted accordingly. But what relation has that proposition to the question, whether the same question of law can be re-argued on the ground that it was not argued or not sufficiently argued, or that the decision of law upon the argument was wrong? It has no application at all.

Under these circumstances, it appears to me that your lordships would do well to act upon that which has been universally assumed in the profession, so far as I know, to be the principle—namely, that a decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House. For these reasons, I move your lordships that this appeal be dismissed with costs.

Lord MACNAGHTEN, Lord MORRIS, and Lord JAMES OF HEREFORD concurred.

Solicitors for the appellants, *Murray, Hutchins, & Stirling.*

Solicitor for the respondents, *W. A. Blaxland.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) [and Chan. Div. (Byrne, J.)] — March 24, 25; June 10, 11, 16.

WARD *v.* MAYOR, ALDERMEN, AND BURGESSES OF PORTSMOUTH. (*a.*)

Burial—New burial-ground—Addition to an old burial-ground—Approval of Secretary of State—Burial Act, 1852 (15 & 16 *Vict. c.* 85), *ss.* 25, 26, 28—*Burial Act,* 1853 (16 & 17 *Vict. c.* 134), *ss.* 1, 6.

Under the Burial Act, 1852, *a burial board can buy land or appropriate parish land, or accept a gift of land, for the purpose of a burial-ground without the preliminary sanction of a Secretary of State.*

The restriction contained in section 6 *of the Burial Act,* 1853, *as to the opening of any new burial-ground without the consent of a Secretary of State applies only to the "provision and user" of such burial-ground, and not to its acquisition by a burial board.*

Consequently it is intra vires *of a burial board, or their statutory successors, to acquire ground adjacent to their existing burial-ground as an addition to it without obtaining the approval of a Secretary of State.*

So held by the Court of Appeal, *reversing the decision of* Byrne, J.

This was an action against a municipal corporation upon a contract to purchase a piece of land to be used as an addition to a burial-ground already existing, the approval of the Home Secretary not having been obtained.

In August, 1889, the plaintiff, William Ward, agreed to sell, and the burial board for the parish of Portsmouth agreed to purchase, certain land at Portsea, adjoining a burial-ground vested in the corporation, and intended to be used as an addition to or enlargement of the existing burial-ground. The purchase-money was £6,270, of which £100 was paid upon the signing of the contract, and the residue was to be paid upon completion, the date of which was fixed for the 24th of June, 1896. The vendor was to remain in possession in the meantime, and to be at liberty to work the land as a brickfield. The approval of the vestry had previously been obtained.

In January, 1895, the Corporation of Portsmouth, acting as an urban sanitary authority, passed a resolution in conformity with section 62 of the Local Government Act, 1894, whereby the powers, duties, property, and liabilities of the burial board were transferred to the corporation, who became their successors as from the 11th of June, 1896.

In 1854 an order in council was made under section 1 of the Burial Act, 1853, restraining the opening of any new burial-ground in Portsmouth without the previous approval of a secretary of state. The corporation in consequence applied to the Home Secretary for his approval to the land agreed to be purchased being used as a burial-ground, but the Secretary declined to accede to the application upon the ground that the land being within 100 yards of dwelling-houses the case came within the prohibition of section 9 of the Burial Act, 1855. Thereupon the corporation refused to complete the purchase of the land, and the vendor brought this action for specific performance of the agreement, or in the alternative for damages for its breach.

The following sections of the Burial Acts are the material ones:

Burial Act, 1852 (15 & 16 Vict. c. 85), s. 25.—Every burial board shall, with all convenient speed, proceed to provide a burial-ground for the parish or parishes for which they are appointed to act, and to make arrangements for facilitating interments therein; and in providing such burial-ground the board shall have reference to the convenience of access thereto from the parish or parishes for which the same is provided; and any such burial-ground may be provided either within or without the limits of the parish, or all or any of the parishes for which the same is provided; but [no ground not already used as or appropriated for a cemetery shall be appropriated as a burial-ground, or as an addition to a burial-ground, under this Act, nearer than 200 yards to any dwelling-house without the consent in writing of the owner, lessee, and occupier of such dwelling-house]. (The words in brackets have been repealed.)

Section 26.—For the providing such burial-ground it shall be lawful for the burial board, with the approval of the vestry or vestries of the parish or respective parishes, to contract for and purchase any lands for the purpose of forming a burial-ground, or for making additions to any burial-ground to be formed or purchased under this Act, as such board may think fit. . . .

Section 28.—It shall be lawful for any such board,

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

with the approval of the vestry, to sell and dispose of any lands purchased by them under this Act, or any part thereof, in which no interment shall have taken place, and which it may appear to the board may be properly sold or disposed of. . . .

Burial Act, 1853 (16 & 17 Vict. c. 134), s. 1.—In case it appear to her Majesty in council, upon the representation of one of her Majesty's principal secretaries of state, that for the protection of the public health the opening of any new burial-ground in any city or town, or within any other limits, save with the previous approval of one of such secretaries of state, should be prohibited, or that burials in any city or town, or within any other limits, or in any burial-grounds or places of burial, should be wholly discontinued, or should be discontinued subject to any exception or qualification, it shall be lawful for her Majesty, by and with the advice of her privy council, to order that no new burial-ground shall be opened in such city or town, or within such limits, without such previous approval, or (as the case may require) that after a time mentioned in the order burials in such city or town, or within such limits, or in such burial-grounds or places of burial, shall be discontinued wholly, or subject to any exceptions or qualifications mentioned in such order, and so from time to time as circumstances may require. . . .

Section 6.—Where by any such order in council as aforesaid it is ordered that no new burial-ground shall be opened in any city or town, or within any limits therein mentioned, without the previous approval of one of her Majesty's principal secretaries of state, no new burial-ground or cemetery (parochial or non-parochial) shall be provided and used in such a city or town, or within such limits, without such previous approval.

Burial Act, 1855 (18 & 19 Vict. c. 128), s. 9.—So much of the said Act of the 15th and 16th years of her Majesty as enacts that "No ground . . . such dwelling house," shall be repealed; but no ground not already used as or appropriated for a cemetery shall be used for burials under the said Act or this Act, or either of them, within the distance of one hundred yards from any dwelling-house, without such consent as aforesaid.

Warmington, Q.C., Astbury, Q.C. and *Methold*, for the plaintiff.—The only thing prohibited is a *new* burial-ground. There is no prohibition of the enlargement of an existing one, which is all that is proposed to be done here. The approval of the secretary of state is not then necessary, and the contract is not *ultra vires*, and the defendants are bound to complete. In the Burial Act, 1852, s. 25, an addition to a burial-ground is mentioned as something distinct from a new burial-ground, and so in section 26. When, therefore, we find no mention of an addition in section 6 of the Burial Act, 1853, we must suppose the section was not intended to apply to such a case. In any case there is nothing *ultra vires* in the burial board making the contract, or the corporation taking it over. The prohibition only extends to actually using the land as a burial-ground: *Cowley (Lord)* v. *Byas*, 26 W. R. 1, 5 Ch. D. 944. They can sell it again if they choose (see Burial Act, 1852, s. 28).

Eve, Q.C., Macmorran, Q.C., and *George Williamson*, for the defendants.—A piece of land bought for a burial-ground is not the less a new burial-ground because it adjoins an existing one. Suppose the old ground was full, would not further land be a new ground? New ground means any ground used for the first time for the purpose. On the plaintiff's contention you may extend the old cemetery to any extent, but you may not add a single acre across the road. The contract was consequently *ultra vires*. The burial board could only acquire land for the specific purpose, and they had not the approval of the board which was requisite under the Burial Act, 1855: *Stevens* v. *Gourley*, 8 W. R. 85, 7 C. B. N. S. 99.

[They also cited *Reg.* v. *Burial Board of Kilham*, 1 Times L. R. 577.]

BYRNE, J.—In this case the plaintiff, on the 1st of August, 1889, entered into a contract with the burial board for the sale of certain property. The land was wanted by the board for use as a burial-ground, and was adjacent to a burial-ground which the board already had, and it was wanted to make, what I may call without prejudice to the question I have to decide, "an addition" to the old burial-ground. The contract was not to be complete until after the lapse of a term of years, and in the meantime the plaintiff was to have a certain use of the property. The term has elapsed, and the plaintiff now asks for specific performance against the corporation of Portsmouth, who are the transferees under statute of the burial board; and the case may be treated as against them as if it were a case against the burial board.

The question arises upon the construction of certain Burial Acts. The first of these is the Burial Act of 1852, which provides, by section 25, that "Every burial board"—[His lordship read the section, and continued:] The latter part of the section containing the provision beginning with the words "But no ground" has since been repealed and a new provision substituted to which I need not refer. But it is legitimate to refer to this latter part of section 25 for the purpose of ascertaining whether other provisions, to which I shall have to refer, relate to property wanted (as in the present case) as an addition to a burial-ground. It has been pointed out that while the first part of the section speaks of "a burial-ground," the latter part speaks of "a burial-ground" and of "an addition to a burial-ground," as though the latter was something different from a burial-ground.

Then by section 26; "For the providing of such burial-ground it shall be lawful for the burial board, with the approval of the vestry or vestries of the parish or respective parishes, to contract for and purchase any lands for the purpose of forming a burial-ground, or for making additions to any burial-ground to be formed or purchased under this Act, as such board may think fit." Then follows a provision whereby the burial board may for the same objects purchase an existing cemetery or cemeteries or parts subject to certain existing rights. The rest of the section is immaterial for the present purpose. Section 28 provides, "It shall be lawful"—[His lordship read the section down to "disposed of"]. Then follow provisions for carrying out the earlier part of the section. Now, without referring at present to the Burial Act of 1853, what is the true meaning of section 25? A duty is imposed on the board with all convenient speed to provide—not a new burial-ground, but—a burial-ground. This burial-ground may or may not be new, because the board may acquire, and acquire only, an already existing burial-ground. Or again, they may acquire an existing burial-ground, and in addition to it other land to be used with it. Or thirdly, they may provide fresh land only. In the latter part of this section 25 we find a provision inserted for the protection of occupiers of lands near the burial-ground, that no ground not already so used shall be appropriated as a burial-ground or as an addition to a burial-ground nearer than the distance mentioned without the

consent of those occupiers. Thus, this part of the section contemplates the possibility of the board acquiring an already existing burial-ground. If the words "or as an addition to a burial-ground" had been omitted, it would have been open to the contention that if an existing burial-ground had been acquired, and some extra ground was required to be used with it, the two together would constitute ground "already used or appropriated as a cemetery." Whether such a contention would have succeeded or not I do not know, but it appears to me that the words "or as an addition to a burial-ground" were probably inserted to avoid the possibility of such a contention. At that date the Legislature were not dealing with the case of the intervention by a secretary of state in pursuance of an order in council, and the only safeguard was (under section 28) the necessity of obtaining the approval of the vestry before purchasing. No question of this kind arises in the case before me, as this condition has been complied with. Coming to the Act of 1853, we find that by section 6 "Where by any order in council as there mentioned"—and such an order was passed before the contract in this case—"it is ordered"—[His lordship read the section].

On the one hand it is urged that, notwithstanding such an order in council, where there is an existing burial-ground, and it is only required to obtain an addition to it, the consent of the secretary of state is not required before entering into a contract for the purchase of land for such additional accommodation. I do not think that this is the right construction to place on the Act. I bear in mind the argument that has been addressed to me on section 1 of this same Act of 1853, but I think that what was meant was, that after the passing of the order no new burial-ground, whether to be used alone or as an addition to an already existing one, is to be "provided and used" without the previous approval of a secretary of state. Where you have ambiguous expressions in an Act of Parliament, and have to choose between two constructions, it is legitimate to test the meaning by the probable results. Now, on the other construction it has been pointed out that where the secretary of state has authorized a small burial-ground, say of one or two acres in extent, in a particular part of the town, he may have taken into consideration the accompanying circumstances, as the nature of the soil, the way in which the surrounding property was occupied, and other conditions, and yet it might be that if they were so minded, the moment after he had given his consent the burial board might acquire 100 or 150 acres more, so long as these 100 or 150 acres formed an addition to the other ground, without any such consent or approval. On the other hand, it is said that the Legislature may have well thought that when a burial board had been constituted, and a new burial-ground provided, it might be fairly left to the board to consider whether or not an addition should be made. But if so, I do not see why the board should not have been trusted to open an altogether new ground without further consent. I think, therefore, that section 6 applies to a new burial-ground which is an addition to an existing one as well as to a burial-ground which is not an addition.

Judgment for the defendants.

The plaintiff appealed.

Warmington, Q.C., Astbury, Q.C., and *Methold*, for the appellant, used the same arguments as in the court below, and cited *Eastern Counties Railway Co.* v. *Hawkes*, 3 W. R. 609, 5 H. L. Cas. 331; *Adams* v. *Weare*, 1 Bro. Ch. Cas. 567; and *Baily* v. *De Crespigny*, 17 W. R. 494, L. R. 4 Q. B. 180.

Robson, Q.C., Eve, Q.C., and *George Williamson*, for the respondents.

LINDLEY, M.R.—The facts of this case are not really in dispute. I will state them very shortly. [His lordship stated the facts, and continued:] Hence this litigation; and what we have to consider is the question whether the sanction of the Secretary of State ought to have been obtained by the burial board in or before August, 1889, when the burial board entered into this contract? If the sanction of the Secretary of State was essential to the validity of the contract, of course the decision appealed from was right. If, on the other hand, it was not necessary to the validity of the contract, if the necessity of obtaining the sanction of the Secretary of State arose afterwards, then, whatever defence there might be to an action for specific performance, there would be none to an action for damages. That raises the next question whether the sanction of the Secretary of State is necessary in order to render the contract sued upon a valid contract. That turns upon the various Burial Acts which have been called to our attention, and in particular it turns upon the meaning and effect of section 6 of the Burial Act of 1853, which I will read. [His lordship read the section, and continued:] Now, in order to understand the meaning of that Act of 1853, which extends the Burial Act of 1852, and extends it, with some modifications, to the whole of England and Wales, it is absolutely necessary to understand the principal Act, which is the Act of 1852. We must understand not only the objects of it but the machinery provided by it; and I proceed therefore to address myself to the Act of 1852, and see if we can ascertain the meaning of a similar prohibition which is to be found there. Sections 2-8 provide for closing burial-grounds where the continued use of them may be injurious to public health. This part of the Act introduces the Secretary of State and orders in council. Sections 9-32 relate to the provision of new burial-grounds. By section 9 no new burial-ground can be "provided and used"—these are the words which occur and with which we have to deal—"without the sanction of the Secretary of State." The effect of that prohibition on the rest of the Act of 1852, which introduces the machinery for providing new burial-grounds, cannot be understood without examining a great variety of other sections. In order to provide a new burial-ground it is, first of all, necessary to constitute some authority to provide it, and that is done by sections 10, 11, and 24. The first step is to convene a meeting to consider whether a burial-ground shall be provided, and, if it is resolved to provide one, a copy of the resolution shall be sent to the Secretary of State. That is by section 10; but no approval by him of the proceedings is required, and if the resolution is passed, then a burial board is to be formed.

Now, pausing there, we have had an argument addressed to us as to the object of transmitting to the Secretary of State a copy of that resolution. I daresay the object of it is that he may be informed of what is going on. At all events the Act of Parliament does not say a word about what is to be done on that. That was complied with. When the burial board is formed under section 11, then it is incorporated by section 24. Then, as soon as the burial board is formed, it is to *provide* a burial-ground. I am obliged to lay emphasis on the word "provide" because that is the word with which we have to deal. That is contained in section 25 of the Act of 1852. This provision necessarily involves obtaining or appropriating land for the purpose, and section 24 authorizes the board to take and hold land for the purpose. That section, therefore, enables the

board to accept a gift of land from anyone who would be willing to make such a gift whether by deed or will. But the Act further empowers the board, with the consent of the vestry, to buy land for providing a burial-ground (that is, section 26) and with the consent of the vestry and the guardians, to appropriate parish land for the purpose of a burial-ground. That is section 29. Further the board is empowered to lay out and embellish any burial-ground provided by the board—that is, by section 30—and to build a chapel on any land purchased or appropriated for a burial-ground, and such burial-ground may be consecrated when in a fit and proper condition for interment. That is all in section 30. Then comes a proviso which is worth referring to: "And in providing any burial-ground the board is required to set apart a portion which shall not be consecrated." Supposing all this to be done, the land does not become the burial-ground of the parish until the bishop has consecrated it, or, if no consecration is necessary, has fixed a time for its becoming such burial-ground. That is section 32. When all that is done—when land is acquired, when it is made fit for the purpose, and when it is consecrated—then, and before, you get a complete burial-ground. One of the problems we have to solve is this, What do the words "providing land for a burial-ground" mean? I pass that over for the present. Provision is made by section 23 for providing burial-grounds for several parishes, and by section 20 for borrowing money with the sanction of the vestry and the Treasury for providing and laying out burial-grounds and building chapels upon them. Then by section 28 the board is empowered, with the approval of the vestry, to sell land purchased by the board under the Act, in which no interment has been made, and which the board may consider proper to be sold. That is the scheme of the Act of 1852. There are other sections. It is rather a long Act, but those are all, I think, which we need consider on the present occasion. I now come back to the prohibition contained in section 9. The word "providing" as applied to new burial-grounds clearly in some cases includes purchase. It must include that under section 20, which is the borrowing section; and so in section 25, as regards access the word "providing" means to include buying. "Buying" and "providing" do not appear to me to be synonymous expressions. "Providing" may include "buying" but it must include acquiring; you cannot provide a thing before you have got it; but a burial-ground may be acquired without buying. The words "in providing" which occur in the proviso in section 30, to which I have already alluded, can hardly mean buying or acquiring. They point to a later stage in the process of rendering the land referred to fit for a burial-ground. The process of providing a parochial burial-ground naturally begins with acquiring and ends with its consecration or the appointment by the bishop of a time fixed. Now section 26, which is the providing section which we have to consider, clearly authorizes the purchase of land out of the metropolis and the two miles' limit without the consent of the Secretary of State. The question is whether the consent of the Secretary of State is necessary for the purchase of land within those limits. I must say I do not think it is. If Mr. Robson could make out that it was, I think he would be successful, but I cannot come myself to that conclusion. Now when we turn to section 9, the language of which I have commented upon, it is to be observed that the prohibition is not a prohibition against acquiring land, and I do not find the the word "provide" used with reference to the acquisition of land. The word "provide" in this Act of Parliament is applied to providing burial-grounds, and it looks to me as if that word indicated something which was to take place after the acquisition and not before. If you put upon the word "provide" the sense contended for by Mr. Robson, that is to say, if you say it includes all the steps, including the first and the last, for obtaining a site for use as a burial-ground for the parish, then unquestionably these defendants have not provided in that sense. What they have done, and all they have done at present, is to take the first step and to acquire land with a view to providing. I do not think myself that in common parlance the defendants or rather the burial board who entered into this contract provided the land for the purpose of burial when they bought it considering that it was part of the bargain that the land should for the first six or seven years be used as a brickfield. The provision of the burial-ground did not arise so early, but it arose at some later date. I feel a difficulty in saying when exactly the provision begins, but feeling that difficulty I am not prepared to say on this Act of Parliament that it begins so early as acquiring land, whether it is by gift, or by appropriation, or by purchase. Now Bryne, J., felt this difficulty, and I feel it the same. He was impressed by the difficulty that unless the prohibition contained in the prohibitory section includes acquiring, that prohibition might just as well have been confined to using. I feel the full force of that, but, great as that difficulty is, I feel still greater difficulty in cutting down what appears to me to be the plain language of sections 26 and 29 which are addressed specifically to the first step in providing a burial-ground, namely, buying the land or setting apart parochial land for the purpose. Upon the Act of 1852, which is the Act on which the difficulty really arises, the only conclusion at which I can arrive is, that a burial board can buy land or appropriate parish land or accept a gift of land for the purpose of a burial-ground without the preliminary sanction of the Secretary of State, and whatever "providing" means in section 9 the prohibition there contained does not extend to the acquisition by purchase or otherwise of land for a burial-ground. The prohibition, be it observed, is not against "acquiring" but it is against "providing and using," an expression which is not without significance. So much for the Act of 1852.

Now I pass on to the Act of 1853, which extended the Act of 1852 to places to which that Act did not apply. The prohibition contained in section 6 of the Burial Act, 1853, is a mere repetition of, and is open to the same observations as, section 9 of the earlier Act. I say it is a mere repetition, although it is not exactly worded like it, but it is obvious that all the observations I have made on the earlier section apply to this. It is urged before us that section 6 of the Act of 1853 did not apply to new additions to burial-grounds as distinguished from new burial-grounds. Having studied the Act of 1852 and the Act of 1853 together, I am unable to assent to that argument. I think that if the plaintiff's case turned on that, and that alone, he would fail. Now, as regards the Burial Act of 1855, which we also have to consider; that amends the two former Acts, but I do not think it throws much light on the construction of the prohibitory sections contained in them. The end of section 6 of the Act of 1855 tends to show that the consent of the Secretary of State is not wanted for purchasing if they do not want to borrow under section 30; and section 17 of the Act of 1855, which enables burial boards with the sanction of the Secretary of State to let land purchased for burial purposes and not consecrated, and in which no interment has taken place, shows that land may be purchased before being consecrated or used. That really exhausts the

difficulties of this case. I have looked at the case rather narrowly in order to discover, if I could, the meaning of the expression "provided and used," but when we look at it more broadly it appears to me that the defect in the view of the defendants is this. It is obvious, I think, from these Acts of Parliament, that the Secretary of State is brought in for the protection of the public health, and not for financial reasons at all. The financial part is left to the Treasury when the board wants to borrow money, and although the Secretary of State is brought in by the section in the Act of 1855 as to letting, there are indications, I think, in the Act of 1855 itself which show it was never supposed that his control was required for the expenditure of money. That is not his affair.

The check that is put by this Act of Parliament upon the expenditure of money for purchasing is the consent of the vestry; and the Secretary of State, to my mind, has nothing whatever to do with it. If the broad view is that his sanction is rendered necessary by Parliament for the purpose of protecting the public health, full effect can be given to that by holding that the prohibition does not apply so early as the acquisition of land, especially when, as in this case, an opportunity may occur for acquiring land for burial purposes, although you do not want to use it for some years. I cannot suppose for a moment that if the burial board in this case had applied to the Secretary of State for his sanction to the purchase of a burial-ground seven years hence he would have entertained it for a moment. He would say: "Do not come to me now; come to me when you want it; I have to look after the public health; I cannot tell what may be necessary seven years hence for the protection of the public health." It does not at all follow, to my mind, that the burial board, with the consent of the vestry, may not acquire the land for the purpose of providing a burial-ground when the proper time shall arrive. That really disposes of that controversy, because, if I am right, it means this, that there is nothing to invalidate the contract of purchase, and there is nothing which the vendor need trouble himself about in looking to the title, or the power of the purchaser to pay the money and complete the contract for the purchase of land for the purpose of making a burial-ground, and does not obtain the sanction of the Secretary of State at the time; the risk of not getting it must be run, but it must be run by the purchaser, and not by the vendor. I think Mr. Warmington in his observations upon that was right. Now as regards the remedy, if the plaintiff here pressed for specific performance, it appears to me that would require some consideration, because, although the contract is valid enough, there are practical difficulties which arise, and inasmuch as the present defendants were not the contracting parties there might be some little difficulty about that; but, however, the plaintiff does not insist upon specific performance, but says he is content with damages. If he is content with damages, it appears to me he is entitled to damages. The result, therefore, is that the appeal must be allowed with costs here and below, and there must be an inquiry what damages the plaintiff has sustained by reason of the breach of the contract by the defendants, and an order for the payment of those damages to the plaintiff when ascertained.

CHITTY, L.J.—The question on this appeal is whether the contract of 1889 is void as being beyond the powers of the burial board which entered into it, who were a corporation constituted by Act of Parliament with limited powers. After the careful analysis that the Master of the Rolls has presented of the Acts of Parliament, I shall not consider it incumbent on me to go through the sections again. I shall rest content with adding a few words upon those which appear to me to be the principal points in this case. It is stated that the approval of the Secretary of State is required *ex post facto* to validate this contract, and that, inasmuch as his approval had not been obtained under the 6th section of the Act of 1853, the contract not only cannot be enforced by specific performance, but is altogether void. The 26th section of the Act of 1852 is clear as it stands by itself. It gives power to a burial board to contract for the purchase of land for the purpose of providing a burial-ground, and there is one condition only in that section imposed, which is, obtaining the approval of the vestry before the contract is entered into. That approval has been obtained; consequently there is a clear and clean power conferred upon the burial board by this 26th section. After carefully considering the case, it seems to me that there is no other condition imposed with which this power to purchase is clogged. I accept what the Master of the Rolls has stated as being the two leading ideas in this Act of Parliament, and I still express myself quite shortly, and without any reference to detail, that the one is finance and the other is public health. I am not speaking of some of the smaller details, but the Secretary of State is invoked for the purpose of protecting the public health; but, speaking again without reference to any particular details of the Act of Parliament, the question of finance is not left to him. On reverting to the 26th section the question of finance is left to the vestry, whose approval is required. Now, it is plain that under the 28th section the burial board has power to sell without the sanction of the Secretary of State any land that is purchased with the approval of the vestry. They are the persons to whom the power of sale is confided, so that it follows that the Secretary of State is not called in here, and there is no ground for saying that he can interfere in the matter at all. There is a fetter imposed by this section 28 which is quite immaterial for the purpose for which I am dealing with it. I speak generally. Until the land has been consecrated or until the land has been actually used for the purpose of interment, a power of sale corresponding to the power of purchase is vested in the same body with the same approval. That, I think, goes a long way in explaining the force and effect of the 26th section. And, as ancillary to this, I refer to the later Act of 1855, which contains a power of letting; that, I think, is a subordinate matter, but it shows that the burial board can make use of this land for other purposes than merely for simple interment.

There might be danger in confiding to a body such as this is—a burial board—a power to speculate in land, and, if it had been shown that they bought this land merely as a speculation, I think the case would have stood very differently. But, so far from that being the case, it is shown that they bought it with a view to converting it into a burial-ground; and it is of advantage to bodies thus placed, and particularly in districts where the population is increasing—and, so far as can be seen, rapidly increasing—that they should have some power of making provision beforehand for that which they, acting reasonably, see will be likely to occur—namely, that the existing burial-ground, as in this particular case, will become too small for its requirements. When that is stated, it is obviously the case, and it is equally obvious that a body (whatever may be the view of this 26th section) such as a burial board can never buy exactly the number of poles or roods they require for the immediate purpose of converting it into a burial-ground. Of course, *ex hypothesi*, they must have ground

unused. Then, I think, on the general construction of the Act, there comes in, with still greater force, the various sections and provisions that I have referred to. The result is this—that they can buy beforehand, with a view to proper economy, in the execution of the duties that are entrusted to them. In my opinion they would not go, in the ordinary reasonable course, to the Secretary of State, as, according to the case for the defendants, they ought to have done, and ask for the consent of the Secretary of State under the 6th section of the Act of 1853, at the time the contract was entered into. Had they gone to the Secretary of State, I do not presume to say what the Secretary of State would do, but I take it that he would act at least reasonably, and that his answer would be: "No, I cannot tell now what will be the state of things with regard to health six or seven years hence, and I will approve of some limited area being dedicated to the burial-ground now; but as for saying I will do this six or seven years hence, it may not then be a matter for me at all; it may be a matter possibly for my successor and not for me to consider." As has been pointed out, and it assists the main argument, a burial board may accept gifts of ground, and it is quite plain that the Secretary of State's sanction is in no way required for the acceptance of such gifts. The argument has largely turned on the meaning of the words "provide and use" in the 6th section. After hearing the arguments, and devoting my utmost attention to the various and numerous places in which the term "provide" occurs throughout these Acts of Parliament, I am by no means satisfied that the Legislature has used that term in any strict or technical sense. There is a want of uniformity in the various phrases; and I think I am at liberty to say, after that observation, that I have not an absolutely clear view of what is meant by "provide," but I can get near it, and I think sufficiently near for the purposes of this case. It is, at least, this, in my opinion—it is doing something to the land after the contract of purchase; how much, whether it is forming, or converting, or laying out, or some other operation, or in some cases the consecration—which, no doubt, is required in some parts—it is not necessary to say; but I am satisfied that the word "providing" in the 6th section is not equivalent to purchasing by contract. As I think I said, probably the term "opening" is a fairly rough mode of describing what is meant—the opening of the ground. I do not say that that is so, but it is not necessary to say exactly what is meant.

It is necessary, however, to say that it is not equivalent to purchasing under the 26th section. Purchasing is, no doubt, the first step. Mr. Robson, in his very able argument, and I think Mr. Eve supported the same proposition, spoke of "providing" as consisting of a series of steps. I think there are a series of steps before you can get a ground provided, but the first ordinary step, not the absolutely necessary first step, because gifts may also be made, would be the purchase by the board itself. Upon these general grounds, and acceding as I do to the analysis which the Master of the Rolls has carefully presented with reference to the clauses of the Act of Parliament themselves, it appears to me that the right conclusion is that this contract was not *ultra vires* when it was entered into; and there is no question raised, as I understand, in regard to the liability of the defendants, who are the successors of the board who entered into it; and consequently I agree with what the Master of the Rolls has said with reference to the result of this appeal. I do not understand that the defendants make any objection to damages in lieu of specific performance; but by the position they occupy as successors, although our attention has not been called to the Act of Parliament, for all practical purposes in this suit they are in the same position as the burial board was in which entered into the contract.

COLLINS, L.J.—I am of the same opinion. After the elaborate and complete examination which the statute has received at the hands of my brethren, I propose to add very few words—in fact, I should say nothing but for the fact that we are differing from the very careful and elaborate judgment of the learned judge in the court below. Now, arguments, no doubt, may be derived from a minute examination of the wording of each of the several sections in these Acts of Parliament, but those arguments are, at the best, inconclusive, and many of them are two-edged; and, therefore, what one has got to do in dealing with this matter is to see, if one can, what is the broad principle lying at the bottom of these enactments. I gather that this is the object of these provisions. It is clear, I think, from the preamble of the Act that the paramount consideration is health. There is a recital which is obviously based on considerations of health, and it is in terms stated to be so. And, following on that, come provisions for closing existing burial-grounds, and for dealing with those which are hereafter to be opened. We had in existence at the date of the Act the old common law body, the vestry, and that vestry, composed of ratepayers, was capable of looking after its own financial interest, and I have no reason to suppose that the Legislature in the scheme of this legislation desired so superadd any additional restrictions upon their financial operations. Then I find in the scheme of the Act a provision (I need not go through the sections in detail) for a meeting of the vestry being called and a resolution of the vestry being passed that it is desirable that a burial-ground shall be provided. Then I find by the 26th section an absolute provision for enabling the burial board, with the approval of the vestry—there is no other condition imposed—to contract for the purchase of land for the purpose of a burial-ground. So far there is an absolute power vested in the burial board to contract with the consent of the vestry. But it is said that the power has been controlled by a fetter put upon it which imposes, as a condition precedent to the making of any contract, the consent of the Secretary of State. That provision is in the 6th section of the Act of 1853, which extends to the area now in question the prior provision in section 9 of the Act of 1852, which is: "No new burial-ground or cemetery shall be provided and used in the metropolis or within two miles of any part thereof without the previous approval of one of her Majesty's principal secretaries of state." The words are "provided and used," and we are asked to say that, under those words, it is a condition precedent to the contracting for and purchasing the site of a proposed burial-ground that the sanction of the Secretary of State shall be obtained. I cannot find it in the words because the words are "provided and used." The thing done is the contract to buy. I cannot find it in the words, and I do not find it in the sense, or in the supposed purpose of the Legislature. As I have pointed out, what the Legislature is providing for is not the financial arrangements, which are alone concerned in the purchase, but for the sanitary arrangements which are in jeopardy when and not until it is proposed to open land which has been bought and turn it into a burial-ground. Then the sanitary considerations come in. But it was argued that we must suppose that the Legislature intended the Secretary of State to supervise the financial as well as the sanitary arrangements. I think one argument,

if indeed one more were needed, is conclusive that that is not the case, because, as was pointed out by Mr. Robson, who made the point, this provision making the consent of the Secretary of State a condition precedent does not apply, even on his own argument, when the proposed purchase is outside the limits named in the section—namely, "in the metropolis or within two miles of any part thereof." If the object of the Legislature was to safeguard the financial arrangements of the vestry, why should they not have safeguarded them as much outside the metropolis as in it? No reason can be suggested why. The financial considerations are the same, but the sanitary considerations are different; and therefore, to the sanitary considerations and to those alone, in my judgment, the Legislature has addressed this section. Now let me say a few words as to whether what was done in this case is that which we may deem the Legislature to have contemplated. I gather from more than one section (I need not refer to them in detail) that the Act did contemplate a burial board acquiring land more than sufficient for their needs for the time being. There are two sections which can be pointed to at once which show that that is necessarily so. There are the provisions in the 28th section empowering them to sell lands which have been acquired, but which have not been used, for the purpose of interments; there is also the 17th section in the later Act which provides for their letting, with the sanction of the Secretary of State, lands not for the time being required for the purposes of a burial-ground. Therefore the Legislature does contemplate their being in possession, through the machinery of the Act, of land more than sufficient for the purposes of interment. Now, is it reasonable to insist that on each occasion when the vestry or the burial board has a favourable opportunity they should limit the purchase to so much land only as for the time being is required, and to that, and that only, they should direct the consideration of the Secretary of State? It seems to me that that would be an obvious inconvenience, a practical inconvenience so great that I cannot conceive that the Legislature could have intended it. Let me take a case which is a common one. There is in the market a piece of land which is admittedly eligible for the purpose of a burial-ground, but it is larger than is required for present needs, and there is no possibility of buying only a part of it—it must be all bought or none. It may be an exceedingly useful and prudent thing for the burial board to secure it; but, if the assent of the Secretary of State is a condition precedent to the acquisition of that land, he would be obliged, at the time when it is contemplated to purchase, to determine whether on sanitary considerations it is desirable that it should now be opened or that his approval should be given. I may point out that if he has once given his consent to it, the provisions for closing burial-grounds under the Burial Acts no longer apply to that area; that is enacted by the 7th section, and it bars the closing of any new burial-ground provided with the approval of the Secretary of State.

There may be other means of dealing with it, but the short, simple, and summary means on sanitary grounds of closing burial-grounds do not apply when he has once given his approval. It would be so large a responsibility to impose on the Secretary of State, to forecast as to whether in future it may or may not be advisable that burials should go on in that place, that he would be practically bound to limit his assent to cases only where just a sufficient amount of land for the immediate requirements of the board was contemplated in the proposed purchase. I think that would be so great a public inconvenience that if it existed it would have to be remedied, and I find no words in the Act that point to it, but I find other words which clearly contemplate that the burial board may find itself in possession of more land than it wants, and leave is given to let or to sell it. I cannot doubt that the course taken by the burial board in this case is one that comes within the general scheme of the Legislature. That being so, it seems to me there is clear specific authority given to them to purchase with the consent of the vestry. But when I look at the supposed condition which fetters that, it does not in terms constitute a condition precedent to the purchase, and cannot be supposed to be intended to do so. When I look at the principle, and when I look at the words of this section and test it by a test suggested in argument—namely, if criminal proceedings were taken under this 9th section against a burial board which had "provided" but had not "used" without the consent of the Secretary of State a burial-ground, could it be contended for a moment that an indictment based on that section, leaving out the word "used," could be sustained? It seems to me clearly it could not. That is only one way of testing the question whether or not the governing word in that section is "used," or merely something antecedent both to provision and user—namely, the purchase. I agree it is partly embraced in the word "provided"; but, as was pointed out by Chitty, L.J., although it is an essential part, it does not exhaust the provision, and, not exhausting it, it cannot be said that the person who has purchased has "provided." I entirely agree, therefore, with the reasons that have already been given.

Appeal allowed.

Solicitors for the plaintiff, *Rowcliffe, Rawle, & Co.*, for *Cousins & Burbidge*, Portsmouth.

Solicitors for the defendants, *Williamson, Hill, & Co.*, for *Alexander Hellard*, Portsmouth.

From Q. B. Div.
(A. L. Smith and Chitty, L.JJ.) April 27.

KOTCHIE AND OUSEY v. GOLDEN SOVEREIGNS (LIMITED).
BRIGHT AND OTHERS (*Claimants*). (a.)

Practice—Interpleader—Sheriff's interpleader—Claim to goods seized in execution—Claimant ordered to pay value of goods into court—Withdrawal of sheriff—Second execution—Liability of claimant to make further payment into court.

Where a claimant of goods seized by the sheriff in execution has paid into court the value of the goods and the amount of the sheriff's charges as a security for the execution pending the hearing of an interpleader issue, and before the hearing a second execution has been levied on the same goods, and the claimant has claimed the goods again, he may be ordered, as a condition to the sheriff being directed to withdraw, to pay into court again the value of the goods and the sheriff's charges as a security for the second execution creditor.

Appeal from an order of Grantham, J., on an interpleader summons.

A judgment having been obtained by Messrs. Smythe & Sons against the Golden Sovereigns (Limited), a writ of execution was issued, and goods in the possession of the execution debtors were seized by the sheriff. A claim was made to the goods by one Bright, and on an interpleader sum-

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

mons it was ordered that, on Bright paying into court the sum of £137 to abide the result of an interpleader issue, the sheriff should withdraw. The sum of £137 represented the value of the goods and the sheriff's charges, and was less than the amount of the judgment.

Bright failed to pay the money into court, and a claim was then made to the goods by the Credit Assurance Corporation. A similar order was made with regard to the Credit Assurance Corporation, and on their complying with it the sheriff withdrew. Before the interpleader issue between the Credit Assurance Corporation and Smythe & Sons was tried, the sheriff again seized the goods under a writ of execution issued by Messrs. Kotchie and Ousey on a judgment for £159 obtained by them against the Golden Sovereigns (Limited). The goods were then again claimed by Bright and the Credit Assurance Corporation, and on an interpleader summons it was ordered by the master that, on Bright paying into court the sum of £137 and on the Credit Assurance Corporation paying into court the sum of £10, to abide the event of an interpleader issue, the sheriff should withdraw. The sum of £10 represented the amount of the sheriff's charges in respect of the second execution.

Grantham, J., varied the master's order by directing that the claimants should only pay into court the sum of £10.

The execution creditors, Kotchie and Ousey, appealed.

Carrington, for the execution creditors.

Boxall, for the claimants.

A. L. SMITH, L.J.—Smythe & Co. obtained a judgment against the defendants and put in an execution on their goods. Bright claimed the goods as his, and he was ordered to pay into court the full value of the goods and charges to abide the decision of the judge on his claim. He did not pay the money into court, and then the Credit Assurance Co. came forward and made a claim to the goods. An order was made that on their paying into court the value of the goods, the goods should not be sold, and the money should remain in court to abide the decision of the judge. Now, what effect had the order so made on the goods taken by the sheriff? I am satisfied now, after reading the case of *Haddow* v. *Morton*, [1894] 1 Q. B. 565, that upon payment into court of the value of the goods by the claimant, the goods are free goods, they are taken out of the hands of the sheriff, and they are free in the hands of the execution debtor. Then came forward a second execution creditor—viz., Kotchie and Ousey, the present plaintiffs, who had a judgment for £159. The sheriff was again put in, and again there came forward the Credit Assurance Co. and Bright. An order was made by the master that £147 should be paid into court by the claimants. On appeal Grantham, J., held that that order was wrong, and that the claimants need only pay into court £10. Kotchie and Ousey now appeal and contend that they are entitled to have in court as security for their judgment the full value of the goods which they seized in execution. I think that *Haddow* v. *Morton* shows that the goods just before the second execution were free goods in the hands of the execution debtors, and that therefore the view of the appellants is correct. The appeal must be allowed, and the order of the master must be restored.

CHITTY, L.J.—It was settled in *Haddow* v. *Morton* that payment into court by a claimant of the value of the goods claimed by him is not a purchase by him of them. The money paid into court remains in court as security for the execution creditor, and the goods remain free goods. If the claimants' claim is defeated, the execution creditor takes the money, and cannot have recourse to the goods again. When a second execution creditor comes forward and the goods are seized again, and are claimed again, the same course of reasoning applies. The result therefore is this, that the order which ought to be made in the second case is an order which gives money security to the second execution creditor, for whose execution the goods would be available if there were no claim. The order of the master is right, and that of the judge cannot be supported.

Appeal allowed.

Solicitors for the execution creditors, *Greenwood & Greenwood.*

Solicitor for the claimants, *G. B. W. Digby.*

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 31; April 1, 4, 5.

In re SALE HOTEL AND BOTANICAL GARDENS CO. (LIMITED).

HESKETH'S CASE. (*a*.)

Company—Winding up—Promoter—Liability to account or make compensation—"Moneys or property of the company"—Money had and received to the use of the company—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

Where it was sought to make a promoter of a company account to the company, under section 10 *of the Companies (Winding-up) Act*, 1890, *for promotion money received by him from the vendor,*

Held, on the facts (reversing the decision of Wright, J., *ante, p.* 314), *that the defendant was under no obligation to account to the company.*

Semble, *money had and received to the use of the company, but not its property till received by the promoter, is included in the term "moneys or property of the company" in section* 10 *of the Winding-up Act*, 1890.

Appeal from a decision of Wright, J. (*ante*, p. 314, where the facts are sufficiently stated).

McCall, Q.C., and *R. Younger*, for Hesketh, who appealed.

Astbury, Q.C., and *E. S. Ford*, for the liquidator.

LINDLEY, M.R., after examining the evidence, and coming to the conclusion that Hesketh was clearly shown to have been a promoter of the company, within the meaning of section 10 of the Companies (Winding-up) Act, 1890, proceeded: Although there was a great deal that was discreditable in the getting up of the company, and although Hesketh appears to have known more about it than it was at all desirable that he should know, yet I fail to discover any obligation on him to account to the company for this money, or to inform the company what persons were to be paid by the vendor for promoting the company. Of course, when the company found out that their directors had been bribed, the company had a very good case against the directors; but Hesketh was not in a position which made it incumbent upon him to inform the company what remuneration he had received. The money was not money received by him to the use of the company, and no amount of ingenuity can, I think, substantiate the

(*a*.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

contention that it was. If that is so, the company never had a right to call upon him to account for that money.

I am not prepared to put a narrow construction on section 10 of the Companies (Winding-up) Act, 1890, which enacts that "where in the course of the winding up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the company . . . has misapplied or retained, or become liable or accountable for, any moneys or property of the company," the court may "compel him to repay any moneys or restore any property so misapplied, . . . or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer," &c., "as the court thinks just." I cannot help thinking that any money which ought to be treated, whether on legal or on equitable grounds, as received by any promoter to the use of the company, falls within that description. I think the words "moneys or property of the company" are used in a popular sense. This is not a section which is concerned with drawing accurate lines between ownership and non-ownership; and I think it would be a very narrow construction of this part of the section to confine its operation to moneys which were the property of the company before they reached the pocket of the man whom it is sought to make accountable for them. But, putting on those words the wider construction which I think one ought to put on them, I look in vain for any obligation on Hesketh's part to hand over this money to the company.

A great deal was said during the argument, and in the court below, about fraud, and about the Statutes of Limitations. In the view I take those statutes have nothing at all to do with the matter. The company had no right to an account of this money. Section 10 of the Act of 1890 does not say a word about fraud, and it is not necessary for the liquidator to use the word in his summons. In this case it is sought to make Hesketh accountable for a sum of £250. When the Statutes of Limitations are set up as an answer to that claim it will be time enough to talk about fraud.

I think, therefore, that the appeal must be allowed, and that the summons, as against Hesketh, must be dismissed.

RIGBY, L.J.—I am of the same opinion, but I expressly found my judgment on the nature of the claim that was made, and I certainly am not satisfied that another claim might not have been made which would have succeeded.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Roper, Briggs, & Crosse*, Manchester; *W. A. Gibb*, for *Charles Dunderdale*, Manchester.

From Q. B. Div. (A. L. Smith and Collins, L.JJ.) March 9.

BAGSHAWES (LIMITED) v. DEACON. (a.)

Sheriff — Execution — Fieri facias — Abandonment of possession of goods — Temporary withdrawal from premises.

The question whether a sheriff by withdrawing for a time from premises on which he has seized goods under a writ of fieri facias *has abandoned possession of the goods is a question of fact.*

Appeal from the judgment of Ridley, J., in an interpleader issue.

On the 8th of July, 1897, Deacon, the defendant in the issue, obtained judgment by default in an action which he had brought against Arthur Bagshawe, who carried on business as a dealer in cycles and cycle accessories, to recover £159 for goods sold and delivered.

On the 10th of July execution was levied on the goods at Arthur Bagshawe's business premises under a writ of *fi. fa.*

Arthur Bagshawe was at that time in negotiation for the sale of his business to a limited company—viz., Bagshawes (Limited), the plaintiffs in the issue; and, in order to prevent such sale being prejudiced by the presence of a man in possession, he paid the sheriff's officer £80 on account, with a promise to pay the balance the following week, and signed a document requesting the officer to withdraw from possession and undertaking that he should be at liberty to re-enter at any time until the action was settled. The officer withdrew accordingly.

On the 12th of July a deed of assignment was executed by Arthur Bagshawe purporting to convey the business to the company as from the 25th of March, 1897.

On the 15th of July, the sheriff's officer having again entered under the writ of *fi. fa.*, notice was given to him by the solicitors to the company that the goods did not belong to Arthur Bagshawe but to Bagshawes (Limited).

The sheriff thereupon interpleaded, and this interpleader issue was directed to be tried.

At the trial of the issue Ridley, J., gave judgment for the plaintiffs.

The defendant appealed.

Atherley Jones, Q.C. (*R. J. Willis* with him), for the defendant.—The learned judge thought that in point of law there had been an abandonment of the goods by the sheriff. There is, however, no authority showing that the mere fact of the sheriff temporarily quitting physical possession of the goods constitutes abandonment. The question of abandonment has been held to be one of fact: *Ackland* v. *Paynter*, 8 Price, 95; see also *Blades* v. *Arundale*, 1 M. & Sel. 711. The sheriff by going out under the circumstances of this case did not lose his right to re-enter.

Bosanquet, Q.C. (*Morton Smith* with him), for the plaintiffs.—The sheriff did not go out by reason of any necessity; he went out merely to assist the debtor. The effect was that the goods ceased to be in *custodia legis*. He cited *Crowder* v. *Long*, 8 B. & C. 598.

The following cases were also cited: *Swann* v. *Earl of Falmouth*, 8 B. & C. 456; *Eldridge* v. *Stacey*, 12 W. R. 51, 15 C. B. N. S. 458.

A. L. SMITH, L.J.—Why did the sheriff go out of possession in this case? He went out because it would have been inconvenient to Arthur Bagshawe that he should remain in. This is not the case of a sheriff's man going out of possession for some temporary necessity, such as to get food or to see a doctor. The sheriff withdrew merely to assist the execution debtor and to enable the sale of the business to the limited company to be carried out. The cases of *Ackland* v. *Paynter* and *Blades* v. *Arundale* show that the question whether a sheriff has abandoned possession is a question of fact; and I

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

agree with the learned judge's decision in this case that the sheriff did abandon possession.

COLLINS, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Walker & Rowe.*

Solicitor for the defendant, *T. M. Richardson.*

High Court of Justice.

Q. B. Div. (Lord Russell of Killowen, C.J., and Ridley, J.) April 4, 5; May 23.

RUNDLE *v.* HEARLE. (*a.*)

Highways—Public footway—Stile—Liability of occupier to repair ratione tenuræ*—Evidence of liability.*

The defendant was the yearly tenant of a farm through which ran a public pathway at a certain point of which was a stile with stone steps. The steps being out of repair, the plaintiff in crossing fell and was injured, and he brought an action for the injuries against the defendant, as being liable ratione tenuræ *to repair the stile. There was no evidence that the parish had ever repaired, or had ever required the defendant or any prior occupier to repair, but there was evidence that the defendant's predecessor, who was also owner, had done repairs to the path and stile; there was also some evidence that previous occupiers had repaired, and a witness stated that he had done some repairs at the defendant's instance. The repairs were all small and inconsiderable, and they were done on the defendant's own land.*

Held, that evidence of such small repairs, done by the occupier on his own land and possibly for his own benefit, was not sufficient to show that the defendant was bound to repair ratione tenuræ.

Quære, *whether an action will lie at the instance of a private person against one liable* ratione tenuræ *to repair.*

Appeal by the defendant from a judgment of his Honour Judge Granger, sitting at the Falmouth County Court of Cornwall.

The plaintiff brought his action against the defendant to recover damages for personal injuries sustained by him in crossing over a stile in a public footpath, which ran through a farm in the occupation of the defendant, and he claimed on the ground that the stile was out of repair and that the defendant was liable *ratione tenuræ* to repair the same.

The facts are fully set out in the written judgment of the court.

The learned county court judge gave judgment for the plaintiff, and the defendant now appealed.

Duke and *D. M. Kerly*, for the defendant.

Fraser McLeod, for the plaintiff.

Cur. adv. vult.

May 23.—The judgment of the court was read by

Lord RUSSELL OF KILLOWEN, C.J.—This is an appeal by the defendant from the judgment of his Honour Judge Granger. The plaintiff sued the defendant under these circumstances. The defendant is the yearly tenant of a farm through which is a public pathway. At one point in its course is a stone stile with stone steps, some of which have been worn away by time and user. In crossing it the plaintiff slipped from one of these steps, fell, and broke his leg. He thereupon sued the defendant for damages, alleging that he was liable *ratione tenuræ* to repair the stile and that he had suffered by its want of repair. The learned county judge took this view and awarded him damages. It appears that the plaintiff was aged 67 years and that as far back as 1891 he had had a "seizure." He was described by his medical attendant, who was called by him, as being, when the accident happened, in a decrepit state, and as never having had the complete use of his legs since the "seizure." He added he did not think it was safe for him to cross the stile in question and that it was a difficult stile. The learned county court judge, however, who heard the witnesses, has not thought it proper to find contributory negligence, and we do not dwell further on this point, and we proceed to consider the ground on which he did act. If it were necessary to consider and determine the point whether an action will lie at the instance of a private person against one liable *ratione tenuræ* to repair we should desire to hear further argument upon it. There is, so far as we are aware, no record of any such case in the books, although the circumstances giving rise to such an action must have been of frequent occurrence. Baron Martin expressed considerable doubt upon the point in the case of *Young* v. *Davis* 10 W. R. 524, 7 H. & N. 760, at p. 773, where he says: "I should have been surprised if any case had been found in which it was determined that an action for non-repair was maintainable against a person bound to repair *ratione tenuræ*. The case in the Year Book, 11 Hen. 4, 82, 83"—set out in a note at p. 766—"which was supposed to be an authority for that position, on being examined will be found not to be so. That was an action by a lord of a manor who relied on a prescription that he, and all those whose estate he had in the manor, had a right to have a bridge kept in repair by the owner of a mill. That is totally different from an obligation towards all the Queen's subjects passing along a highway."

We do not, however, decide this case on the view taken by this learned judge, for we are of opinion that there was in this case no sufficient evidence to warrant the learned county court judge in coming to the conclusion that the defendant was under the obligation to repair *ratione tenuræ*. There was the usual conflict as to the past and existing state of the stile and what had been done to it in the way of repairs. One of the plaintiff's witnesses stated that the stile was at the time of the accident in the same state it was in forty years ago, and the defendant and his witnesses denied that the defendant had in fact repaired the stile. We must, however, assume that the learned county court judge gave effect to the other evidence on the part of the plaintiff and proceed to examine it. There was no evidence that the parish had ever repaired or had ever required the defendant or any prior occupier to repair, but there was evidence that the defendant's predecessor in possession, who was, however, proved also to be the owner, had done repairs to the path and stile. Another witness stated that previous occupiers had repaired, and finally a man formerly in the defendant's employment stated that he had done some repairs. In no case do the repairs seem to have been considerable. The fact that a person has done repairs to a way may certainly be some evidence of such liability. For instance, in *Reg.* v. *Blakemore*, 2 Den. C. C. 410, 16 Jur. 154, where the defendant was so held liable, the evidence was that his predecessor had been convicted of not repairing the high road in question in the year 1801,

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

and had subsequently done repairs to it; and in *Reg.* v. *Barker*, 25 Q. B. D. 213, 38 W. R. Dig. 85, the defendant and his predecessors had repaired the high road, for the non-repair of which he was indicted, from time immemorial, and on that evidence was found liable. But in each of those cases the road was a road for carriages and horses, which is a widely different thing from a foot-path through fields and over stiles. The one requires repairs on a system, and at certain intervals, from the nature of the user, while the other does not; and on the contrary may never, except on isolated occasions, receive any repairs at all.

Such a path may be dedicated subject to the right of ploughing (*Mercer* v. *Woodgate*, 18 W. R. 116, L. R. 5 Q. B. 26), although the plough would for the time destroy all traces of the path, and after the plough has passed, the path is in common experience trodden out afresh by passers by, not made by repair or of hard material, for that would be inconsistent with the passage of the plough at the next season. So it may be that in dedicating to the public such a pathway through his fields the farmer may do so without any obligation to repair resting on himself or on anybody. It is a path on which people may pass if they choose to do so, but they must pass along it as they find it, and must take it (to use the words of Cockburn, C.J., in the case just quoted) subject to any condition which the owner imposes. Blackburn, J., in the same case, said, "If this right is inconsistent with a grant of a right of way to the public, then there was no dedication at all, and the present owner has a right to stop up the pathway altogether and so prevent the parish from repairing the path in such a way as to interfere with his ploughing." As the user for which the path is dedicated does not necessitate repairs, we see no objection in law to a dedication of the path without placing on anyone the obligation to do them. In the present instance the evidence on which the learned county court judge has acted is very slight, considering that the path is an immemorial one, and it is quite consistent with such small repairs as were done, that they were done by the occupier for his own benefit. They were done on his own land. It is not as if they had been done outside his own land, or as if he had done the repairs under threat of legal proceedings or had admitted that in doing them he was discharging a legal obligation.

We think that the case is like *Hudson* v. *Tabor*, 24 W. R. 579, 25 W. R. 740, 1 Q. B. D. 225, 2 Q. B. Div. 290. There an action was brought for not maintaining a sea-wall on the defendant's land, where it adjoined that of the plaintiff, whereby the plaintiff's land became flooded. And it was shown, in order to prove the liability of the defendant, that he and his predecessors had from time immemorial repaired the wall where his land fronted the sea. The jury found for the plaintiff, but the Court of Queen's Bench and the Court of Appeal held that there was no evidence of liability, and Lord Coleridge, in giving judgment, said, "The mere repair of a man's own fence for his own benefit, however often done, and during however long a period of time, will not, *per se*, although a man's neighbour may in fact benefit by such repair, impose on a man the duty of continuing such repair for his neighbour's benefit, when he ceases to care to do it for his own." So here the acts relied on were at the least ambiguous, and we think constitute no sufficient evidence of liability—see also *per* Baron Hullock, in *Rex* v. *Allanson*, Lewin's C. C. 158. In the words of the learned Baron, "An adjoining occupier occasionally doing repairs for his own convenience to go and come is no more like that sort of repair which makes a man liable *ratione tenuræ* than the repair by an individual of a road close to his door is to the repair or the road outside his gate." We, therefore, think the defendant entitled to judgment. The appeal must therefore be allowed.

Appeal allowed.

Solicitors for the plaintiff, *Rowcliffes, Bawle, & Co.*, for *W. J. Terrill*, Penryn.

Solicitor for the defendant, *H. Dobell*, for *R. Dobell*, Truro.

Q. B. Div.
(Lord Russell of Killowen, C.J., Sir Francis Jeune, P., Chitty, L.J., and Wright, Darling, and Channell, JJ.) April 4; May 14.

COPPEN v. MOORE. (*a.*)

Sale of goods—False trade description—Criminal liability of master for acts of servant—Absence of mens rea—*Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *ss.* 1, 2, 5.

A salesman and an assistant employed by the appellant in his business of a provision dealer sold as a Scotch ham (stating it on the invoice to be such) a ham which was in fact an American ham. The sale was effected in the absence and without the knowledge of the appellant, who had directed the persons employed in his business not to sell hams under any specific name of place or origin.

Held, that the appellant was properly convicted of selling goods to which a false trade description was applied.

Case stated by justices of the borough of Richmond, Surrey.

The appellant was summarily convicted of an offence against section 2, sub-section (2), of the Merchandise Marks Act, 1887, for having unlawfully sold certain goods—to wit, an American ham—to which a false trade description—to wit, "Scotch ham"—was applied.

The facts found by the justices and the material enactments of the Merchandise Marks Act are stated in the judgment of the court.

The case was argued before Wright and Darling, JJ., on the 25th of March, when they held that there had been a sale of an article to which a false trade description was applied; but they reserved for argument before a full court the question whether the appellant could be convicted under the circumstances of this case, the sale having been effected by the servant of the appellant without the knowledge and contrary to the express instructions of the appellant.

The case was re-argued before Lord Russell of Killowen, C.J., Sir Francis Jeune, P., Chitty, L.J., and Wright, Darling, and Channell, JJ., on the 4th of April.

Asquith, Q.C., and *Bonsey*, for the appellant.—The conviction cannot be sustained. It is contrary to the general principle of law that a master is not criminally responsible for the acts of his servant in the absence of any guilty knowledge or connivance on the part of the master. Here such knowledge or connivance is expressly negatived; the appellant had expressly forbidden his servants to sell hams under any specific name of place or origin. There is nothing in the Merchandise Marks Act showing any intention to exclude the application of the general rule of law to offences created by that Act.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

They referred to *Reg.* v. *Stephens*, 14 W. R. 859, L. R. 1 Q. B. 702; *Mullins* v. *Collins*, 22 W. R. 297, L. R. 9 Q. B. 292; *Reg.* v. *Holbrook*, 26 W. R. 144, 3 Q. B. D. 60; *Somerset* v. *Hart*, 32 W. R. 594, 12 Q. B. D. 360; *Bond* v. *Evans*, 36 W. R. 767, 21 Q. B. D. 249; *Chisholm* v. *Doulton*, 37 W. R. 749, 22 Q. B. D. 736; *Reg.* v. *Tolson*, 37 W. R. 716, 23 Q. B. D. 168; *Roberts* v. *Woodward*, 38 W. R. 770, 25 Q. B. D. 412; *Budd* v. *Lucas*, 39 W. R. 350, [1891] 1 Q. B. 408; *Massey* v. *Morriss*, 42 W. R. 638, [1894] 2 Q. B. 412; *Sherras* v. *De Rutzen*, 43 W. R. 526, [1895] 1 Q. B. 918; *Commissioners of Police* v. *Cartman*, 44 W. R. 637, [1896] 1 Q. B. 655; *Derbyshire* v. *Houliston*, 45 W. R. 527, [1897] 1 Q. B. 772; *Kearley* v. *Tylor*, 65 L. T. Rep. 261; s.c. *sub nom*, *Kearley* v. *Tonge*, 60 L. J. M. C. 159, 40 W. R. Dig. 5; and *Brown* v. *Foot*, 61 L. J. M. C. 110, 40 W. R. Dig. 6.

Jelf, Q.C., and *A. J. David*, for the respondent.—The conviction was right. This offence is an exception to the general rule that *mens rea* is a necessary ingredient of every offence. By section 2 (2) of the Merchandise Marks Act the burden of proving his innocence is thrown on the defendant. The appellant has not discharged this burden; the magistrates have expressly found that he did not take all reasonable precautions against the commission of an offence under the Act.

Cur. adv. vult.

May 14.—The judgment of the COURT was delivered by

Lord RUSSELL OF KILLOWEN, C.J.—This is a case stated by justices who summarily convicted the appellant of an offence against the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28). The appellant was charged under section 1, sub-section (2), with having sold goods to which a "false trade description" was applied. The facts were as follows: On the 4th of September, 1897, the respondent, at the London Supply Stores, 42, George-street, Richmond (one of several places of business of the appellant), asked the salesman at the door of the shop for a small English ham. The salesman pointed to a number of hams on a shelf, and said they were Scotch hams. In fact they were long-cut American hams. The salesman stated the price, 8½d. per lb., and the respondent said he would take one, which was then produced. The salesman then passed the ham selected through the open window to a shop assistant inside, saying, "Weigh up, Scotch ham, 8½d." The respondent, before paying, asked the assistant to make him out an account, and put on it "Scotch ham," "as he had bought it as such." The assistant at first handed the respondent an invoice without the word "Scotch," on it. The respondent did not accept it so written, but told the assistant to put the word "Scotch," "as he had bought it as such." The assistant then did so, and handed the invoice to the respondent, who then paid the price, 4s. 5½d. Upon this being done, the respondent asked the assistant whether he still said it was a Scotch ham, whereupon the assistant admitted it was not, but was an American ham. The salesman, in like manner, was asked, and he at once admitted it was an American ham.

On the part of the appellant evidence was given that he had sent out a notice to all his branch places of business, including that in question, in the following terms:

"Marsham-street, Feb. 25th, 1897.

"Most important.

"Please instruct your assistants most explicitly that the hams described in the list must not be sold under any specific name of place or origin—that is to say, they must not be described as 'Bristol,' 'Bath,' 'Wiltshire,' or any such title, but simply as breakfast hams.

"To Mr. Bedford, Richmond.

"Please sign and return.

"H. W. COPPEN."

The ham in question would come within the category of breakfast hams. Evidence was given that the terms of this notice were communicated to the manager and assistants, and the appellant stated that he had no reason to believe that his instructions were not being carried out.

It is now necessary to consider the statute in question and its application to the facts proved. Section 2 is the important section. Sub-section (1) deals with the forging of any trade-mark and with the false application to goods of any such mark or of any false trade description, and enacts that, subject to the provisions of the Act, an offence shall have been committed by such forging or application unless the party charged proves that he acted without intent to defraud. Sub-section (2) enacts (omitting words immaterial in this case) that every person who sells any goods to which any false trade description is applied shall be guilty of an offence against the Act unless he proves—(*a*) that having taken all reasonable precautions he had no reason to suspect the genuineness of the trade description; and (*b*) that on demand duly made he gave all information in his power with respect to the persons from whom he obtained such goods; or (*c*) that otherwise he had acted innocently.

By section 3 it is enacted that "trade description" shall mean any description, statement, or any indication, direct or indirect, as to (amongst other things) the place or country in which any goods were made or produced. Later in such section it is enacted that the expression "false trade description" shall mean a trade description false in any material sense as regards the goods to which it is applied.

By section 5, sub-section (1), it is enacted that a person shall be deemed to have applied a trade description to goods who applies it to the goods themselves or uses a trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade description.

In *Budd* v. *Lucas* it was decided that where certain casks of beer were delivered accompanied by an invoice in which the casks were falsely described as "barrels" (which word had acquired the character of a trade description) it was held that an offence under section 2, sub-section (1), of the Act in question had been committed, although the invoice containing the false description was not physically attached to the casks. I think this case was well decided; in other words, I think that it is not necessary to constitute the offence that there shall be any physical connection between the false trade description and the goods to which it is applied.

It was admitted that the description "Scotch ham" was a trade description, and it was found that it was applied to the ham sold by the appellant's *employés*, and it was admittedly false. It was not contended that it was not material. In these circumstances it is clear than an offence against the Act was committed by the salesman and by the assistant of the appellant. But the question which the court is now called upon to decide is whether the appellant also is not personally liable to be convicted. This was the question argued before us.

The appellant's contention was that the charge here preferred was a criminal charge and that the general principle of law applied—*nemo reus est nisi*

mens sit rea. There is no doubt that this is the general rule, but it is subject to exceptions, and the question here is whether the present case falls within the rule or within the exception.

Apart from statute exceptions have been engrafted upon the rule; for example, in the case of *Reg.* v. *Stephens* the defendant was held liable on indictment for obstructing navigation by throwing rubbish into a river from a quarry owned by the defendant but managed by his son, although it was proved that the men employed at the quarry had been by order prohibited from doing the acts complained of. No doubt in that case the fact that the proceedings were only in form criminal was adverted to by the judges who decided it, but the fact remains that the defendant was criminally indicted.

But by far the greater number of exceptions engrafted upon the general rule are cases in which it has been decided that by various statutes criminal responsibility has been put upon masters for the acts of their servants. Amongst such cases are *Mullins* v. *Collins*, where a licensed victualler was convicted of an offence under the 16th section of the Licensing Act of 1872 for supplying liquor to a constable on duty, although this was done by his servant without the knowledge of his master. Again in *Bond* v. *Evans*, a licensed victualler was convicted of an offence against the 17th section of the same Act where gaming had been allowed in the licensed premises by the servant in charge of the premises, although without the knowledge of his master.

The decisions in these and in other like cases were based upon the construction of the statutes in question. The court, in fact, came to the conclusion that, having regard to the language, scope, and object of those Acts, the Legislature intended to fix criminal responsibility upon the master for acts done by his servant in the course of his employment, although such acts were not authorized by the master and may even have been expressly prohibited by him.

The question, then, in this case comes to be narrowed to the simple point, whether upon the true construction of the statute here in question the master was intended to be made criminally responsible for acts done by his servant in contravention of the Act, where such acts were done, as in this case, within the scope or in the course of their employment. In my judgment it was clearly the intention of the Legislature to make the master criminally liable for such acts, unless he was able to rebut the *primâ facie* presumption of guilt by one or other of the methods pointed out in the Act.

Take the facts here and apply the Act to them.

To begin with, it cannot be doubted that the appellant sold the ham in question although the transaction was carried out by his servants. In other words, he was the seller although not the actual salesman. It is clear also, as already stated, that the ham was sold with a "false trade description," which was material. If so, there is evidence establishing a *primâ facie* case of an offence against the Act having been committed by the appellant. But it is only a *primâ facie* case. The burthen of proof is shifted upon the appellant, and he might meet successfully that *primâ facie* case if he is able, where the charge is under the first sub-section of section 1, to prove that he acted without intent to defraud; or, where the charge is under sub-section 2 of section 1, if he is able to prove (*a*) that he had taken all reasonable precautions against committing an offence against the Act and had no reason to suspect the genuineness of the trade description in question, and (*b*) that on demand he had given full information, or (*c*) if he is able to prove that otherwise he acted innocently. It seems clear that clauses (*a*) and (*b*) of sub-section 2 apply to cases where the goods in question are in the possession of the accused for sale or are sold with the forged trade-mark or false trade description already stamped upon them or otherwise applied to them, and not to a case like the present, where the false trade description is applied upon the occasion and as part of the terms of sale; and in the latter case the accused must rely for his exculpation upon clause (*c*)—namely, by showing that he had acted innocently.

In the present case there was ample evidence to justify the conclusion of the magistrates that the appellant was *primâ facie* guilty of the offence charged, and that *primâ facie* case has not been met in the manner required by the Act. The magistrates, indeed, have affirmatively found—in the terms of clause (*a*)—that the appellant had not, in fact, taken all reasonable precautions against committing an offence against the Act, but I have already pointed out that that clause does not directly apply to the facts of this case. This finding is, therefore, not strictly relevant, although it suggests an important element in determining whether the accused is innocent; but what is material to note is that the magistrates do not appear to have been asked to find, and certainly they do not in fact find, that the appellant acted innocently within the meaning of clause (*c*). There was evidence before them that the American hams in question were dressed so as to deceive the public; and this probably explains the reason of the affirmative finding to which I have adverted and the absence of the finding that the appellant had acted innocently within the meaning of clause (*c*).

In answer, then, to the question which alone is put to us—namely, whether, upon the facts stated, the decision of the magistrates convicting the appellant was in point of law correct—my answer is that, in my judgment, it was. When the scope and object of the Act are borne in mind, any other conclusion would, to a large extent, render the Act ineffective for its avowed purposes. The circumstances of the present case afford a convenient illustration of this. The appellant, under the style of the "London Supply Stores," carries on an extensive business as grocer and provision dealer, having, it appears, six shops or branch establishments, and having also a wholesale warehouse. It is obvious that, if sales with false trade descriptions could be carried out in these establishments with impunity so far as the principal is concerned, the Act would, to a large extent, be nugatory. I conceive the effect of the Act to be to make the master or principal liable criminally (as he is already by law civilly) for the acts of his agents and servants in all cases within the sections with which we are dealing, where the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this—that the master or principal may be relieved from criminal responsibility where he can prove that he had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act.

The result, therefore, is that the conviction will be affirmed, and with costs.

I wish to add that the form in which this case is stated is not satisfactory. It does not throughout clearly distinguish between what was merely evidence and what was proved to the satisfaction of the magistrates. It is important that it should be borne in mind that when a case is submitted to the court it ought to state clearly what the facts proved were, and not merely what the evidence was.

Conviction affirmed.

Solicitors for the appellant, *Neve & Beck.*

Solicitors for the respondent, *Weekes & Co.*

Q. B. Div.
(Wills and Kennedy, JJ.) April 22.

LANCASTER *v.* BARNES URBAN DISTRICT COUNCIL. (*a.*)

Local government—Public health—Nuisance—"Single private drain"—Notice to execute works addressed to owners collectively—Work done different from work specified in notice—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 41—*Public Health Act,* 1890 (53 *&* 54 *Vict. c.* 59), *s.* 19.

Three houses belonging to A. and two belonging to B. were connected by a single private drain with a public sewer. The drain was complained of as a nuisance, and the surveyor of the local sanitary authority opened a part of the drain situated at the back of B.'s two houses and one of A.'s houses, and found it there choked with sewage. The local authority then, under section 41 *of the Public Health Act,* 1875, *served a notice on both A. and B., addressed to them jointly, requiring them to relay the whole drain. A. and B. having neglected to comply, the local authority themselves repaired the whole drain, and also lowered the level of it in relaying it. They then sued A. under section* 19 *of the Public Health Act,* 1890, *for his proportion, as apportioned by their surveyor, of the expenses so incurred. The apportionment was not disputed by A.*

Held, (1) *that the fact that the notice to repair was in form a joint notice to A. and B. did not render it invalid;* (2) *that it was not necessary that the whole of the drain should have been previously examined; and* (3) *that if the work done in respect of which the expenses were sought to be recovered was not substantially the same as that specified in the notice, the expenses incurred were not recoverable.*

Special case stated by justices on the hearing of a summons taken out by the Barnes Urban District Council to recover from one Lancaster the sum of £12 16s. 3d., being his share of the costs incurred by the council in repairing the drain hereinafter described.

The drain was a single private drain serving the houses Nos. 6, 7, 8, 9, and 10, Park-terrace in the respondents' district. It began opposite the back of No. 10, and after passing along the back of the other houses was connected with a public sewer beyond No. 6. Of these houses Nos. 8, 9, and 10 belonged to the appellant, the other two belonging to one Baker.

On the 23rd of March, 1897, the respondents having received a complaint in writing as to the condition of this drain, passed a resolution pursuant to section 41 of the Public Health Act, 1875, empowering their surveyor to examine the drain. On the following day their surveyor opened the ground at the rear of Nos. 6, 7, and 8 and found the connections therewith broken and choked with sewage. No evidence was given that the drain was inspected at the rear of Nos. 9 and 10.

The next day (the 25th of March) notice was given to Lancaster and to Baker, which, after reciting that they were the owners of the respective premises, continued thus: "Notice is hereby given you that I, the said surveyor for and on behalf of the Urban District Council of Barnes, require you to commence the necessary works within forty-eight hours from the service of this notice, and to be completed within the space of ten days from the date of such service, and to remedy the above defect—that is to say, that you relay the said drain with an intercepting trap at No. 6, Park-terrace, aforesaid, and place a ventilator at the head of the drain at No. 10, Park-terrace aforesaid, with proper connections to each of the said houses, the said work to be done to my satisfaction. And further, take notice that if this notice is not complied with you will be liable to a penalty. . . . And the Urban District Council of Barnes may, if they think fit, themselves execute the said works, and may recover from the owners the expenses thereof in such shares and proportions as shall be settled by me as their surveyor or (in case of dispute) by a court of summary jurisdiction, or the said council may by order declare the same to be private improvement expenses."

The owners failed to comply with the notice, and the respondents repaired and cleansed the portion of the drain belonging to and in rear of Nos. 6, 7, 8, and 9; and further, to secure a better fall to the public sewer, re-laid it at a lower level.

The surveyor served due notice of apportionment on the appellant, which was not disputed, within three months.

On behalf of the appellant it was contended that the notice requiring him to do the work was bad, on the ground that only a part of the drain ordered to be repaired had been examined, whereas inspection under the section was a condition precedent to the giving of such a notice by the surveyor; that to do part of the work ordered the appellant must necessarily trespass on another person's premises; that the respondents, in so altering the level of the drain, thereby made a new drain and did work which they did not by their notice require the appellant to do, and could not therefore charge him with the costs.

The justices overruled these objections, and ordered the appellant to pay the sum apportioned to him.

The appellant appealed.

Courthope-Munroe, for the appellant.—The questions for the decision of the court are: (1) Was the notice given to Lancaster and Baker bad on the ground that, as to Lancaster's part of the drain, at rear of No. 10, there was no previous examination? Under section 41 of the Public Health Act, 1875, a previous examination of a drain alleged to be a nuisance is a condition precedent to the service of a notice to repair the drain. These proceedings were taken under section 19 of the Public Health Acts Amendment Act, 1890, which authorizes local authorities to recover expenses from the owners of houses in such shares and proportions as shall be settled by their surveyor or a court of summary jurisdiction for work which section 41 of the Act of 1875 gives power to be done. If the respondents' contention is right, then an examination of a drain at the rear of one house would be a sufficient "examination" to serve notice on the owners of the rest of the houses in a whole street. Particulars of the work to be done must be set out in the notice to each owner, and this cannot be done unless there has been an inspection. (2) I say the order is bad, because a man should not be liable to penalties for failure to comply with a notice the carrying out of which would compel him to commit a trespass: *Scarborough Corporation* v. *Scarborough Union,* 1 Ex. D. 344, 25 W. R. Dig. 166; *Reg.* v. *Trimble,* 36 L. T. Rep. 508, 25 W. R. Dig. 167. (3) The respondents cannot in this case recover their costs, because the notice was to relay the drain; it said nothing about alteration of the level. The council have not relaid the drain merely, but have substantially sub-

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(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

stituted a new drain at a different level for the old one.

Macmorran, Q.C., and *E. U. Bullen*, for respondent council.—The section treats the drain as one entire thing and provides that if the drain is complained of as being a nuisance and on examination is found to be defective, then the owners after notice must put the drain right or pay for the work being done by the local authority. The liability is not on each owner for his particular separate bit of the drain, but upon the owners generally for the drain as a whole. There is no hardship in that if the nuisance is due to the negligence of one owner the surveyor can apportion a merely nominal sum or nothing upon the others. Notice must necessarily be given to the owners collectively. It is only following the common procedure under section 150 of the Public Health Act, 1875. The point taken that the order is bad because there is a penalty under section 41 of the Act of 1875 is ill-founded since the penal provisions are not incorporated with section 19 of the Act of 1890, and cannot be read as applying in the case of proceedings under that section: *Parker* v. *Inge*, 17 Q. B. D. 584, 35 W. R. Dig. 141. Lastly, the case has not found that the work done differed from the work specified to be done in the notice. To relay a drain means to relay it in such a manner that it will be effectual, and that may very well involve some alteration of level.

WILLS, J.—The first point which arises here is whether there is power under section 19 of the Public Health Act, 1890, on the part of the local authority to give notice to the owners of the premises affected generally, or whether it is necessary to give each individual owner a separate notice as to the work to be done by him, or to couple with the general notice a notice as to the work to be done by each individual. Mr. Courthope-Munroe contended that a man could not be ordered to do work which would involve his trespassing on the premises of another person. If disobedience to the order would have involved a penalty there might have been substance in that argument, but no penalty is provided. There is no substantial difference between the language of section 19 of the Act of 1890 and that of section 150 of the Act of 1875, under which it is well-known that the notice to execute repairs is always framed generally. In practice, moreover, we know that the difficulties in the way of the execution of combined work of the kind in question by different owners are such that it is never done by them, but the work is left to be done by the local authority; and I think it would be wrong to hold that a notice in that form is invalid.

Then it was argued that, as the local authority only opened the drain opposite three out of the five houses, they could not give notice with respect to the other houses. In my opinion that is not so. I think it is enough to make a sufficient examination to discover that the drain is out of order; and that was done in this case, and the drain and connections was found to be broken and choked with sewage. Then the notice was given, and the local authority having done the work seek to be repaid. In my opinion the provision that the expenses are in that case to be apportioned by the surveyor, or in case of dispute by a court of summary jurisdiction, renders the enactment quite reasonable, and removes the grievance of that owner whose particular portions of the drain are not defective and did not contribute to the nuisance. I agree that, if it were not for the provision as to apportionment, it would be hard that such an owner should be called upon to pay a substantial part of the expenses of abating the nuisance. But the surveyor, or the justices on appeal from him, can direct that the person not in fault ought not to be called upon to pay anything substantial, or perhaps that he ought to pay nothing at all. It is clear, therefore, that the whole proceedings are not made wrong because the notice is addressed to persons who have not substantially contributed to the nuisance. The order was to relay the drain, and the justices have found that the drain was "relaid at a lower level." That may mean something merely trivial, or it may mean something substantial, and as we have not the materials to decide whether this is so or not the case must go back to the justices. If the justices should find that the work done was substantially different from that directed to be done in the notice, then the respondents cannot recover the expenses so incurred by them in doing work never ordered in fact to be done by the owner of the premises; and in that case this appeal must be allowed with costs. If this question is decided adversely to the appellant, then this appeal must be dismissed with costs.

KENNEDY, J.—I am of the same opinion. The last point is the really important point in the decision of this appeal. I agree that a local authority cannot order one kind of work to be done, do another kind of work themselves, and charge the owners with the costs of the latter. For the reason my brother Wills has pointed out, the case must go back for the justices to decide this question of fact.

Case remitted accordingly.

Solicitors for the appellant, *Willett & Sandford.*

Solicitor for the respondents, *J. Eustace Anderson.*

Q. B. Div.
(Wills and Kennedy, JJ.) April 20.

GEEN v. NEWINGTON VESTRY. (a.)

Metropolis management—Nuisance—Sewer or drain—Drain for drainage by combined operation—Evidence of order of vestry—Unauthorized connection between drains—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 74, 250.

A metropolitan vestry produced from their records a plan submitted in 1874 *by the present appellant for drainage of a group of houses belonging to him by means of a single pipe, bearing on it an application by the owner of the houses to the vestry for their sanction to the proposed work, and evidence was given that the plan was carried out under the superintendence of the officer of the vestry. At a subsequent date the owner of adjoining premises, without authority and without the knowledge of the parties to this appeal, connected with the pipe for the draining by a combined operation the appellant's houses in question, a pipe to carry off sewage from his stables. The drainage became defective and the question was whether the appellant or the vestry was to abate the nuisance.*

Held, that there was evidence upon which it might be inferred that the houses had been drained by a combined operation by an order of the vestry within the meaning of section 74 *of the Metropolis Management Act,* 1855, *and therefore if the drain had been used only for the purposes for which it was originally made the vestry would not have been responsible for the repairs now necessary. The connection, however, of a drain from other premises, although unauthorized, rendered the original "drain" a "sewer" within section* 250 *of that Act, and it was therefore now repairable by the vestry.*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Holland *v.* Lazarus, 66 *L. J. Q. B.* 285, 45 *W. R. Dig.* 99, *considered and approved.*

Case stated by A. A. Hopkins, Esq., a Metropolitan police magistrate.

The appellant, as owner of four adjoining houses in Clandon-street in the respondents' parish, was summoned by them under section 2 of the Public Health (London) Act, 1891, in respect of a nuisance existing upon his premises arising from defective drainage. The appellant admitted the nuisance, and the only question for the determination of the court was whether the appellant or the vestry were liable to abate it.

The case stated the following facts:

In 1874 the four houses in question were owned by one Gant, who in June of that year deposited with the respondents a plan showing the proposed drainage for these houses, and bearing on it an application to the respondents in these terms: "I hereby apply for leave, at my own expense, to lay, in accordance with the regulations of the vestry, and as shown by the plan and references below, with glazed stoneware pipe drain 9 in. and 6 in. in diameter from the premises known as 6, 5, 4, 3, Clandon-street into the sewer in Clandon-street."

The plan showed that the drainage of these houses was to be conveyed into the main sewer by a single pipe with which the drain from each house respectively was to be connected, and subsequently the work was carried out in accordance with the plan and not otherwise, and the nuisance now complained of arose from the defective state of that drainage.

At the hearing before the magistrate, the respondents produced from the office of their surveyor a book containing the plan above mentioned, upon which was a note initialed by their surveyor in these terms: "Viewed by Goatman and found to be laid satisfactorily." Goatman gave evidence before the learned magistrate, that as foreman under the vestry's surveyor he had superintended the work in accordance with his orders. No minute of the respondents or of any of their committees could be found having any reference to the matter.

The appellant contended that there was no evidence of any order by the respondents sanctioning the combined drainage operation. The learned magistrate decided otherwise, and held that, if as a matter of law he might be satisfied by the evidence, he was satisfied thereby that the respondents had then sanctioned the combined drainage operation. He found as a fact that the combined drainage operation was carried out by Gant according to the plan, and not otherwise, under the superintendence of the respondents' then surveyor, and that the drainage operation when completed was then a combined drainage operation by which the four houses, and no other premises, were drained.

At the hearing before the magistrate it was proved that a connection existed at the time that the present proceedings were taken between the combined drainage of the four houses and the drains of the stables of No. 1, Clandon-street, and that by means of such connection the stables were drained into and through the combined drainage of the four houses. It was further proved that this connection had existed for the past fourteen years at least, but had not been made by, or by any authority of, the appellant, or to his knowledge. It was not proved how or when or by whom or under what circumstances the connection was made, nor whether or not No. 1, Clandon-street or its stables had at any time since 1874 been in the same ownership as the four houses, and the only fact the magistrate was able to find as to the making of the connection was that it had been made without the knowledge of the respondents at some time subsequent to the completion of the combined drainage by which the four houses only and no other premises were then drained.

The learned magistrate made an order upon the appellant on these facts to abate the nuisance.

The questions for the opinion of the court were: (1) whether there was any evidence by which the magistrate might be satisfied that the four houses were drained by a combined operation under the order of the respondents; and (2) whether, assuming the first question to be answered in the affirmative, the learned magistrate was right in holding the appellant to be liable to abate the nuisance.

English Harrison and *A. C. Glen* for the appellant.—The question is whether this pipe which conveys the drainage of the four houses and of the stable of a fifth is a "drain" or a "sewer" within the Metropolis Management Acts. If it is a drain then the order is right, but if it is a sewer then the order is wrong. Since it became vested in the respondents by section 68 of the Metropolis Management Act, 1855, and under section 69 of that Act the respondents are responsible for its proper maintenance. This pipe from the first was a sewer unless it was constructed under an order of the vestry for combined drainage, the vestry having power under section 74 to make such an order. And the *onus* of showing such an order was made is upon the respondents: *Reg.* v. *Vestry of St. Matthew's, Bethnal Green*, 44 W. R. 559, [1896] 2 Q. B. 697, affirmed in the House of Lords under the name of *Vestry of St. Matthew's, Bethnal Green* v. *School Board for London*, *ante*, p. 353, [1898] A. C. 190; *Kershaw* v. *Taylor*, 44 W. R. 28, [1895] 2 Q. B. 471. That *onus* the respondents have failed to discharge, and the magistrate was wrong in the conclusion he come to. *Bateman* v. *Poplar District Board*, 33 Ch. D. 360, 35 W. R. Dig. 131, shows that approval by the vestry may be equivalent to an order, but there a minute of the district board was produced in evidence recording their approval. That is not the evidence here. If the vestry did give their approval that is not of itself sufficient, since their approval was equally necessary having regard to sections 47, 64 and 88 of the Metropolis Management Amendment Act, 1862, whether the pipe was laid as a combined drain or a sewer. If it is held that the pipe was originally laid under an order of the vestry for combined drainage, *i.e.*, was a "drain," the connection of the stable drain made it a "sewer," for the order, if it existed at all was not one for the drainage of the four houses plus that of the stable, and the fact that the stable drain was connected thereto without their authority or knowledge makes no difference: *Holland* v. *Lazarus*, 66 L. J. Q. B. 285, 45 W. R. Dig. 99.

Macmorran, Q.C., for the respondents.—The rule is laid down in *Bateman* v. *Poplar District Board* that approval by vestry is equivalent to an order. The evidence shows the vestry's approval was given in this case. [He was stopped on this point.] On the second point, whether the connection with the pipe in question of the drain from the stables made the drain a sewer, I admit the case of *Holland* v. *Lazarus*, the facts of which are on all fours with this case, is indistinguishable, but that was a decision at *nisi prius*, and is not binding on this court. It is unfair that the vestry should be saddled with the responsibility for a drain by a wholly unlawful act which, having no knowledge that it was being committed, they were unable to prevent.

WILLS, J.—The facts of this case appear to me to be fairly clear. There is evidence in my opinion for holding that originally this contrivance for drainage

was constructed with a view of its draining these four houses only by a combined operation. The plan for the drainage was deposited by the then owner with the vestry, and it was found upon their plan book, which was produced before the magistrate. It is proved by the evidence of Goatman that the work was carried out under the supervision of the surveyor to the vestry and in accordance with his orders, and it is signed by the proper officer, and there is a note upon it by that officer's foreman. On such evidence as that is it an unreasonable conclusion to come to that the matter at the time had received the attention of the vestry, and that they had sanctioned what was then done? So far I am in accord with the view taken by the magistrate. But another point, the really substantial one as it seems to me, was taken by the appellant that by the subsequent connecting of the stable drain it became a sewer, if it was not a sewer before. We have therefore to decide whether, after that date and as the matter is now, this contrivance as I will call it, used for the double purpose of draining the four houses, *plus* the stable, is a "drain" or a "sewer."

The Act says "any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board" is a drain. As matters stand now, however, there is something beyond that. There is a combined system which would be a drain if it stood by itself and drained merely the appellant's block of four houses, but the fact that it drains the stables belonging to other premises, I think, clearly takes it out of the definition of a "drain," and makes it come within that of a "sewer." Our attention was called by Mr. Macmorran to what North, J., said in his judgment in *Bateman* v. *Poplar District Board*, which case appears not to have been cited in *Holland* v. *Lazarus*. Speaking of a drain laid under order of a district board for the drainage of a row of houses by a combined operation, with which another drain had been connected, he says: "I am not at present prepared to hold that the unlawful act of a stranger done without the consent of the owner of the block of houses could affect his ownership of the 9 in. drain, or the liability of the district board, by vesting the drain in them, and thus throwing the responsibility for it upon them." I quite appreciate that North, J., declined to decide the point when it was not necessary to decide it. My experience has fully convinced me of the wisdom of refraining from deciding a point which does not require to be determined in order to decide the question actually before the court. In this case that question has to be decided, and I feel no doubt as to the answer.

I do not see how the terms of the definition clause can be got out of; this is *de facto* a sewer, because it is now used to take the drainage from more than one house, and not being within the exception—not being a drain for draining a block of houses alone by a combined operation, although constructed under an order of the vestry—it must be a sewer, and as such vested in the respondents under section 68, and consequently is repairable by them under section 69. The question of responsibility does not depend upon the consideration of hardship, but upon whether we ought to hold this contrivance, which is not within the definition of a "drain," nevertheless to be a drain at the present time and not a sewer. I think the appeal must be allowed, and the magistrates' order quashed.

KENNEDY, J., delivered judgment to the same effect.

Appeal allowed; order quashed.

Solicitors for the appellant, *Todd, Dennes, & Lamb.*

Solicitors for the respondents, *Ricketts & Son.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, Chitty, and Vaughan Williams, L.JJ.) — May 16.

STROUD v. LAWSON. (a.)

Practice — Parties — Joinder of plaintiffs — Separate causes of action—Right to relief arising out of same transaction—Ord. 16, *r.* 1.

In an action by a shareholder in a limited company against the directors, the company being joined as a defendant, the plaintiff claimed damages from the directors for having induced him by deceit and fraud to buy shares in the company, one of the particulars of deceit and fraud being the payment of a dividend out of capital. The plaintiff also claimed on behalf of himself and all the other shareholders a declaration that the payment of the said dividend was ultra vires *and illegal, and that the directors were liable to repay to the company the money so paid by them.*

Held, that the plaintiff, suing in two different capacities, could not join the two separate causes of action in one action, inasmuch as they did not arise out of the same transaction, or series of transactions, within the meaning of ord. 16, *r.* 1.

Appeal from the refusal of Darling, J., to strike out a statement of claim as embarrassing.

The plaintiff was a shareholder in the Beeston Pneumatic Tyre Co. The defendants were the three directors of the company and the company itself.

The plaintiff alleged that the defendants other than the company had by means of deceit and fraud induced him to purchase shares in the company at a price far above their real value. One of the particulars of the alleged deceit and fraud was the declaration and payment of a dividend otherwise than out of the profits of the company. The plaintiff also alleged on behalf of himself and all the other shareholders that the payment of the said dividend was *ultra vires* and illegal.

The plaintiff claimed—first on his own behalf, damages for the said deceit and fraud; secondly, on behalf of himself and all the other shareholders, a declaration that the said dividend was *ultra vires* and illegal, and that the defendants other than the company were jointly and severally liable to make good to the company all moneys paid by them out of the company's assets in respect of the said dividend.

An application by the defendants that the statement of claim should be struck out as embarrassing, unless the plaintiff elected on which of the two causes of action he would proceed, was dismissed by Darling, J., at chambers.

The defendants appealed.

Brooke-Little, for the defendants.—The case must be treated as if there were two several plaintiffs; for the plaintiff sues in two several capacities, the one personal, the other representative. It is therefore governed by ord. 16, r. 1, which enacts that "all persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise." The plaintiff's alleged right to relief in respect of the first cause of action does not arise out

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

of the same transaction or series of transactions as his alleged right to right to relief in respect of the second cause of action. The two causes of action therefore cannot rightly be joined in one action, and the plaintiff ought to be put to his election.

Mattinson, Q. C., and G. F. Hart, for the plaintiff.—The two causes of action are rightly joined under ord. 16, r. 1. They arise out of the same transactions, and the illegal payment of a dividend is a matter which gives rise to a question which is common to both causes of action.

A. L. SMITH, L.J.—The question is, whether the plaintiff ought to be put to his election as between two absolutely distinct causes of action. I am of opinion that he ought to be put to his election. The action is brought by the plaintiff, in the first place, on his own behalf, to recover damages from the three defendants who are directors for having cheated him into becoming a shareholder by false and fraudulent misrepresentations. That is a common-law action of deceit, and is purely personal to the plaintiff. He then sues in different capacity, that is to say, not in his own personal capacity, but on behalf of himself and all the other shareholders he sues the same three persons for having paid a dividend out of capital. In order to bring this sort of action it was necessary for him to sue in a representative capacity on behalf of himself and the other shareholders, and it was also necessary to make the company a defendant on the record. His claim on this second cause of action is that the defendants other than the company should put back the money, which they have so paid *ultra vires*, not into his own pocket, but into the coffers of the company for the benefit of the shareholders. The plaintiff is thus joining in one action a well-known common-law action and an action which is familiar in the Chancery Division. In the one he sues in his personal capacity, and he has to prove fraud; in the other he sues not on his own behalf alone but in a representative capacity, and he has not to prove fraud, but merely that the directors acted *ultra vires*. In my opinion these are two entirely distinct causes of action, and they do not come within ord. 16, r. 1, as arising out of the same transaction or series of transactions. The present rule was made in consequence of the decision of the House of Lords in *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494, and the subsequent case of *Carter* v. *Rigby*, 44 W. R. 566, [1896] 2 Q. B. 113. But the plaintiff fails to bring the present case within the rule, unless he can show that the two causes of action arose out of the same transaction. It is not enough to show that there is a common question of law or fact. I therefore think that the proper order to make in this case is that the statement of claim be struck out, unless the plaintiff elect on which of the two causes of action he will proceed.

CHITTY and VAUGHAN WILLIAMS, L.JJ., concurred.

Appeal allowed.

Solicitor for the plaintiff, *Lewis Stroud*,

Solicitors for the defendants, *Steadman & Van Praagh*.

High Court of Justice.

Chan. Div. Romer, J. — June 24, 25.

In re MORRIS.

JAMES v. LONDON AND COUNTY BANKING CO. (*a*.)

Bankruptcy—Proof—Bill of exchange—Secured creditor—Consolidation of debts and securities.

In bankruptcy it would primâ facie *be right for a creditor who had several debts due to him from a bankrupt to prove for the lump sum without distinguishing the debts. But if there were different rights over with respect to some of the debts as against third parties, or different securities given by the bankrupt for the different debts, it would be the duty of the trustee to require the person proving to specify the particular debts, or the security for each debt.*

In re Smith and Logan, Ex parte Fletcher and Brandon, 43 *W. R.* 412, 2 *Manson Bank. Rep.* 70, *explained.*

The holder of four dishonoured bills of exchange sent in a proof in the liquidation of the estate of a firm which had endorsed each bill, for the aggregate amount of the four bills with noting expenses. The trustee in the liquidation had different rights of indemnity in respect of the four bills. In respect of two of those bills the holder had received more than 20s. in the £ upon his proofs against the various parties to the said bills, but the total amount received by him was considerably less than the aggregate amount claimed in respect of the four bills.

Held, that he could not be allowed to retain the surplus beyond the amount due on either of the two overpaid bills and attribute it to payment of the debts on the other bills.

Summons.

The defendants were at the date of the creditor's deed hereinafter mentioned holders of four bills of exchange hereinafter referred to as A, B, C, and D. A, B, and C were for £2,000 each, and D £1,000. A and C were drawn by Job & Co., in Newfoundland, upon Job Bros., in England, payable to order of the Commercial Bank of Newfoundland, and were accepted by Job Bros. B and D were drawn by Goodridge in Newfoundland upon Bennett in England, payable in like manner as A and C, and were accepted by Bennett. A, B, C, and D were severally endorsed by the said bank to Prowse, Hall & Morris, and by them to R., and by R. to the defendants, all in the ordinary course and for value.

The said bank, Job Bros., Bennett, and Goodridge became bankrupt or entered into liquidation, and the defendants proved against their respective estates for the amounts due upon the bills to which they were respectively parties. In September, 1896, R. paid the defendants in respect of the said four bills £615 odd, forming part of the estate of Prowse, Hall, & Morris, which came into the hands of R., and the propriety of such payment was not now disputed.

The plaintiff was the trustee of a creditors' deed entered into in April, 1895, by Morris, the debtor, who was the surviving partner of the firm of Prowse, Hall, & Morris. The deed in effect provided for the distribution of that firm's assets as in bankruptcy among the assenting creditors who would have been entitled to prove if the debtor had been adjudicated bankrupt as therein mentioned. The defendants, waiving interest, claimed under the said deed against

(*a*.) Reported by J. F. WALBY, Esq., Barrister-at-Law.

the estate of the firm for the amount of the said four bills of exchange with noting expenses, after deducting the said sum of £615 odd, making a total of about £6,480.

Upon their proofs against the various parties to the said bills, the defendants received amounts in respect of the bills B and D exceeding the amounts due on such bills, with noting expenses and interest, by £373 odd and £192 odd respectively. The defendants had not received payment in full of either of the bills A and C, and the whole amount received by them was less than the whole amount due in respect of the said four bills. Under these circumstances the plaintiff claimed to have it declared that the defendants were not entitled to any further dividends from the estate of Prowse, Hall, & Morris in respect of bills B and D, and that the said sums of £373 and £192 should be repaid by the defendants to the plaintiff, and that the defendants should be ordered to deliver up the said bills to the plaintiff. The plaintiff had in fact paid the defendants by way of dividends from the estate of Prowse, Hall, & Morris the said sums of £365 and of £182 10s. in respect of the bills B and D respectively, but did not know at the time of such payment how much had been received by the defendants in respect of the said bills.

Levett, Q.C., and *F. Thompson*, for the plaintiff.—The liability of the indorser of a bill of exchange is governed by the Bills of Exchange Act, 1882, s. 55 (2). He engages that it shall be "accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder." The defendant bank had therefore four separate rights of indemnity, and by indorsing each bill Prowse, Hall, & Morris engaged with the bank that they would indemnify the bank in respect of that bill. *In re Smith and Logan, Ex parte Fletcher and Brandon*, 43 W. R. 412, 2 Manson Bank. Rep. 70, will be cited to show that the bank could lump together the amounts due on the four several bills and prove for the aggregate sum against Prowse & Co., but that case only shows that it is permissible to lump together debts and securities.

They also cited *Paley* v. *Field*, 12 Ves. 435.

Neville, Q.C., and *Muir Mackenzie*, for the defendants.—Section 57 of the Bills of Exchange Act, 1882, shows the damages recoverable where a bill is dishonoured. But the question is governed by the law and practice in bankruptcy. The question is one of admission of proof and not of realization of securities. The practice is to make a single proof, as was done here, and not distinct proofs. The defendants, who are secured creditors in respect of the bills, were not required and could not be compelled to value separately the component parts of their security. They were entitled to lump the debts and prove for the aggregate amount against the estate of Prowse & Co.: see *In re Smith and Logan, Ex parte Fletcher and Brandon*. That is the ordinary practice in bankruptcy. The plaintiff's claim is therefore wrong.

They also cited *In re Du Bedat*, 29 L. R. Ir. 324, 41 W. R. Dig. 17, and referred to the Bankruptcy Act, 1883, ss. 37 (3), 38, and schedule 2, and Williams on Bankruptcy (1898) p. 526.

ROMER, J.—I have no doubt that in the ordinary case in bankruptcy it would *primâ facie* be right, and the ordinary course to pursue, for a creditor who has several debts due to him from a bankrupt to prove for the lump sum without distinguishing the debts, and in most cases that is all that is necessary. But it appears to me that if the debts are distinct in substance in this respect that the trustee in bankruptcy may have different rights over with respect to some of these debts as against third parties, or there are different securities given by the bankrupt for the different debts, that then it would not only be the right, but I should say it would be the duty, of the trustee in bankruptcy to require the person proving to specify the particular debts, and the value of the security if there were a security for each debt, unless, indeed, of course there was a right of consolidation.

That is what really was decided in that case of *In re Smith and Logan* which has been cited before me. In that particular case it happened that the trustee having consented to the form of proof of different secured debts as a whole, the securities all being lumped and valued together as a whole, having consented to that, and having let the time pass by in which he could remedy that, it was held that he was barred, and that it was too late for him to come forward then and say that the debts ought to be separately considered and the separate securities separately valued. In my opinion the right of the trustee in bankruptcy to have debts separately valued where the debts, as I have said, may involve different rights over by the trustee or different rights of the trustee in respect of each debt, is certainly not confined to a case where the debts are secured by securities of the bankrupt. Take this case, a case I put to counsel in course of the argument. Suppose a creditor is a creditor on a bill of which the bankrupt is the last endorser, and he is also a creditor on a common goods sold and delivered account of the bankrupt, and he proves for the amount of the bill and for the amount of the ordinary debt. After proof, but before any payment of dividend by the bankrupt, the persons who are primarily liable on the bill before the bankrupt, pay the bill in full, could the creditor in that case claim to keep on receiving dividends on that bill after it had been paid him in full as well as on the other debt on the ground that he had proved on the whole? I think certainly not. I think, unless indeed there had been any waiver of rights which I am not considering, that very case shows that in such a case of debts having separate rights attaching to them separate liabilities and rights over, it is the duty of the trustee, as it appears to me, as well as his right to require in a case of that kind that the proofs should not be lumped together, but that the items of the proof shall appear, though I quite agree that so long as the same proof remains unpaid off as to any portion, he is for the purpose of the proof, and for the purpose of voting and so forth, regarded as a creditor for the total amount of his proof at the time when he comes in and proves.

Now, to apply the principle of that case to the case before me. Here there were proofs in respect of four separate bills. Those bills the trustee in bankruptcy had different rights in respect of. If the bills were paid in full by the bankrupt, the persons as against whom he would have a right over were different, so that he had different rights, and the trustee in bankruptcy had different rights in respect of each of the bills. What happened? Two of those bills are paid in full and overpaid, so that it appears that the creditor has been paid more than 20s. in the £ in respect of each bill. Clearly, to my mind, he cannot claim, as against the persons who in the aggregate were liable on that bill, to retain the surplus he has received, and claim to attribute it to payment of the debts on the other bills. The persons who in the aggregate are liable on one of those bills being different from the persons who in the aggregate are liable on the other bills, have a right to complain, and would naturally have the right to complain if the holder of one bill claim to set off the surplus he has received in respect of the others. The

must as between themselves have a right to require between them payment of what the creditor had received over 20s. in the £ on the whole.

That being so, when I come to consider the bills before me, where the creditor proving has received more than 20s. in the £, who, as between the persons in the aggregate liable on those bills, is entitled to receive the overplus? It turns out in this case it must be the trustee in bankruptcy, because all the other persons who overpaid on those bills were primarily liable as against the trustee in bankruptcy. It appears to me, therefore, that the bankrupt's trustee was entitled in respect of the surplus received by each creditor in respect of each bill to have that surplus handed back to him, and I so decide. The trustee is also entitled to have the two paid bills handed over.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Simpson, Cullingford, Partington, & Holland.*

Solicitors for the defendants, *Harries, Wilkinson, & Raikes.*

Chan. Div. }
Romer, J. } June 8, 18.

TOMS *v.* CLACTON URBAN DISTRICT COUNCIL. (*a.*)

Local government—Vendor and purchaser—Burial—Purchase of land by district council for—Action for injunction under Burial Act, 1855 (18 *&* 19 *Vict. c.* 128), *s.* 9—*Costs—Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61).

The rule that a grantor cannot derogate from his own grant disentitles the vendor of land for the purposes of a cemetery from claiming the benefit of the prohibition in section 9 *of the Burial Act,* 1855, *against burying within* 100 *yards of a dwelling-house, in respect of a house situate on other land of the vendor; and a lessee or occupier thereof, after and with full knowledge of the vendor's grant, cannot be in a better position than his own grantor.*

In the above action, which was for an injunction under section 9 *of the Burial Act,* 1855, *to restrain a district council from using land for the purposes of a cemetery within* 100 *yards from the plaintiff's dwelling-house, judgment was accordingly given for the defendants.*

The defendants then claimed that they were entitled as of right to costs as between solicitor and client by virtue of the Public Authorities Protection Act, 1893.

Held, that the action was for an "act done in pursuance of public duty," and was therefore one to which the Act applied.

Action.

This was an action for an injunction to restrain the defendants from using land in their possession for the purposes of a cemetery, except beyond a radius of 100 yards from the plaintiff's dwelling-house. It appeared that the vendor of the land had sold the fee simple to the defendants for the purposes of a cemetery, and the conveyance contained a covenant by them not to use the land for any other purposes except with the vendor's consent. The plaintiff was the occupier of a small cottage close to the land. This cottage belonged to the vendor, and the plaintiff was in his service as gardener. The tenancy appeared to be a weekly one.

By 18 & 19 Vict. c. 128, s. 9, no ground not already used as or appropriated for a cemetery shall be used for burials within the distance of 100 yards from any dwelling-house without the consent of the owner, lessee, or occupier of such dwelling-house.

The plaintiff was cross-examined with the object of extracting from him the admission that he was plaintiff in name only, and that the real, although not nominal, plaintiff was his employer, the vendor of the land.

Levett, Q.C., and *C. E. Jones,* for the plaintiff.—The land has not been appropriated for burial within the meaning of the enactment, and the plaintiff is entitled to the benefit of the prohibition in section 9 of the Burial Act, 1855, against burying within 100 yards of a dwelling-house.

Neville, Q.C., and *Ingpen,* for the defendants.—If the prohibition of the Act were held to apply in such a case, the express purpose of the vendor's grant might be entirely defeated, and the effect of the rule that a man shall not derogate from his grant is, as shown by the cases, to prevent not only the vendor, but anyone claiming through or under him, from invoking the Act for the purpose of restricting the defendants' user of the land: see *Elliot* v. *North-Eastern Railway Co.,* 8 W. R. 603, 11 *ib.* 604, 1 Johns. & H. 145, 10 H. L. Cas. 333; *Siddons* v. *Short,* 2 C. P. D. 572, 26 W. R. Dig. 253.

They also referred to *Broomfield* v. *Williams,* 45 W. R. 469, [1897] 1 Ch. 602; *Swansborough* v. *Coventry,* 2 Moo. & Sc. 362, 9 Bing. 305; Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 141; and Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31).

ROMER, J.—I will assume for the purpose of my judgment that the land is subject to the restrictions imposed by the Burial Act, 1852 (15 & 16 Vict. c. 85), and the Burial Act, 1855 (18 & 19 Vict. c. 128), or to analogous restrictions. The vendor granted the land in order that every part of it should be used for the purposes of a cemetery. He then placed his gardener in a cottage near it for the purpose of bringing this action and preventing in effect any of it being so used. There is no doubt that the action in substance is the vendor's action, and the costs of the action will have to be provided by him. Could he then bring an action to prevent its use for the express purpose for which he sold it? That would be derogating from his grant to the defendants. It must be remembered that the defendants are doing nothing illegal. Only they have, under the Burial Acts, to obtain the statutory consent of the owner to what they are doing. The vendor, therefore, could not bring an action. Could a person in the position of the plaintiff, and acting *bonâ fide,* do so—that is to say, a lessee or occupier, after and with full knowledge of the vendor's grant and its purpose? Such a person could not be in any better position than his own grantor, or acquire a right which his own grantor had not. In fact the plaintiff is a weekly tenant only of the vendor, and he could give a week's notice to the plaintiff at any time. Other grounds might be stated for dismissing the action. But on the above ground alone the action fails. I dismiss the action with costs.

Neville, for the defendants, asked for costs as between solicitor and client under the Public Authorities Protection Act, 1893, citing *Harrop* v. *Ossett Corporation, ante,* p. 391, [1898] 1 Ch. 525.

Levett, for the plaintiff, submitted that the action was not, within the words of section 1, brought against the defendants "for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority."

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

He referred to the case of the *Somersetshire Drainage Commissioners* v. *Corporation of Bridgwater*, before the Court of Appeal on the 4th of April, 1898, where the plaintiffs were unsuccessful in a claim for an injunction restraining the defendants from carrying out public sewerage works so as to interfere with the banks and bed of the River Parrett, the court being of opinion that the defendants had a customary right to do the acts complained of. Counsel for the defendants in that action having asked for solicitor and client costs under the Act, their lordships held that the Act was not applicable, inasmuch as the question in dispute was on a custom, and the Act was meant to apply only to frivolous prosecutions and actions. The question, however, was not argued in that case.

Cur. adv. vult.

June 18.—ROMER, J.—I have considered the matter as to the question of costs, and I cannot see in the Act any limitation beyond that imposed by the very words of the Act. This action appears to me to be one against the defendants for using or being about to use certain land for burial purposes, and is, in my opinion, within the words of the Act an action against the defendants for an "act done in pursuance of public duty," and I cannot see, therefore, why the Act does not apply. I shall direct the registrar to draw up the order with costs to be taxed as between solicitor and client. I should like to have a decision of the Court of Appeal to guide me in determining the classes of cases to which the Act is not to apply.

Solicitors, *A. S. C. Doyle*, for *Jones & Son*, Colchester; *Chamberlayne & Short.*

Q. B. Div.
(Lord Russell of Killowen, C.J., Sir Francis Jeune, P., Chitty, L.J., and Mathew, Wright, Darling, and Channell, JJ.) April 4; May 14.

KRUSE *v.* JOHNSON. (*a.*)

Local government—County council—Bye-law for good rule and government — Validity — Reasonableness— Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 16.

A bye-law made by a county council under section 23 *of the Municipal Corporations Act*, 1882, *and section* 16 *of the Local Government Act*, 1888, *and duly confirmed, provided that "No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable or by any inmate of such house personally, or by his or her servant, to desist." The appellant continued to sing on a highway within fifty yards of a dwelling-house after being requested by a constable to desist.*

Held, by Lord Russell of Killowen, C.J., Sir F. Jeune, P., Chitty, L.J., *and* Wright, Darling, *and* Channell, JJ. (Mathew, J., *dissenting*), *that the bye-law was reasonable, and that the appellant was rightly convicted of an offence against it.*

Observations as to the principles to be applied by the court in deciding as to the validity of the bye-laws of local representative bodies.

Slattery *v.* Naylor, 36 *W. R.* 897, 13 *App. Cas.* 446, *applied.*

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Case stated by justices of the county of Kent.

A bye-law made by the Kent County Council for the good rule and government of the county, under the powers given to them by section 23 of the Municipal Corporations Act, 1882, and section 16 of the Local Government Act, 1888, and duly confirmed by the Secretary of State, provided that "No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling house after being required by any constable or by any inmate of such house personally or by his or her servant, to desist." The appellant was charged under this bye-law on the information of the respondent, a police-constable, for that he on Sunday, the 10th of October, 1897, at the parish of Leeds, in the county of Kent, did sing in a certain highway within fifty yards of a dwelling-house there, after being required by a constable of the said county to desist. It was proved before the justices that the appellant, who was conducting an open-air religious service at about 5.45 p.m. on the 10th of October, 1897, did with others congregate within fifty yards of a dwelling-house in the parish of Leeds, and commence to sing a hymn, in which those with him joined, and that after singing two or three lines of the hymn he was requested by a constable to desist but continued singing after such request. And it was further proved by the occupier of the dwelling-house that the singing of the appellant and those with him was an annoyance to him, the occupier, but it was not proved that the occupier had requested the constable on the day in question to ask the appellant to desist from singing, although he had complained to the police on previous occasions. On the part of the appellant it was contended that the bye-law was invalid on the grounds that it was unreasonable; that it was not limited to cases of persons playing musical or noisy instruments or singing to the annoyance of residents or passengers; and that it created a new offence and was repugnant to the general law of the land. The justices were of opinion that the bye-law was good, and they convicted the appellant, imposing a fine of £1 with 13s. costs. And they stated the case for the opinion of the High Court.

The case was in the list for hearing before Lord Russell of Killowen, C.J., and Mathew, J., in March, 1898, immediately after a case of *Brownscombe* v. *Johnson*, 78 L. T. Rep. 265, arising under the same bye-law, in which the facts were almost identical with those of the present case. In that case Lord Russell of Killowen, C.J., held that the bye-law was valid, while Mathew, J., was of opinion that it was unreasonable and bad. The present case was therefore reserved for hearing before a specially-constituted court.

Robson, Q.C., and *Hohler*, for the appellant.—The bye-law is unreasonable and invalid. A bye-law made under these statutory powers must be in terms confined to prohibiting acts done to the annoyance of other people; but if this bye-law be valid a man may be convicted of an offence under it although his act is harmless and causes no annoyance to anyone. *Everett* v. *Grapes*, 3 L. T. Rep. 669, 9 W. R. C. L. Dig. 57; *Heap* v. *Burnley Union*, 32 W. R. 6[illegible], 12 Q. B. D. 617; *Johnson* v. *The Mayor of Croydon*, 16 Q. B. D. 708, 34 W. R. Dig. 129; *Munro* v. *Watson*, 57 L. T. Rep. 366, 36 W. R. Dig. 124; *Strickland* v. *Hayes*, 44 W. R. 398, [1896] 1 Q. B. 290. A bye-law similar to that in *Strickland* v. *Hayes* was held valid in *Mantle* v. *Jordan*, [1897] 1 Q. B. 248, 45 W. R. Dig. 88, on the ground that the prohibition was confined to cases where annoyance was caused. The bye-law is unreasonable on the further ground that it confers powers a single police-constable at his discretion of

caprice to put a stop to an act which may not only be causing no annoyance but may be actually agreeable to the inhabitants: *Alty* v. *Farrell*, [1896] 1 Q. B. 636, 44 W. R. Dig. 92. It is true that in *Burnett* v. *Berry*, 44 W. R. 512, [1896] 1 Q. B. 641, a bye-law was upheld in which the prohibition did not contain words as to causing annoyance, but that case can only be supported on the ground that the bye-law dealt with the manifest evil of betting in streets.

Dickens, Q.C., and *A. Gill*, for the respondent.—The bye-law is good; it is made by a representative local authority, well acquainted with the wants and desires of the locality for which it legislates and responsible to the electorate; it has also been confirmed by a high state department. Such a bye-law ought not to be interfered with by the court except in extreme cases: *Slattery* v. *Naylor*, 36 W. R. 897, 13 App. Cas. 446; *Bailey* v. *Williamson*, 21 W. R. 404, L. R. 8 Q. B. 118. A bye-law is not unreasonable because, if harshly enforced, it may cause hardship in particular instances. The general public interest and the circumstances of the locality (as to which the local authority are the best judges) must be considered: *Simmons* v. *Malling Rural District Council*, 45 W. R. 603, [1897] 2 Q. B. 433; *Wanstead Local Board of Health* v. *Wooster*, 38 J. P. 21; *Gray* v. *Sylvester*, *ante*, p. 63. This court is not bound by the decisions of ordinary Divisional Courts, and is at liberty to review the earlier decisions upon the validity of bye-laws: *Fortescue* v. *The Vestry of St. Matthew, Bethnal Green*, [1891] 2 Q. B. 170, 39 W. R. Dig. 125.

Cur. adv. vult.

May 14.—Lord RUSSELL OF KILLOWEN, C.J.—The County Council of Kent, claiming to act under their statutory powers, made the following bye-law: "4. Playing musical instruments, &c.—No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable, or by an inmate of such house personally, or by his or her servant, to desist."

The appellant was summoned before the magistrates for offending against this bye-law, when it was proved that on the 17th of October, 1897, he persisted in singing in a public highway within fifty yards of a dwelling-house, after having been required by a police-constable to desist. It was further proved by the occupier of the dwelling-house that the singing of the appellant and those with him was an annoyance to such occupier. The occupier had not, on the day in question, set the constable in motion, but he had on previous occasions complained to the police of the appellant's singing. The magistrates convicted the appellant, and against that conviction the present appeal is brought.

The question reserved for this court is whether the bye-law is valid. If valid the conviction is to stand. It is objected that the bye-law is *ultra vires* on the ground that it is unreasonable and therefore bad. It is necessary, therefore, to see what is the authority under which the bye-law in question has been made, and what are the relations between its framers and those affected by it?

But first it seems necessary to consider what is a bye-law.

A bye-law of the class we are here considering I take to be an ordinance affecting the public or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the bye-law, they would be free to do or not to do, as they pleased. Further it involves this consequence—that if validly made it has the force of law within the sphere of its legitimate operation (see *Edmonds* (*Appellant*) v. *The Company of Watermen*, [1855] 24 L. J. M. C. 124).

In the present case we are dealing with a bye-law made by a local representative body—namely, the County Council of Kent, which is created under the Local Government Act, 1888, and which is endowed with the powers of making bye-laws given to municipal corporate bodies under the Municipal Corporations Act, 1882.

Section 16 of the Local Government Act, 1888, provides that a county council shall have the same power of making bye-laws in relation to their county as the council of a borough have in relation to their borough; and it further provides that section 187 of the Public Health Act of 1875 shall apply to such bye-laws.

I will take these statutes in the order of time.

Section 182 of the Act of 1875 provides that all bye-laws made by a local authority under that Act shall be under their common seal and may be altered or repealed by a subsequent bye-law, but no bye-law shall be repugnant to the laws of England or to the provisions of the Act.

Section 183 gives power to impose penalties.

Section 184 provides that bye-laws shall not take effect until confirmed by the Local Government Board, which may allow or disallow them, and, before their confirmation, notice of intention to apply for confirmation must be advertised, and for a month at least before such application a copy of the proposed bye-laws must have been kept at the office of the local authority for the inspection of ratepayers, and the clerk of the local authority is bound to furnish on application a copy of the proposed bye-laws, or a part of them, to any ratepayer on a certain payment being made.

Section 23 of the Act of 1882 provides that the council of a borough may from time to time make such bye-laws as to them seem meet for the good rule and government of the borough and for the prevention and suppression of nuisances not already punishable in a summary manner, and they may by such bye-laws appoint such fines, not exceeding £5, as they deem necessary for the prevention of offences against the bye-laws.

It is under this authority that the bye-law in question was framed.

What are the checks or safeguards under which this very wide authority of making bye-laws is exercisable? The same section 23 further provides that no bye-law can be made unless two-thirds of the whole number of the council are present, and, when so made, it shall not come into force until the expiration of forty days after a copy thereof has been fixed on the town-hall and it shall not come into force until the expiration of forty days after a copy sealed with the corporate seal has been sent to the Secretary of State; and if within those forty days the Queen, with the advice of her Privy Council, disallows a proposed bye-law or part thereof, such bye-law or such part shall not come into force, and the Queen may within the forty days enlarge the time within which the bye-law shall not come into force.

We thus find that Parliament has thought fit to delegate to representative public bodies in towns and cities, and also in counties, the power of exercising their own judgment as to what are the bye-laws which to them seem proper to be made for good rule and government in their own localities. But that power is accom-

panied by certain safeguards; there must be antecedent publication of the bye-law, with a view, I presume, of eliciting the public opinion of the locality upon it, and such bye-laws shall have no force until after they have been forwarded to the Secretary of State. Further, the Queen, with the advice of her Privy Council, may disallow the bye-law wholly or in part, and may enlarge the suspensory period before it comes into operation. I agree that the presence of these safeguards in no way relieves the court of the responsibility of inquiring into the validity of bye-laws where they are brought in question, or in any way affects the authority of the court in the determination of their validity or invalidity.

It is to be observed, moreover, that the bye-laws having come into force they are not like the laws, or what were said to be the laws, of the Medes and Persians—they are not unchangeable. The power is to make bye-laws from time to time as to the authority shall seem meet, and if experience shows that in any respect existing bye-laws work hardly or inconveniently the local authority, acted upon by the public opinion, as it must necessarily be, of those concerned, has full power to repeal or alter them. It need hardly be added that should experience warrant that course the Legislature, which has given, may modify or take away the powers they have delegated. I have thought it well to deal with these points in some detail, and for this reason—that the great majority of the cases in which the question of bye-laws has been discussed are not cases of bye-laws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies which carry on their business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that the courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage.

But when the court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them and in the manner which to them shall seem meet, I think courts of justice ought to be slow to condemn as invalid any bye-laws so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn, C.J., said in *Bailey* v. *Williamson*—an analogous case—I do not mean to say that there may not be cases in which it would be the duty of the court to condemn bye-laws made under such authority as these were made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that, in matters which directly and mainly concern the people of the country who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of bye-laws were to be determined by the opinion of judges as to what was reasonable—in the narrow sense of that word—the cases in the books on this subject are no guide, for they reveal, as, indeed, one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested.

So much for the general considerations which it seems to me ought to be borne in mind in considering bye-laws of this class. I now come to the bye-law in question.

It is admitted that the county council of Kent were within their authority in making a bye-law in relation to the subject-matter which is dealt with by the impeached bye-law. In other words, it is conceded—and properly so—that the local authority might make a bye-law imposing conditions under which musical instruments and singing might be permitted or prevented in public places. But it is objected that they have no authority to make a bye-law on that subject in the terms of this bye-law. Further, it is not contended that the bye-law should, in order to be valid, be confined to cases where the playing or singing amounted to a nuisance; but the objections are, as I understand them, that the bye-law is bad—first, because it is not confined to cases where the playing or singing is in fact causing annoyance, and next, because it enables a police-constable to bring it into operation by a request on his part to the player or singer to desist. As to the first of these objections, if the general principles upon which these bye-laws ought to be dealt with are those which I have already stated, it is clear that the absence of this qualification cannot make the bye-law invalid. But, further, such a qualification, in my judgment, would render the bye-law ineffective. What is to be the standard of annoyance? What may be a cause of annoyance to one person may be no annoyance, and may even be pleasurable, to another person. Again, who is to be the judge in such a case of whether there is or is not an annoyance? Is it to be the resident of the house within fifty yards of the playing or singing, or is it to be the magistrate who hears the charge? It is enough to say that in my judgment the absence of the suggested qualification cannot make the bye-law invalid, even if it be admitted that its presence would be an improvement.

As to the second objection—namely, that the policeman has the power of putting the bye-law into operation by requiring the player or singer to desist—I again say that, even if the absence of this power would be an improvement and would make the bye-law in the apprehension of some more reasonable, it is not on the principles I have already stated a ground for declaring the bye-law to be invalid. In support of this objection pictures have in argument

been drawn (more or less highly coloured) of policemen who, without rhyme or reason, would or might gratuitously interfere with what might be a source of enjoyment to many. In answer, I say a policeman is not an irresponsible person without check or control; if he acts capriciously or vexatiously he can be checked by his immediate superiors, or he can be taught a lesson by the magistrates should he prefer vexatious charges. If the policeman persisted in saying that the musician should desist when the people in the neighbourhood desire his music, his gratuitous interference would promptly come to an end. Nor is it correct to say (as has been erroneously stated in some of the cases cited) that the magistrate would be bound in every case to convict where the musician did not desist when called upon. It is clear that, under section 16 of the Summary Jurisdiction Act, 1879, the magistrate, if he thinks the case of so trifling a nature that it is inexpedient to inflict any punishment, may without proceeding to conviction dismiss the information. The facts of this case are certainly no illustration of the bye-law having been gratuitously or vexatiously put in force. The case states (paragraph 5) that although it was not proved that the occupier of the house within fifty yards had on the day in question requested the constable to require the appellant to desist, yet it was proved that the singing was an annoyance to the occupier and that he had on previous occasions complained to the police of such singing. Indeed, it was stated during the argument that the conviction here appealed from was the second conviction of the appellant for an offence against this bye-law.

I have carefully read the cases cited in argument, but I do not propose to consider them in detail. Many of them relate to bye-laws made under different statutes; others it is difficult to reconcile; few deal with the principles upon which bye-laws like those in question are to be dealt with by the courts; and some of them—as, for instance, *Munro* v. *Watson*, and perhaps *Johnson* v. *Mayor of Croydon*—may be distinguished from the present case.

In weighing previous authorities it is further to be recollected that the cases have come before Divisional Courts, usually consisting of two members, and that those cases, being in their nature criminal, there has been no judgment of a Court of Appeal upon them. It is for this reason that the present special court has been constituted. I cannot doubt that this court has authority to review, and if it thinks fit to differ from, any prior decision of a Divisional Court on this subject: see *Fortescue* v. *The Vestry of St. Matthew, Bethnal Green*.

I have said that there are few of the prior cases dealing with this matter which lay down the principles upon which the bye-laws made by representative public bodies are to be considered. There is one notable exception; I refer to the case of *Slattery* v. *Naylor*. That was a case in the Privy Council, in which the members of that court had to consider the validity of a bye-law passed by the municipal council of the borough of Petersham, in New South Wales, under the provisions of the Municipalities Act, 1867. The court consisted of Lords Hobhouse, Herschell, and Macnaghten and Sir Barnes Peacock and Sir Richard Couch. That case has been so fully discussed during the course of the argument that I do not think it necessary here to refer to it in detail. It is enough to say that, beyond doubt, the reasoning and principles on which it proceeds fully justify the views which I have expressed in this judgment. Nor are the weight and value of the reasoning in that case, as an authority in the present case, in any way lessened by the fact that the bye-law there was made under the authority of a different statute. The cases are strictly analogous, and it was necessary for the judgment of the Privy Council that that tribunal should consider the principles upon which bye-laws of representative governing bodies made under statutory authority should be considered. That it has done thoroughly and clearly.

In my opinion, judged by the test of reasonableness, even in its narrower sense, this is a reasonable bye-law; but, whether I am right or wrong in this view, I am clearly of opinion that no court of law can properly say that is invalid.

In the result the conviction appealed from must, in my opinion, be affirmed; but as the question is one of wide importance, and as to which there has been a contrariety of judicial opinion, it will be affirmed without costs.

Sir FRANCIS JEUNE, P.—The bye-law of which the validity is in question on this appeal in effect makes it an offence to perform music or singing in a public place or highway within fifty yards of a dwelling-house, if an inmate of such house or if a police-constable require the performer to desist. The provisions as to the inmate and as to the police-constable give rise to somewhat different considerations.

The sole question is whether this court should hold that, in its judgment, this bye-law is invalid because it is unreasonable. I agree with the contention urged before us that it is material to consider by what authority the bye-law was made. It was made by the county council of Kent—that is to say, a public representative body to which Parliament has confided the duty of making bye-laws for the good rule and government of the inhabitants of Kent and the prevention of nuisances in that county. Three considerations appear to me to apply with especial force to such an authority dealing with such subject-matter. First, the case is wholly different from that of manorial authorities, or of trading corporations, such as dock or railway companies, who often have a pecuniary interest in their bye-laws, or even of such a municipal corporation as might be supposed to have trade interests involved. Secondly, such an authority as a county council must be credited with adequate knowledge of the locality, its wants and wishes. Thirdly, the opportunity afforded by legislation for a request for reconsideration, and an appeal to higher authorities, by members of the public, shows that any bye-law which comes into force has secured at least the acquiescence of those whom it affects. Cases may be imagined in which in spite of these considerations this court, acting in discharge of its undoubted powers and duty, might feel compelled to hold a bye-law made by a county council invalid on the ground that it was unreasonable. But when a question of the requirements and wishes of the locality is involved, this court should, I think, be very slow to set aside the conclusions of the local authority. If support be needed for this opinion, it is to be found in the language of the Privy Council in the case of *Slattery* v. *Naylor*, an appeal which came from a colony to which the settlers carried the law of England, and which was fully considered by a board of high authority. I will quote only one among several passages which might be referred to: "The jurisdiction of testing bye-laws by their reasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations having inherent powers or general powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen, the same jurisdiction has been exercised over them. But in determining whether or

no a bye-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned."

The main ground of objection taken to this bye-law is, as I understand it, that it does not require proof that annoyance has in the particular instance been caused by the musical performance complained of. It is undoubtedly true that in several cases it has been held by this court that the absence of a provision that annoyance or nuisance must be shown renders the bye-law unreasonable. But such cases appear to me to be distinguishable from the present. I will take as an example one of them in which the subject-matter is similar to that in this present case. In *Johnson* v. *The Mayor of Croydon* it was held that a bye-law prohibiting in effect music other than military music in the streets in the borough on Sunday was unreasonable on the ground, as I understand it, that it did not require evidence of annoyance being caused. It is obvious that for aught contained in such a bye-law a musical performance subject to condemnation under it might have taken place on a spot where no one could be annoyed, or in a manner to which no one felt any objection. But it is not necessary that a requirement of evidence of actual annoyance should be prescribed in terms. It is enough if the circumstances render annoyance certain, or even probable. For example, it has been held that a bye-law forbidding the keeping of pigs within 100 feet from a dwelling-house in a populous place is reasonable: *Wanstead Local Board* v. *Wooster*. The case of *Slattery* v. *Naylor*, where it was held reasonable to prohibit burials within 100 yards of public buildings, dwelling-houses, or public roads, is another illustration of the same principle.

These were instances of matters by which anyone affected would presumably be annoyed. But a musical performance in a street is not a thing in its nature certain to annoy anyone. It is only an annoyance if someone who hears it thinks it one to him.

In the bye-law before us it is accordingly provided that an offence is committed only if the performance takes place within fifty yards of a dwelling-house, and has been objected to by an inmate of such house. I will deal with the provisions as to the constable presently. To my mind this insistence on the place of the performance, and on objection being taken by an inhabitant affected may be considered to supply the element which, in the cases I have referred to, appeared to the court to have been wanting. People who live in public streets must submit to the primary purposes for which streets exist. They must put up with frequent annoyances of traffic, and occasional annoyances from the opening of roads for repair for the supply of gas, water, or electricity, or from building operations in their vicinity. But street music is not a primary purpose of a street. It may be harmless if no one who lives there objects to it; it may even be acceptable to the locality; but if an inhabitant affected entertains and signifies an objection, I do not think that this court should consider that a county council, in giving him a veto upon it, pursues an unreasonable course.

The bye-law provides in the alternative that police-constable may require the performancer to desist. Whether this be an unreasonable provision or not appears to me to depend on the view taken as to the probable action of a police-constable in such a matter. If it is thought he will act harshly and without fair grounds of public order or comfort, it would be unreasonable to invest him with such discretion. But if it be believed that he will act either in assistance of an inhabitant entitled to object, but who does not desire to be involved in a not improbable altercation, or because he sees that public order is concerned, it is not unreasonable that he should be entrusted to exercise a discretion on the requirements of the case. Which of these two views is to be taken seems to me precisely a matter on which the judgment of the county councillors is entitled to be respected, especially as probably most of them are magistrates. I for one cannot pretend to know whether a Kent policeman may be trusted to do his duty fairly and properly, as well as I have no doubt they do. The case of *Alty* v. *Farrell*, which was cited to us as an authority against the reasonableness of conferring on policemen such powers as are given in the present case, appears to turn on the powers of the borough, under the Act in question, to delegate their authority to all constables instead of to persons especially appointed to execute the provisions of the Act. Further, it is not to be forgotten that an important safeguard is provided by the Legislature against the exceptional caprice of an inhabitant or abuse of discretion by a policeman, because the 16th section of the Summary Jurisdiction Act, 1879, enables the magistrate to dismiss an information if he thinks that the charge, though proved, was, in the particular case, of a trifling nature.

I agree with the Lord Chief Justice of England that this conviction should be affirmed, but without costs.

MATHEW, J.—The bye-law in question has been made under the Local Government Act of 1888, with which were incorporated certain provisions of the Public Health Act, 1875, and the Municipal Corporations Act, 1882.

By one of the incorporated sections—namely, section 23 of the Act of 1882, the county council were enabled to make such bye-laws as to them seemed meet for the good rule and government of the district under their jurisdiction, and for the prevention and suppression of nuisances not already punishable in a summary manner.

By the same section, in accordance with the usual practice where statutory powers to make bye-laws are conferred, certain formalities were directed to be observed before the local enactments came into operation. These formalities, it was admitted, had been complied with, and the first question which presented itself was whether the bye-law in question had been thereby legalized.

By 19 Hen. 7, c. 7, which recited a previous Act which had been allowed to expire, it was provided that no masters, wardens, and fellowships of crafts or mysteries, nor any rulers of guilds or fraternities, should take upon them to make or to execute any acts or ordinances by them theretofore made in disheritance or diminution of the prerogative of the Crown or of others, nor against the common profit of the people; but that the same acts or ordinances should be examined and approved by the Chancellor, Treasurer of England, or Chief Justices of both benches, or three of them, or before both the justices of assize in their circuit or progress in that shire where such acts or ordinances were made, on pain of forfeiting £40 for every time that they should do to the contrary.

It was decided in very early times that the approval of the bye-law by the authorities mentioned in the statute did not give it validity if not otherwise legal: *Ipswich Tailors' case*, 11 Co. 53; *Stationers' Co.* v. *Salisbury*, Comb. 221, at p. 222; 2 Kyd on Corporations, 109. The validity of the bye-laws must be determined by the judges when they are brought properly before them. This duty has been cast on the superior courts where any restriction is sought to

be imposed on personal liberty, and is traceable to the clause in the Great Charter, "*Nullus liber homo disseisiatur de . . . libertatibus suis . . . nisi . . . per legem terræ.*" This rule has been followed and acted upon down to the present time. The power to make bye-laws is conferred upon a vast number of corporate bodies and associations created by charter or by statute, as—*e.g.*, municipal bodies, companies for trading or other purposes, literary and scientific associations, and such institutions as the University of London and the College of Surgeons: see, for further instances, Lumley on Bye-laws, p. 164.

From the many decisions upon the subject it would seem clear that a bye-law to be valid must, among other conditions, have two properties; it must be certain—that is, it must contain adequate information as to the duties of those who are to obey—and it must be reasonable: see *City of London case*, 8 Co. 121*b*, Com. Dig. Bye-law, B. 1; *Framework Knitter's Co.* v. *Green*, 1 Ld. Raym. 113; *Eagleton* v. *East India Co.*, 3 Bos. & P. 55. The bye-law in question was, so far as is material to my judgment, in the following form: No. 4. "No person shall sound or play upon any musical or noisy instrument, or sing in any public place or highway, within fifty yards of any dwelling-house after being required by any constable to desist." It was contended on behalf of the appellant that the bye-law was not reasonable and was not certain. It forbade, without qualification of any kind, conduct which might be perfectly innocent and unobjectionable. It did not provide, as has been done in similar enactments and in this county council's bye-law No. 3, that the act prohibited should be an annoyance to anyone. It contained no exception, and would, according to its terms, condemn all music and singing within fifty yards of a dwelling-house as in the nature of a nuisance. The right to prohibit was conferred on any policeman. Why should liberty of conduct, it was asked, be so interfered with? A policeman has no such authority in the metropolis. Why should a policeman in the country be entrusted with powers so easily abused?

For the respondents it was argued that the bye-law was well enough. It had been framed by a representative body, created under recent legislation, whose regulations should be indulgently treated. It must be taken, it was said, that Parliament intended that local authorities should be upheld, and to this end that new canons of construction should be adopted by the courts to preserve their bye-laws from being declared invalid. It was no longer enough to point out that a bye-law according to its terms was unreasonable; it should be upheld if it might be reasonably enforced, and it was no longer an objection that it might be unreasonably enforced. It was urged that there were adequate safeguards for the public which, though not expressed, ought to be implied. It was true that any policeman might prohibit acts of which no reasonable man ought to complain; but it was said that confidence might be reposed in the discretion of a policeman, and that he would not be likely to interfere unreasonably. This seems to me too generous a view of the qualifications of the ordinary constable. There was, it was said, a further safeguard—namely, that the county council would not sanction interference by the police unless there was some good cause. But a bye-law once made could not be, and ought not to be, controlled in its operation by the members of the council. Further, the policeman who interfered without good cause would, it was argued, be reprimanded by his superiors, or a magistrate would probably refuse to issue a summons. These suggestions imply that there would be cases in which a constable ought not to have the power to prohibit or to prosecute. It seems to me that the public ought to be informed in clear language what these cases are. It would not be satisfactory to a person, who was innocent of any real offence and was summoned as a criminal, to have an apology offered to him on the ground that the policeman had been wanting in discretion. Again, it was said that the magistrate would have the power to refuse to convict, in a trifling case, under section 16 of the Summary Jurisdiction Act, but the bye-law affords no security that this power would be exercised. A magistrate might reasonably consider that he was bound to convict; for a bye-law once duly published becomes part of the law of the land in the locality in which it applies. It should be remembered that this bye-law has been made for the purpose of securing the good rule and government of the district. It would appear not to be well calculated in its present form to secure any such result. The interference of a policeman, which the bye-law permits, would not be unlikely, it seems to me, to produce angry altercation, and to lead to a breach of the peace. I do not propose to refer at length to the cases cited in the argument where bye-laws made under local authority have in recent times been condemned as unreasonable. In none of those cases is there any indication of the principle which I understand to be now contended for—namely, that such ordinances should receive a special kind of interpretation. The powers conferred on county councils have been spoken of in the discussion as something previously unknown to the law. But from the earliest times when charters were granted to towns municipal affairs have been managed by elected representatives of the inhabitants. The bye-laws made by such bodies have been frequently declared to be invalid. Take, for instance, the bye-laws which have been held to be unreasonable restraints of trade, and which are referred to in the judgment in *Mitchell* v. *Reynolds*, 1 Sm. L. C., 10th ed., p. 391. No case has been cited in which there is any trace of the principle now contended for, that such bye-laws are to be interpreted with any particular indulgence because of their popular origin. If this view be adopted, it seems to me the judges will be placed in an anomalous position. Where they differ from bodies not popularly elected their jurisdiction to pronounce upon the validity of a bye-law would remain unimpaired; but where they differed from bodies like a county council their position would be altogether different. They would be bound to uphold what in other cases they would be right in condemning. I concur in the view that deference should be shown by the courts to the bye-laws of a local authority which may appear to interfere unduly with personal liberty, but where there was reason to suppose that the regulations were called for by the requirements of the particular place. There may be peculiar circumstances in the condition of a borough or part of a county which make stringent regulations as to personal conduct necessary. In that sense, I agree, a bye-law ought to receive an indulgent interpretation. But this bye-law is not confined to a particular locality; it applies to the whole of rural Kent.

It seems to me that what we are asked to do in this case is not to interpret the bye-law but to frame a new enactment with the necessary safeguards for freedom of conduct. It is practically proposed that we should add a proviso to the bye-law as it stands to the effect that it ought not to be unnecessarily or unreasonably enforced. This I consider we have no power to do. The only authority relied upon for the novel principle contended for by the respondent was

the judgment of the Privy Council in *Slattery* v. *Naylor*. In that case a bye-law had been made by a local authority in the colony of New South Wales for regulating interments in cemeteries. Under its provisions interments in a particular case had been prohibited. The court held the bye-law was valid. It is difficult to see how any doubt could have existed on the subject. This decision was sufficient to dispose of the case; but it would seem that an argument had been addressed to the court that the compliance with the statutory requisites provided by the colonial law had been sufficient to render the bye-law valid, and I gather that this view was favourably entertained by their lordships. The argument was that the bye-law was legalized by force of section 158 of the colonial Act under which it had been made, and which provided that all bye-laws consistent with the provisions of the Act, and not repugnant to any other Act or law in force in the colony, should have the force of law when confirmed by the governor and published in the Government Gazette.

It seems to me clear that the case is only an authority on a question of colonial law, and I do not find in the judgment any indication of an intention to pronounce an opinion on the decisions of our courts which declare what has been understood to be the law of England on this subject. I have been unable to find any authority in our books for the suggestion that the validity of a bye-law can be established in any other way than by a judgment of a court of law as to its meaning according to ordinary rules of construction.

In my judgment this bye-law should be amended. It came into operation on the 19th of May, 1897, and the offence with which it deals is therefore of very recent creation. As it stands, any constable may prohibit any singing on any highway within fifty yards of a dwelling-house in any part of the county of Kent, except such parts as are within any municipal borough. It has been suggested that the real intent of the council was to prevent noisy demonstrations which would be offensive to residents within their jurisdiction. If this were so, it becomes difficult to understand why this intention was not stated in plain terms, and why the language should be so wide of the mark. It seems to me of special importance, where the aid of constables is invoked to maintain order, that the duties of the police on the one hand, and the obligations of the public on the other, should be stated with reasonable clearness. Laxity in the preparation of local enactments is not to be encouraged.

I regret to be unable to concur in the view of the majority of my colleagues. Their judgment appears to me to conflict with the recent decisions referred to in the course of the discussion, and with the views expressed by Hawkins, J., the late Mr. Justice Cave, the present Master of the Rolls, and the late Lord Justice Kay. In the case of *Alty* v. *Farrell* a bye-law which gave a policeman an unqualified right to require a vendor of coals in small quantities to weigh the coal in the policeman's presence was held to be unreasonable and invalid because the power might be exercised oppressively. This principle seems to me applicable to the present case. The decision of *Alty* v. *Farrell* has the high authority of the Lord Chief Justice and Wright, J.

The judgments of the majority of the judges by whom this case is decided will no doubt be entitled to great respect from those who may have similiar cases to deal with; but the decision will not be binding on any other Divisional Court, and in the present state of the law there seems to be no mode of finally settling the differences of judicial opinion that may arise in cases like the present. A change of procedure would seem to be necessary which would permit an appeal in the ordinary way.

I am of opinion that this conviction should be quashed.

CHITTY, L.J., and WRIGHT, DARLING, and CHANNELL, JJ., concurred in the judgment of Lord Russell of Killowen, C.J.

Judgment for the respondent.

Solicitors for the appellant, *Schultz & Sons*, for *A. J. Ellis*, Maidstone.

Solicitors for the respondent, *Kingsford, Dorman, & Co.*, for *Hoar, Howlett, & Tatham*, Maidstone.

Q. B. D.
(Lord Russell of Killowen, C.J., and Day, Wills, Grantham, Wright, Kennedy, and Channell, JJ.) — April 30.

ROPER v. KNOTT. (*a.*)

Criminal law — Wilfully or maliciously committing damage to property — Diluting milk — Fraudulent motive — Absence of malice — Malicious Injuries to Property Act, 1861 (24 & 25 *Vict.* c. 97), *s.* 52.

K., the servant of a milk salesman, was employed by the latter to carry milk round and deliver it to customers. He fraudulently added water to it with the intent of adding to the bulk and putting money into his own pocket by selling and not accounting for the surplus; he, however, had no malice towards, or intention to injure, the owner of the milk.

Held, that he had wilfully committed damage to property within the meaning of section 52 *of the Malicious Injuries to Property Act*, 1861 (24 & 25 *Vict.* c. 97).

It is not necessary in committing the damage within the meaning of that section that there should be malice towards or intention to damage the owner of the property. It is sufficient if the act be done wilfully, and with the knowledge that it will cause damage.

Hall v. Richardson, 54 *J. P.* 345, *overruled.*

Case stated by E. T. D'Eyncourt, Esq., one of the magistrates of the police-courts of the metropolis, sitting at the North London Police Court.

(1) Upon the hearing at the said North London Police Court, on the 11th and 19th of January, 1898, of a charge made by Robert Roper (hereinafter called the appellant) against Charles Knott (hereinafter called the respondent) that the said respondent did wilfully commit damage, injury, or spoil to four gallons of milk, the property of the said appellant, contrary to the provisions of section 52 of the Malicious Injuries to Property Act (24 & 25 Vict. c. 97), the following facts were proved:

(2) The appellant is a milk salesman carrying on business at 29, Howard-road, South Hornsey, and the respondent, who was a milk carrier in his employ, was in the habit of coming to the place of business every morning to fetch milk, which he subsequently sold to the appellant's customers.

(3) On the morning of the 11th of January, 1898, the respondent was seen at 5.25 by the appellant and a police-constable, who were watching him, to conceal a three-pint can full of water in a garden of a house near the said premises.

(4) The respondent was then seen to fetch four gallons of milk in a barrow from the appellant's premises (which in the ordinary course would be sold and delivered by him to the appellant's customers)

(*a.*) Reported by R. G. STILLWELL, Esq., Barrister-at-Law.

and bring it opposite to the said garden, and then was seen to pour the said three pints of water out of the can into the said milk.

(5) The respondent had been seen on a previous morning going into the same garden, and was being watched on account of complaints from customers of the appellant.

(6) The respondent was immediately taken into custody, the appellant saying to him, "You villain, what do you mean?" and the respondent thereupon said, "I am very sorry. I hope you will forgive me."

(7) The respondent stated that he had on previous occasions been obliged to make good to his master in money the value of milk that he had lost, but there was no evidence of this, and it was contradicted by the appellant.

(8) The appellant in giving evidence said that he was in the habit of allowing each of the milk carriers in his employ (including the respondent) two quarts of milk a day to cover any loss that might arise from accidental spilling of the milk they took out or from the same being stolen from the customer's door, and also stated that he would have allowed a greater quantity had the milk carrier complained that he had lost more than the two quarts.

(9) The respondent had not served any customers on the morning of the 11th of January before he was taken into custody.

(10) The whole of the said milk, after it had been so watered, was in fact damaged and spoiled, and was thrown away, and the loss therein caused amounted in value to the sum of 10s. 8d.

(11) On behalf of the respondent it was contended that in view of the decision in *Hall* v. *Richardson*, 54 J. P. 345, the respondent could not under the above circumstances be convicted of the said offence.

(12) On behalf of the appellant it was contended that the decision in *Hall* v. *Richardson* only applied to a case where the milk had been spilt accidentally.

The magistrate was of opinion that the respondent acted in a fraudulent way, and that his object in adding water was to increase the bulk, and to put the money into his own pocket by selling and not accounting for the surplus, but that there was no malice towards or intention to injure the appellant, the owner of the milk. He was doubtful whether the section was intended to apply to such injury or damage at all, but even if that was so, he felt himself bound by the decision in *Hall* v. *Richardson*, and accordingly dismissed the charge.

The question for the opinion of the court was whether upon the above facts the respondent could legally be convicted of the said offence.

Horace Avory, for the appellant.—The decision of the magistrate was wrong. Unless *Hall* v. *Richardson* amounts to a decision that milk cannot be the subject of damage within the meaning of section 52 the respondent must be held to have wilfully or maliciously committed damage to it. That case was wrongly decided, and ought to be overruled. Section 52 provides against the case of wilful or malicious damage; and if the respondent intentionally diluted the milk with water he committed an offence within the section, even if he had no malice against his employer. He had an ulterior fraudulent motive, and if he wilfully did injury to the property, that is sufficient. The charge against the respondent was only one of "wilful" damage, and the magistrate ought to have convicted.

Counsel also cited *Reg.* v. *Pembliton*, 22 W. R. 553, L. R. 2 C. C. R. 119; and *Hamilton* v. *Bone*, 52 J. P. 726.

The respondent did not appear.

Lord RUSSELL OF KILLOWEN, C.J.—In this case we have to give judgment on a case stated for our opinion by a metropolitan police magistrate, and to say whether, on the facts there set out, he could or could not have convicted the person charged before him of the offence with which he was charged. It is quite natural, I think, that the learned magistrate, having regard to the decision of Lord Coleridge, C.J., and Mathew, J., in *Hall* v. *Richardson*, 54 J. P. 345, should have refused to convict the appellant. The charge against the respondent is based on the Malicious Damage Acts, 1861 (24 & 25 Vict. c. 97), s. 52, and the facts are shortly as follows: The complainant was a milk-salesman and the respondent was a milk-distributor, in the complainant's employ. On the particular morning in question the respondent was detected in the act of adding a considerable quantity of water to milk which was the property of the complainant, and which it was the respondent's duty to deliver to the complainant's customers. The magistrate has found that the respondent did this in order that he might increase the bulk of the milk, and so sell more and put the surplus money into his own pocket. As a fact the milk was damaged and spoiled by the addition of the water, and it had to be thrown away, but the magistrate finds that the respondent was not actuated by any malice against the complainant, and he had no desire or intention of injuring him. When one comes to look at the statute, one finds a number of provisions covering specific cases of damage to various descriptions of property.

Section 52, under which these proceedings were taken, differs, however, in the introductory words from all the other sections. Sections 51 and 52 deal with injuries not before provided for in the Act; but while section 51 follows the wording of other sections in using the expression "unlawfully and maliciously," section 52 says "Whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever." It is quite clear, therefore, that the Legislature intended to show in this section a distinction between acts which are unlawful and malicious, and acts which are merely wilful or malicious. The first question, therefore, that we have to ask ourselves is, was this "damage, injury, or spoil" done to the milk? That is very clearly answered by the finding of the magistrate that the whole of the milk, after it had been so watered, was, in fact, damaged and spoiled, and was thrown away. If, then, the milk was damaged, was it wilfully damaged? There can, I think, be no doubt as to that. The respondent added this water to the milk deliberately and intentionally, and with the fraudulent motive of increasing the bulk of the milk so as to gain an advantage for himself. It seems to me, in construing this section, that a man must be held to do a thing wilfully when he does it either intending to cause damage or knowing the act he commits will cause damage to the property on which it is committed.

I feel no doubt that the respondent was guilty of committing wilful damage to property within the meaning of this section. That leads me to the consideration of the case of *Hall* v. *Richardson*. The first thing that strikes one in regard to that case is, that it was a very natural thing for the magistrate there to desire not to convict the defendant. There there was no intention to defraud the owner of the milk, but the water was merely added in order to make up the quantity of the milk that had been lost by an accident with which the defendant had met, and that his master in fact lost nothing by what he had done. It might, therefore, have been better to have left the case where the magistrate did, and for

the court merely to have declined to interfere with his decision. They thought it right however to deliver a judgment on the question, and that being so it becomes our duty to consider that decision. I may say in passing that I think it would be clearly possible to distinguish the two cases on the facts, but it seems to me right that we should deal with the principle there laid down. I must say that in my opinion *Hall* v. *Richardson* was a case in which damage was done to the milk, and done wilfully. Then, is that decision right? I am bound to say that I think it is not. The first, and I think, if I may say so with the greatest deference to the very learned judges who decided that case, the cardinal error in that decision is that there is a confusion between the damage to the property and the consequent loss or damage to the owner of the property. In my judgment an offence has been committed against the statute if wilful damage has been done to any property, quite irrespective of the question whether any damage has been sustained by the owner of the property. The second error, as it seems to me, is found in the judgment of Lord Coleridge, C.J., in which he seems to think that in order to constitute an offence under the section, there must be an intention to injure or damage somebody. That, as I have already pointed out, is not the case, it is sufficient if wilful damage is done to the property. No doubt if the words of the section were similar to those of the other sections, "wilful (or unlawful) and malicious," the case would be very different. In the last place, the words of Lord Coleridge, C.J., as to the power of the magistrate to order reasonable compensation under the section for any damage done to property, seem to show that he thought the section only applied to such cases where such compensation was needed. All these reasons, which I think are mistaken, spring no doubt from what I have called the cardinal error in their judgment. I think, therefore, the decision in *Hall* v. *Richardson* cannot be supported, and this case must be remitted to the magistrate with our intimation that he ought to convict.

DAY, J.—I am of the same opinion.

WILLS, J.—I am of the same opinion. I will only add that in the case of *Gardner* v. *Mansbridge*, 35 W. R. 809, 19 Q. B. D. 217, to which Smith, L.J., and I were parties, we pointed out that a person commits an offence against section 52 if he wilfully commits the act, even though he has no malice. In my opinion the act meant by the Act of Parliament is a wilful doing of something which the man doing it knows must damage property. If it could be shown that he did not know any damage to property would result, then I think he could not be convicted under this section.

GRANTHAM, J.—I am of the same opinion. I think that the Act of Parliament was intended primarily to meet cases of a different character to the adulteration of milk, and I think that appears when we look at the other sections of the Act. But I think that by section 52 it was intended to sweep up in one general section a number of smaller offences for which no penalty has been imposed by the rest of the Act. This is, no doubt, the reason of the change of the language of section 52—namely, the substitution of the word "wilfully" for "unlawfully" and "or" for "and," and it is impossible not to see that the change must have been intentional. It is necessary to ask three questions in order to see whether an offence has been committed under this section. Is the subject-matter "property"? Has it been damaged? Has that damage been done wilfully? The answer in this case to all those three questions is in the affirmative, and therefore the respondent has committed an offence within the section, and should be convicted. That being so, I must dissent from the judgment in *Hall* v. *Richardson*.

WRIGHT, J.—I agree.

KENNEDY, J.—I agree. It seems to me impossible to say that as to material facts this case can be distinguished from *Hall* v. *Richardson*, and therefore I entirely agree in the view of that decision expressed by my lord.

CHANNELL, J.—I am of the same opinion.

Appeal allowed.

Solicitors for the appellant, *C. V. Young & Windsor.*

Prob. Div. & Adm. Div. Admiralty. } March 8.

"THE WARSAW." (*a.*)

Ship—Pilotage—Damage—Tyne Pilotage Order Confirmation Act, 1865 (28 *Vict. c.* 44), *Schedule, ss.* 16-22—*Home trade passenger ship—Employment of pilot in Tyne Pilotage District—Compulsory pilotage—Merchant Shipping Act*, 1894, *s.* 604, *sub-section* 1.

The master of a ship carrying passengers between any place in the British Islands and any other place so situate is, if neither he nor the mate of his ship has a pilotage certificate, bound by compulsion of law to employ a licensed pilot whilst navigating within the Tyne Pilotage District.

This was an action of damage *in rem* instituted on behalf of Joseph Crosthwaite, the owner of the steam-tug *Warrior*, against the steamship *Warsaw*, to recover for the damages occasioned by a collision between the two vessels in the River Tyne on the 3rd of August, 1897, when *The Warrior*, when lying at anchor at the Fellings buoys, was run into and damaged by *The Warsaw* as the latter vessel was proceeding up the river on a voyage from Leith to Newcastle in charge of a duly licensed pilot and having on board fifty passengers.

The action was heard on the 4th of March, 1897, before Barnes, J., and two of the Elder Brethren of the Trinity House, and after hearing evidence for the plaintiffs and the defendants the court came to the conclusion, on the merits, that the pilot of *The Warsaw* was alone to blame for the collision; the question whether at the time and place of the collision the master and owners of *The Warsaw* were compelled by compulsion of law to employ the pilot was then argued by counsel.

It appeared from the evidence that neither the master nor the mate of *The Warsaw* had a pilotage certificate applying to the Tyne Pilotage District.

Aspinall, Q.C., and *Butler Aspinall*, for the plaintiff.

Boyd, Q.C., and *Laing*, for the defendants, the owners of *The Warsaw*.

The arguments are fully stated in the judgment.

Cur. adv. vult.

BARNES, J.—I have already decided that the collision was solely occasioned by the fault of the pilot of *The Warsaw*, and the question now arises whether or not the employment of the pilot was compulsory by law.

This question depends upon statute law. Section

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

604 of the Merchant Shipping Act, 1894, sub-section 1, is as follows: "The master of every ship carrying passengers between any place in the British Islands and any other place so situate shall, while navigating within the limits of any district for which pilots are licensed under this or any other Act, employ a qualified pilot, unless he or the mate of his ship holds a pilotage certificate or a certificate granted under this section applying to the district, and, if he fails to do so, shall for each offence be liable to a fine not exceeding £100." Subject to a contention raised by counsel for the plaintiff, this sub-section is applicable to the case and determines the question in favour of the defendants, because the vessel was carrying passengers between places in the British Isles, and neither the master nor the mate had a pilotage certificate.

Counsel for the plaintiff, however, contended that, notwithstanding this section, the vessel was exempted from compulsory pilotage by virtue of the 16th section of the Tyne Pilotage Provisional Order, confirmed by the Tyne Pilotage Order Confirmation Act, 1865. That section is in the following terms: "Nothing in this order shall extend to oblige the owner or master of any vessel to employ or make use of any pilot in piloting or conducting such vessel into or out of the said district or within any part thereof, if he is not desirous so to do, or to pay any pilotage dues when not employing or making use of a pilot." The 22nd section of the same order provides that "nothing in this order shall exempt the commissioners or the pilotage district aforesaid from the provisions of any general Act of Parliament now in force or hereafter to be passed, relating to pilotage or pilotage dues or to merchant shipping. . . ." I am of opinion that in the absence of any previous decision binding the court to decide otherwise, section 604 of the Act of 1894 expressly imposed upon the master of *The Warsaw* the duty to employ a qualified pilot, and that the order and Act of 1865 do not free him from this duty.

It was, however, urged for the plaintiff that the present case is governed by the decision in *The Johann Sverdrup*, 35 W. R. 300, 12 P. D. 43. In that case a collision occurred in the Tyne between a British vessel and the Norwegian steamship *Johann Sverdrup* owing to the negligence of the pilot in charge of the latter. The owners of the foreign vessel were held liable on the ground that the employment of the pilot was not compulsory. She was not carrying passengers. Although it is stated in the judgments of the learned judges who decided that case, both in the Divisional Court and in the Court of Appeal, that the effect of section 16 of the order above referred to is to abolish compulsory pilotage in the Tyne, they were not dealing with the case of a vessel carrying passengers between ports in the British Islands. The question was as to the effect of the Act of 1865 upon a previous Act regulating pilotage in the Tyne. That was an Act passed in 1801 (41 Geo. 3, c. lxxxvi.), which compelled foreign vessels coming into or leaving the Tyne to employ pilots licensed by the Trinity House of Newcastle-upon-Tyne. The Act of 1865 transferred the old jurisdiction of that Trinity House in the Tyne Pilotage District to the Tyne Pilotage Commissioners, by whom the pilot of *The Johann Sverdrup* was licensed. It was held that the Act of 1865 superseded the pilotage provisions of the Act of 1801, and that no obligation to employ a pilot was imposed by the 16th section of the Tyne Pilotage order upon any vessel, whether British or foreign. It will be seen that no question was raised or considered as to the effect of section 354 of the Merchant Shipping Act, 1854, for which section 604 of the Act of 1894 is now substituted. The order of 1865 was made under the powers conferred by section 39 of the Merchant Shipping Act Amendment Act, 1862, and confirmed by the Act of 1865, and although it superseded the local Act of 1801, and substituted new regulations for those contained in that Act, there is nothing in it inconsistent with section 354 of the Act of 1854, or section 604 of the Act of 1894. Section 16 of the Tyne Pilotage order does not even expressly exempt vessels from employing pilots. It merely provides that nothing in the order shall extend to oblige the owner or master of any vessel to employ a pilot or pay pilotage dues, and it is followed by section 22, which I have referred to above. The case of *The Temora*, Lush. 17, 8 W. R. Adm. Dig. 21, was cited by counsel for the defendants. That case decided that section 354 of the Merchant Shipping Act, 1854, was not restricted by the provisions of section 353 of that Act, which provided as follows; "That all existing exemptions from compulsory pilotage should continue in force." These sections are now replaced by sections 603 and 604 of the Act of 1894, and by section 746 of the last-mentioned Act, any local Act which repeals or affects any provisions of the Acts repealed by the Act of 1894 is to have the same effect on the corresponding provisions of that Act as it had on the said provisions repealed by that Act. The case of *The Temora* was not decided on the exact point now in dispute, and although it is favourable to the defendants, it is not necessary to rely on it, because I am of opinion, for the reasons given above, that section 604 expressly makes pilotage compulsory upon vessels circumstanced as *The Warsaw* was, and that the Act of 1865 does not prevent the application of that section. Therefore, although the plaintiff has unfortunately suffered loss through the collision in question, as the collision was solely occasioned by the fault of the pilot of *The Warsaw*, and there was no fault on the part of the defendants or their servants, the defendants are not responsible for the loss, and my judgment must be in their favour, with costs.

Solicitors for the plaintiff, *Adamson & Adamson.*

Solicitors for the defendants, *Lietch, Dodd, Bramwell, & Bell.*

Prob. Div. & Adm. Div. Admiralty. } March 1.

"THE HOLLINSIDE." (*a.*)

Ship—Charter-party—Construction—Balance of freight — Construction of charter-party — "Consignee to effect the discharge of the cargo, steamer paying one franc per ton."

Case of construction of a charter-party where the words "consignee to effect the discharge of the cargo, steamer paying one franc per ton," were construed by the court as providing that the owners of the steamer—the consignees having elected, according to an option given them by a previous clause of the charter-party, to pay freight, not on the weight of cargo delivered, but on the bill of lading quantity less 2 per cent.—were to pay in respect of the cost of discharging, one franc per ton of the same conventional quantity—that is, one franc per ton of the bill of lading quantity less 2 per cent.

This was an appeal from the Admiralty side of the County Court of Northumberland, holden at Newcastle-on-Tyne.

By the decree appealed from the judge of the court below (His Honour Judge Greenwell) had given

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

judgment in favour of the plaintiff in an action instituted under the County Courts Admiralty Jurisdiction Act, 1869, on behalf of the Charlton Steam Shipping Co., the owners of the steamship *Hollinside*, against Messrs. Worms & Co., to recover a balance of freight amounting to 18s. 10d. for the carriage of a cargo of gas coal laden on board the *Hollinside*.

It appeared from the process transmitted to the registry of this court for the purposes of the appeal that the particulars of the plaintiff's claim delivered in the action were the following: "19th of October, 1897.—To amount wrongly deducted in account of this date being excess charge for cost of discharging. 18s. 10d.," and that the defendants had at the hearing in the court below set up a counter-claim alleging that they were entitled to deduct from the balance of freight claimed by the plaintiff the sum of 18s. 10d., being the balance of a sum of £46 19s 8d., the cost of discharging the said cargo; the said 18s. 10d. so claimed to be deducted being arrived at as follows: Discharging expenses on 1,184 tons (the amount stated as the bill of lading quantity of cargo, and from this at one franc per ton, being equal to £46 19s. 8d.); from which sum being claimed to be deducted the amount allowed by owners on 1,184 tons, less 2 per cent., 1,160 less 6 cwt., which at one franc per ton amounted to £46 0s. 10d., leaving a balance of 18s. 10d.

It further appeared from the process that in the bill of lading of the cargo, which contained the words "weight unknown," and incorporated the terms and conditions of the charter-party under which *The Hollinside* was sailing at the time, the cargo was stated to be 1,184 tons of gas coal, and that the charter-party in question, which was headed Chamber of Commerce, North-east Coast (Tees to Berwick) coal charter, 1896, contained, *inter alia*, the three following clauses, numbered 1, 8, and 9, respectively:

1. That the said steamer . . . shall, with all possible dispatch, sail and proceed to South Dock, Sunderland, and there load . . . a full and complete cargo of Lambton gas coal not exceeding 1,250 tons and not less than 1,000 . . . and, being so loaded, shall forthwith proceed with all possible dispatch to Port de Boue and there deliver her cargo . . . on being paid freight at the rate of 9s. (nine shillings) per ton of 20 cwts. . . . delivered or on bill of lading quantity less 2 per cent. at receiver's option, to be declared in writing before bulk broken. If the receiver should elect to weigh the cargo at the port of destination the weighing shall be done (by an official weigher) at his expense. The owner may provide a check weigher at steamer's expense.

8 . . . Consignee to effect the discharge of the cargo, steamer paying one franc per ton of 20 cwt. . . . and providing only steam, steam-winches, winchman, gins, and falls.

9. The freight to be paid one-third if required by owner on signing bills of lading . . . in cash, less 3 per cent. for insurance and interest . . . and the remainder, less sufficient cash for steamer's ordinary disbursements at current exchange, six days after production to Worms & Co., Newcastle-on-Tyne, of the certificate of right delivery of the cargo in cash, less three months' discount at 5 per cent. per annum.

The judge of the court below stated on his notes that the defendants had exercised the option given them by clause No. 1 of the charter-party (above set out); that a certificate of the right delivery of the cargo had been received, and that at the hearing before him the defendants had submitted that the construction of the charter-party clause No. 1 as to the deduction of 2 per cent. did not apply to clause 8, and had proposed to give evidence as to the quantity put on board and actually delivered; but the court had ruled that such evidence was irrevelant on the true construction of clauses 1 and 8, and had declined to allow the certificate from the colliery of the weight of the cargo to be put in, and had dismissed the counter-claim and given leave to the defendants to appeal.

The defendants appealed upon the following grounds:

(1) That upon the true construction of the charter-party the defendants were entitled to judgment.

(2) That upon the true construction of the said charter-party the provision in clause 1 as to the calculation of freight by a deduction of 2 per cent. from the bill of lading quantity could not be read into clause 8 as to the payment by the steamer to the consignee of one franc per ton of 20 cwt. for discharging the cargo.

(3) That under the latter clause the defendants were entitled to charges for discharging the actual weight of the cargo carried and discharged at the rate of one franc per ton of 20 cwt., and that the county court judge was wrong in holding that evidence as to the quantity of cargo put on board the steamship *Hollinside* was irrelevant.

March 1.—The appeal came on to be heard before a Divisional Court of the Admiralty Division (Jeune, P., and Barnes, J.).

Joseph Walton, Q.C., and *F. Laing* appeared for the appellants, and contended that on the true meaning of clause 8 of the charter-party the steamer had to pay in proportion to the work actually done in discharging—that is, one franc for each ton of coal actually discharged, which would reasonably be taken to be ascertainable by the amount of tons in the bill of lading quantity.

Bond, Q.C., and *Stephens*, who appeared for the respondents (plaintiffs in the court below), argued that the judgment of the court below was right, and that the defendants, having exercised their option of paying freight on the bill of lading quantity less 2 per cent., the same quantity must be deemed to be the quantity of the cargo to which the provisions of clause 8 were applicable.

They referred to *Jessel* v. *Bath*, 15 W. R. 1,041, L. R. 2 Ex. 267.

Sir F. JEUNE, P.—We have to put a construction upon the 1st and 8th clauses of the charter-party in this case. It appears that the cargo of coals shipped on board *The Hollinside* was not weighed at the port of destination because the receivers did not exercise their option to do so, and hence the question arises. On what weight of cargo is the cost of discharging to be charged? Is it to be charged on some quantity which at present seems not to have been ascertained unless the statement on the bill of lading is to be taken to be sufficient evidence of the quantity, or is the quantity to be taken to be the bill of lading quantity less 2 per cent.? That is to say, is the cost of discharging to be arrived at in the same way as the amount of the freight? That depends upon the construction to be put upon the two clauses I have mentioned. Of these, clause 1 undoubtedly in terms refers to the freight, and to the freight alone. What it provides is that the delivery is to take place "on being paid freight at the rate of 9s. per ton of 20 cwts. or 1,015 kilos delivered, or on bill of lading quantity less 2 per cent. at receiver's option, to be declared in writing before bulk is broken. If the receiver should elect to weigh the cargo at the port of destination the

weighing shall be done by an official weigher at his expense. The owner may provide a check-weigher at steamer's expense."

I think there is nothing in the subsequent part of the clause which affects the matter.

Now we come to clause 8. The material portion of that clause is as follows: "The cargo to be taken from alongside by consignee at port of discharge free of expense and risk to the steamer at the average rate of 300 tons per day. . . . Consignee to effect the discharge of the cargo, steamer paying one franc per ton of 20 cwts. or 1,015 kilos, and providing only steam, steam-winches, winchman, gins, and falls." This provision in terms relates only to the cost of discharge, and the question we have to decide is whether these two clauses are to be read together. If the convenience of the matter is considered I should have thought it clear that it was intended that the question would be governed by the weighing, in the one case, or the refusal to weigh, in the other. Counsel for the appellants, however, contended that there are reasons why, under the 8th clause, the actual weight, and not the conventional weight, should be taken, but it appears to me that these reasons are entirely overweighed by the consideration of the practical difficulties which arise. The construction contended for seems to me to place the shipowner at a disadvantage under which it was not intended he should be placed. If the receiver elects to weigh, then there is a provision by which the mode of weighing is to be carried out which binds both parties. But if he does not elect to weigh, then the shipowner would be left under clause 8 either, I suppose, to take the bill of lading weight, or to weigh in the best way he could, and in a manner which would not be necessarily binding on either side. It is said that the bill of lading is *primâ facie* evidence of what is stated in it, and that therefore all you have to do is to take the evidence of the bill of lading, and that it is for the shipowner to displace that evidence. Considering that the bill of lading quantity would, I should think, never be the actual quantity—indeed, the provision that 2 per cent. is to be deducted shows that some deduction is necessary—and having regard to the great practical difficulty of weighing, unless it is done by an official weigher, it seems to me most probable that it was intended that clause 8 should be read with clause 1. I do not think it necessary to decide whether the bill of lading in this case, having regard to its form, would be *primâ facie* evidence of the amount delivered, and I am not sure whether it would be *primâ facie* evidence even of the amount received; but, assuming it to be *primâ facie* evidence, that does not carry the matter very far, because such *primâ facie* evidence would be displaced by evidence showing that in point of fact the amount stated in the bill of lading could not correctly represent the amount delivered.

Under these circumstances I am prepared to hold that convenience is so clearly on the side of reading the two clauses together, that they ought to be so read, and I am justified in that opinion by observing that clause 8 is obviously imperfectly drawn. It states only the sum to be paid for discharging—one franc per ton, and does not say whether it is to be per ton delivered or per ton received, or per ton of bill of lading quantity or per ton of bill of lading quantity with deduction. It appears to me to be clear that this clause cannot be read by itself. The whole of the charter-party must be looked at, and looking at the whole, provisions are found which, though I agree they are not applicable in terms, yet they so well be read together, that it seems only common-sense that they should be so read. I therefore think the learned county court judge was right.

BARNES, J.—This action is brought for a small balance of freight, and there is a counter-claim which seeks to extinguish the plaintiffs' claim on the ground that this balance of freight is absorbed by the cost incurred by the consignees for discharging the cargo. The dispute arises out of the terms of the charter-party, which is described as the known form adopted for the North Country coal trade and settled by agreement. It strikes me as singular that it should be so settled as to leave one of the matters which must have been almost of daily or weekly occurrence in such state as to give rise to the question before me in this case. Counsel for the appellants further say that the charter-party cannot be altered. I do not agree with that view, because it seems to me that power is given so that if necessary the parties can alter it. The question turns upon the meaning of certain words in the 1st and 8th clauses of the charter-party of *The Hollinside*. Now, the scope of this charter-party is to provide for the delivery at the port of discharge to the consignees of a coal cargo, freight to be paid either upon the amount actually delivered or upon an estimate of that quantity arrived at by taking the bill of lading weight and reducing that weight by an agreed amount of 2 per cent. The consignee has the option of adopting either of these two courses, and the decision rests with him. He may weigh or not as he chooses. If he chooses to weigh there is a mode provided for weighing; if not, then he may pay freight on the bill of lading quantity less an estimated deduction in weight of 2 per cent. In this case the latter course was adopted.

The difficulty which arises is upon the language of the latter part of the 8th clause, which provides that the discharge of the cargo is to be paid for at one franc per ton of 20 cwts. without providing how that 20 cwt. is to be arrived at. The appellants say that it is to be arrived at by the actual weight; the respondent's contention is that it is to be arrived at in the same way as the freight was arrived at. I think the charter-party must be read as a whole so as to make it work from a business point of view. Reading it in that way it seems to me that the respondent's contention is right. If that contention is not right then the difficulty will always arise that after the receiver has exercised his option as to freight and taken the bill of lading weight, he will make his charge for the cost of discharging on the actual weight. Then the question would be raised, What is the actual weight? Everybody concerned in discharging the cargo would, if the parties choose to fight it out to the bitter end, have to be called to give evidence to prove the weight. Can that have been the intention of those who drew up this charter-party.

I do not think the meaning the appellants contend for is a reasonable meaning to adopt, and I think, taking the charter-party as a whole, the meaning is that the option carries with it on the one hand the weight actually delivered, if freight is paid on the actual delivered weight, and on the other hand a payment depending on the weight ascertained by the bill of lading less 2 per cent., if that is the way the consignees choose to exercise their option and pay freight.

I see no injustice in so reading this charter-party, because the object of reducing the bill of lading freight by 2 per cent. is to account for the waste which is found by experience to take place in the coal. This seems to me to be the true meaning of the charter-party, and therefore this appeal fails.

Solicitors for appellants, *Ince, Colt, & Ince.*

Solicitors for respondents, *Lietch, Dodd, Bramwell, & Hill.*

Court of Appeal.

From Q. B. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) June 23.

HARROLD v. WATNEY. (a.)

Highway—Nuisance—Defective fence adjoining highway — Child climbing on fence — Injury to child arising therefrom—Liability of owner of fence.

The defendant was the owner of a piece of waste ground separated from a highway by a fence belonging to him. A child, who was passing along the highway, put his foot upon the fence in order to look at some boys who were playing in the adjoining ground, when the fence, in consequence of its ruinous condition, came down and injured him. In an action by the child to recover damages for personal injuries,

Held, that the action was maintainable, as the fence in its ruinous condition constituted a danger to those lawfully using the highway, and therefore amounted to a nuisance, and the nuisance was the cause of the injury.

Application by the plaintiff for judgment or a new trial in an action tried before Ridley, J., and a jury.

The action was brought by an infant, aged four years, suing by his next friend, to recover damages for personal injuries.

The defendant was the owner of a piece of ground immediately adjoining a public highway, separated therefrom by a fence belonging to him, and the statement of claim alleged that the defendant wrongfully and negligently allowed the fence to get out of repair and to become ruinous and rotten, so as to be dangerous to persons lawfully passing along the highway, and that in consequence thereof the fence fell upon the plaintiff, who was lawfully passing along the highway, and injured him. The defendant denied the allegations in the statement of claim, and pleaded contributory negligence.

The evidence showed that the plaintiff in order to look at some boys who were playing in the ground adjoining the highway, put his foot upon the fence, when it came down and injured him.

The jury found that the fence was very defective, but actually fell through the child standing wholly or partly on it not for the purpose of climbing over; and they assessed the damages at £45 if the plaintiff was entitled to recover.

The learned judge upon further consideration entered judgment for the defendant upon the ground that the accident was brought about by the plaintiff's wrongdoing.

Chamier (*J. W. Moyses* with him), for the plaintiff.—The fence was dangerous to those using the highway, and therefore constituted a nuisance, and the injury to the plaintiff resulted therefrom: *Barnes* v. *Ward*, 9 C. B. 392; *Jewson* v. *Gatti*, 2 Times L. R. 441. Even if the plaintiff was a trespasser he can still recover: *Ilott* v. *Wilkes*, 3 B. & Ald. 304; *Bird* v. *Holbrook*, 4 Bing. 628; *Lynch* v. *Nurdin*, 1 Q. B. 29. In *Hughes* v. *Macfie*, 12 W. R. 315, 2 H. & C. 744, and *Mangan* v. *Atterton*, L. R. 1 Ex. 239, upon which the learned judge relied in giving judgment, the actions were founded on negligence, and no question of nuisance arose. Moreover those cases were commented upon in *Clark* v. *Chambers*, 26 W. R. 613, 3 Q. B. D. 327.

A. J. David, for the defendant.—The case was fought at the trial upon the question of negligence and not of nuisance. This was a purely voluntary act on the part of the plaintiff which disentitled him from recovering: *Mangan* v. *Atterton*; *Hughes* v. *Macfie*. To give a right of action for a nuisance the cause of the injury must be the result of an involuntary act on the part of the person injured. The plaintiff here had no right to touch this fence for the purpose of climbing on to it. The judgment was therefore right.

A. L. SMITH, L.J.—It does not seem to me that the real question upon which this case turns—namely, whether this fence constituted a nuisance—was distinctly raised at the trial. The evidence showed conclusively that the fence was rotten, and the jury have so found. A boy, four years of age, who was lawfully using the highway, put one foot at any rate upon the fence for the purpose of looking at some boys who were playing on a piece of waste ground adjoining, when the fence fell and injured him. The question is whether the boy can maintain an action. Ridley, J., thought not, and entered judgment for the defendant. In my opinion he was wrong in doing so. This rotten fence which abutted on the highway was clearly dangerous to persons lawfully passing along the highway and constituted, therefore, a nuisance. Suppose a person when passing along the highway became tired and leant against the fence and it gave way with him, that person would clearly have a cause of action. Here the boy was merely doing that which Lord Denman, C.J., described as having been done by the plaintiff in *Lynch* v. *Nurdin*. There the defendant negligently left his cart and horse unattended in a street, and the plaintiff, a boy of seven years of age, got upon the cart in play when another boy incautiously led the horse on and the plaintiff was thrown off and injured. Lord Denman in delivering the judgment of the court said: "But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent—that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse—then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief." That case seems to me to cover the present one. Again, in *Jewson* v. *Gatti* the defendant occupied an open cellar adjoining a street, and a bar protected the opening. There was scene-painting going on in the cellar and a child who was passing along the street leant against the bar to watch the men painting when the bar gave way and he fell into the cellar. Day, J., directed a verdict for the defendant, but the Divisional Court and this court held that there was evidence to go to the jury. In the present case the jury have found what amounts to a verdict for the plaintiff, and have assessed the damages at £45, and therefore a new trial is unnecessary, and judgment must be entered for the plaintiff for that amount.

RIGBY, L.J.—I am of the same opinion. Ridley, J., seems to have held that it was the child's own fault which caused the accident, and that therefore he cannot recover. But how can we say upon the evidence that the act of the child is any bar to the action? The same contention was raised and disposed of in *Jewson* v. *Gatti*.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. This is an action in which it is alleged

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

that the injury was caused to the child by the dangerous condition in which the defendant left his fence which adjoined the highway. No doubt the jury were not asked the specific question whether the fence was in such a condition as to constitute a danger to those lawfully using the highway. But when one considers the evidence and the finding of the jury, the only right conclusion to come to is that the fence, in the condition in which it was, did constitute a danger to those using the highway, that is, it constituted a nuisance. Having proved so much, something more was necessary to be proved in order to give a right of action against the defendant. The plaintiff had to show that this nuisance was the cause of the injury to him. When it is urged on behalf of the defendant that the child ought not to have put his foot upon the fence, that is merely a suggestion that the injury was not caused by the nuisance, but by the conduct of the child, whether that conduct amounted to trespass or to negligence. In my opinion, upon looking at the facts of this case, it is not true to say that the accident was caused by the conduct of the child. The defendant was guilty of creating this nuisance, and when one asks oneself whether the nuisance was the cause of the accident, one puts some such test as this—was that which the child did something which ought to have been present to the mind of the defendant as likely to happen, and was the accident the probable result of leaving the fence in a dangerous condition? If the defendant were to say that this was not a result which could be fairly contemplated as following from his act, inasmuch as no grown up person would think of touching the fence, the answer is that the Queen's highway is not intended for grown up persons only, and that a fence of this sort would be most likely to cause injury to children using the highway. If so, the nuisance is the cause of the injury, and the defendant cannot escape from that conclusion by relying upon the improbability that grown up persons would have touched this fence. For these reasons I think that the plaintiff has made out that the fence constituted a nuisance, and that the nuisance was the cause of the injury.

Appeal allowed.

Solicitor for the plaintiff, *C. F. Appleton.*

Solicitors for the defendant, *Pownall & Co.*

From Chan. Div.
Lindley, M.R., and Chitty and Collins, L.JJ.) June 7.

In re WOODS AND LEWIS'S CONTRACT. (*a.*)

Vendor and purchaser—Interest on purchase-money—Conditions of sale—"Default" of vendor—Delay caused by trifling technical defect in title.

Where the conditions of sale provided that interest on the purchase-money should not be payable during delay caused by the vendor's "default," and delay resulted from a requisition made by the purchaser in respect of a very slight technical defect in the title, not known to the vendor, discoverable only by extraordinary care, and involving no real risk to a purchaser,

Held, that the existence of such a defect did not establish "default" on the vendor's part, and that interest was, notwithstanding, payable during the delay. Decision of Romer, J., ante, *p.* 373, *affirmed.*

Appeal from a decision of Romer, J. (*ante*, p. 373, where the facts are sufficiently stated).

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

Neville, Q.C., and *J. W. M. Holmes*, for the purchaser, who appealed, referred to 8 & 9 Vict. c. lxxv., s. 11; *In re Young and Harston's Contract*, 34 W. R. 84, 31 Ch. D. 168; Dart on Vendors and Purchasers (6th ed.), vol. 2, pp. 724, 725; *In re Hetling and Merton's Contract*, 42 W. R. 19, [1893] 3 Ch. 269; *Williams* v. *Glenton*, 14 W. R. 294, L. R. 1 Ch. 200; *Mayor of London and Tubbs' Contract*, [1894] 2 Ch. 524; *Wilson and Stephens' Contract*, 43 W. R. 23, [1894] 3 Ch. 546,550.

Farwell, Q.C., and *G. Cave*, for the vendor, were not called upon.

LINDLEY, M.R.—It appears to me that in this case the key to the whole situation is this, that there was no want of reasonable care on the part of the vendor in not discovering and providing for the blot on his title, which was discovered by extreme vigilance on the part of the purchaser's professional adviser. If Mr. Neville was right in maintaining that every omission by a vendor to detect and provide for any blot in his title was a "default," then, no doubt, there would be a default here. But when we regard the history of this clause in conditions of sale, I do not think that extreme proposition can be maintained. One knows that the clause which obliges the purchaser to pay interest if for any cause the purchase is not completed on a particular day is put in mainly for the purpose of giving the vendor some hold on the purchaser; for in the absence of some provision of that sort the purchaser might delay indefinitely, and so the thing might go on for ever, unless the vendor chose to bring an action to compel the purchaser to complete. Of course it is a clause which is liable to abuse, because the vendor knows and the purchaser does not know the state of the vendor's title, and knows whether he is fixing a reasonable time with regard to the difficulties which he knows of and has to deal with. If there were not some limit put by construction, or by the wording of the clause, to prevent vendors taking advantage of their own wrong, no doubt the result might be very oppressive. But, partly by construction and partly by the mode in which such clauses are framed by conveyancers, the effect is that injustice is generally avoided. It is very seldom that a vendor can take advantage of his own wrong, and compel the purchaser to pay interest when the vendor is himself to blame. But here we have to deal with a case of a somewhat unusual character. I am bound to say that I do not think the purchaser would have suffered one farthing in money, or any one degree in risk, if he had not insisted upon getting this supplementary deed. He would have got a title open to the technical objection detected by his professional adviser. But he would, it is obvious, have got the legal estate from the trustees of the Standard Assurance Co. conveyed with the consent of the managing directors. He would not have got, nor was it necessary that he should get, a conveyance under the seal of the company, because, as I understand, it was not incorporated. Therefore, to invalidate his title some steps would have had to be taken by the company, who had got the purchase-money, and whose trustees had, with the sanction of the directors, conveyed the property. Such proceedings must have been on the ground of some omission to have the transaction sanctioned in the proper manner. I will not say that it is not a blot on the title. When it is pointed out, one can see that it exists. It is certainly very creditable to the purchaser's adviser that he should have detected it, and said that it must be put straight. It was, however, a most extraordinary precaution. Now, to say that the vendor's omission to discover and

provide for an objection only discoverable by extraordinary vigilance is default, is to go a great deal too far; and unless you can go much farther than that there is no default at all on the vendor's part.

The appeal must therefore be dismissed.

CHITTY, L.J.—I am of the same opinion and have only a very few words to add. The question here is as to the meaning of the term "default" in this 10th clause of the conditions of sale, the contract being one of sale and purchase of real estate. The term "default" is not to be interpreted as in an ordinary case of sale of goods, or any simple contract of that kind. Contracts of sale of real estate have always been put, in courts of equity and even of law, on a special footing of their own. For instance, a stipulation as to time is not usually taken to be of the essence of the contract, and the contract can be specifically performed. Then in regard to damages, even at common law the purchaser is not able to recover damages, in an ordinary case, for the loss of his bargain. I mention these points merely for the purpose of meeting Mr. Neville's argument, the substance of which was that "default" was equivalent to mere failure to perform his contract, that a mere failure to convey the property on the day named, arising from a defect in his title, is sufficient to raise a case of default, and to excuse the purchaser from the payment of interest. This seems to me by no means a difficult case. I quite agree with the Master of the Rolls that with great vigilance brought to bear on the matter something was discovered which showed that the title might be said to be defective. I do not think it amounts to more than that. The legal estate had been conveyed, the money had reached the coffers of the company, and the directors had joined in the conveyance. It seems to me that the purchaser was getting an excellent title, subject of course to this slight defect. It is not a case of the vendor selling the property with a defect, known or suspected, in the title. The vendor had no reason to believe or suspect that there was any defect of title. His purchase had been completed a very short time before, and the presumption is that he had taken the best advice. So, in my opinion, there was no want of reasonable care on the part of the vendor or his advisers in not finding out this defect. It required a high degree of vigilance, or caution to discover it.

The circumstances of this case are not, in my opinion, sufficient to establish a case of default on the part of the vendor. For these reasons I agree with the view taken by the Master of the Rolls.

COLLINS, L.J.—I am of the same opinion. I think the definition of "default" given by Lord Bowen in *Young and Harston's Contract* applies here. He says, speaking of default: "It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction." Mr. Neville's point was that, if there was in fact a blot on the title offered, that in itself was a "default"; and, in a sense, no doubt, if you were dealing with an absolute contract for the sale of goods, that might be so. But when you are dealing with the peculiar transaction of the sale of land, as regulated by the laws of this country, a long current of decisions has decided that you ought not to try that contract by so strict a standard. Further, when you come to look at the process of evolution by which the words "default" and "wilful default" got into these contracts, it is perfectly clear that the word "default" is not used in the sense of a mere failure to perform the contract. That is very clearly stated in the judgment of Turner, L.J., in *Williams v. Glenton*, where the general words were that if "from any cause whatever" the purchase should not be completed on the day named. The Lord Justice said: "The case attempted to be made on the part of the purchaser is, that there has been so much delay on the part of the vendor as to amount to a wilful default or neglect on his part, which according to the cases, would suffice to absolve the purchaser from the liability to interest, even under the terms of such a contract as the present." It was a qualification put upon the general immunity of the vendor, and rested on the principle that a person cannot take advantage of his own wrong. Therefore there is involved in "default" an element over and above mere failure to perform a contract; an element of wrong, not necessarily involving fraud or dishonesty, but the word "default" does mean the conscious abstention on the vendor's part from doing what it was reasonable for him to do.

In the present case, which I have examined with attention, it appears to me clear that no amount of reasonable care would have enabled the vendor to discover this defect in his title, and that the fact that he did not discover it is very far from establishing any "default" in him, or any failure on his part to do that which he ought to have done, and no abstention from doing that which he ought to have done. Therefore I think there has been no default such as is meant by the word as used in the condition.

Appeal dismissed.

Solicitors, *Ingle, Holmes, & Sons; Hulberts, Hussey, & Metcalfe.*

High Court of Justice.

Chan. Div. Stirling, J. — June 7, 8, 14.

GRAND JUNCTION WATERWORKS CO. v. THE HAMPTON URBAN DISTRICT COUNCIL. (a.)

Local government — Proceedings before magistrates — Declaration of rights where no relief asked—Practice —Jurisdiction—Public Health (Buildings in Streets) Act, 1888 (51 & 52 *Vict. c.* 52), *s.* 3—*R. S. C., Ord.* 25, *r.* 5.

Where the Legislature has pointed out proceedings before magistrates as the proper course for a local authority to take with regard to offences under a particular statute, the Court of Chancery will be very slow to exercise its jurisdiction to restrain such proceedings by injunction where there is no evidence that the local authority intend to commit any illegal act.

A fortiori *it will be still less likely to make a declaration of rights where no relief, by way of injunction or damages, is asked.*

Whether the court has, under ord. 25, *r.* 5, *jurisdiction to make such a declaration under such circumstances,* quære.

This was an action brought by the Grand Junction Waterworks Co. asking for a declaration that they were entitled to erect an engine-house and any other building as they might think fit on a piece of land within the defendants' district without their consent.

The plaintiffs were a company incorporated by an Act of Parliament (51 Geo. 3), with power under a subsequent Act of 1852 to make certain works in the lines and on the situation and on the level, and in and through certain lands delineated on plans and

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

sections, and described in the books of reference which were deposited in the usual way.

Under the powers of that Act the waterworks company acquired certain land which was within the jurisdiction of the Hampton Urban District Council, and recently they proposed, in order to provide proper additional pumping accommodation, which had become necessary in order to secure an adequate supply of water within the limits of the company's operations, to build on a vacant portion of this piece of land. Communications took place between the waterworks company on the one hand and the local authority, the Hampton Urban District Council, on the other.

They began on the 24th of September, 1897, with a communication from the surveyor of the local authority addressed to the secretary of the company, which ran as follows:

"I understand that your company are about to erect new buildings adjoining and abutting upon the Upper Sunbury-road, in this district. I wish to point out to you that no plans for such buildings have been deposited in accordance with the requirements of my council's bye-laws, and, further, that it is proposed to erect such buildings contrary to the provisions of the Public Health (Buildings in Streets) Act, 1888."

Then further communications took place and plans were submitted to the local authority, and on the 14th of October this letter was written on behalf of the authority: "I regret to inform you that the council at their meeting on Tuesday evening decided that they could not see their way to allow the proposed new engine-house of your company in the Upper Sunbury-road to be brought forward beyond the front main wall on either side thereof, and accordingly they have been compelled to disapprove the plans."

As appears from this letter the plans were formally rejected by the council. Then the matter passed into the hands of the solicitors of the plaintiffs, who put forward the contention that the enactment contained in the private Act of 1852 exempted the waterworks company from the operation of the provisions of the Public Health Act, 1888, on which the council relied.

On the 11th of November, 1897, the following letter was written on behalf of the council to the solicitor for the waterworks company: "Referring to your letter of the 20th ult., I am instructed to inform you that my council, acting under the advice of counsel, decline to admit your clients' contention that the proposed new engine-house is exempt from the operation of the council's bye-laws, or that the provisions of the company's special Act of 1852 override the enactment contained in the Public Health (Buildings in Streets) Act of 1888 in the manner alleged. If, therefore, the work is proceeded with I am instructed to take legal proceedings for contravention of the Act of 1888, but I trust that the company will see the propriety of not forcing the council to take such measures." To that their solicitors replied. "We communicated the effect of your letter of the 11th inst. to the board of the company to-day, but they have been advised by Mr. Cunningham Glen that they are right in their contention that they are not bound to set back as proposed. If the council still think it necessary to take proceedings, possibly it will be alike to their interest and to that of the company if the best mode of taking proceedings so as to keep expenses as low as possible were agreed on between us, and we should be very happy to meet you if you are likely to be in this neighbourhood to discuss any points connected with the case."

On the 30th of November the council's solicitor replied: "I have conferred with Mr. Munroe, and whilst desirous of obtaining a decision upon the question in dispute in the most friendly way possible, regret that I cannot adopt your suggestion. I see no reason why if your company proceed with the works a summons should not be issued in the usual way, and in the event of either party being dissatisfied with the decision of the magistrates a case would no doubt readily be stated."

Then on the 15th of December the company's solicitors write: "The company have, for reasons connected with their own convenience, delayed proceeding with the erection of the engine-house to which your council objected, and have without admitting that any notice need be given by the company to the council at all, as a matter of courtesy instructed us to give you formal notice that the company intend to proceed to erect the building. If it is the intention of the council to resist the work being proceeded with we shall be glad if you will give us notice to that effect as soon as possible requiring the company to refrain from proceeding."

On the 17th the council's solicitor replied: "In reply to your letter of the 15th inst., I am obliged to you for your courtesy in giving me formal notice that the company intend to proceed with the building, but I am unable to obtain instructions from my council to take any definite action in the matter until some part of the work shall be above the level of the ground."

On the 21st the company's solicitors wrote back: "We are in receipt of your letter of the 17th inst., for which we are obliged. We understand from it, taken in conjunction with your letter of the 11th of November last, that it is your clients' intention, in the event of the company proceeding with the building of their new engine-house, to take proceedings for contravention of Act of 1888, and that your instructions have not been withdrawn, but that you have no instructions to commence proceedings until after the building is above the level of the ground. And that you cannot state precisely the exact form of procedure which you will adopt, but that your clients claim the right to prevent the company from proceeding with their building. This being so our clients have instructed us to take the necessary steps to have the question as to their right to proceed with their building determined in the High Court, and of this we think it right to give you formal notice."

Then there was a break in the correspondence until the 23rd of of February, 1898.

In the meantime the company did not bring any action, but they proceeded to erect their building, and it was stated in the statement of claim that before the day when the writ in this action was delivered, which was the 12th of March, they had expended upwards of £1,500 in erecting this portion of the building. On the 23rd of February the council's solicitor wrote: "I think it only right to give you notice that a special meeting of the council has been convened for Tuesday next to consider a report from the surveyor in regard to the frontage line of the building now in course of erection by the company."

Then the company's solicitors wrote: "We desire to call your attention to the fact that upwards of two months ago our clients told you of their intention to put up the engine-house in question, and that you have allowed them to go on building now for this period and they have expended a very large sum of money, and they naturally inferred, from no step having been taken by your clients, that it was not their intention to pursue the matter further. We may explain that our clients put back their building so that there might be at least a 40ft. road if your clients now desire that the road should be of this width and would acquire the necessary land for this purpose."

On the 7th of March the solicitor to the council wrote: "The surveyor to the council having reported that the Grand Junction Waterworks Co. are erecting a new building adjoining the Upper Sunbury-road, part of which building is being erected beyond the front main wall of the house or building on either side thereof contrary to section 3 of the Public Health (Buildings in Streets) Act, 1888, I am instructed by the council to give written notice in that behalf to the company in accordance with the terms of the Act and to require the immediate discontinuance of the offence."

Then on the 8th of March the council's solicitor wrote: "I was under the impression that it had been made quite clear to you that the only reason for not proceeding was that a technical objection might be taken unless the building were above the level of the ground, and your last letter to me seemed to show that you quite understood this. The council have not the slightest desire to put your clients to any unnecessary expense or to try the question in any but the most amicable spirit."

Then on the 11th of March the company's solicitors wrote: "In order to get the matter between our clients settled in the most expeditious manner we have been advised and have thought it right to issue the accompanying writ, which speaks for itself."

That was the writ in this action which simply claimed a declaration in accordance with the statement of claim subsequently delivered "that the plaintiffs are entitled to erect the said engine-house and any other building they may think proper for the purpose of their works on any portion of the piece of land without the consent of the defendants."

On the 12th of March the writ was issued, and on the 14th of March a copy was left at the offices of the defendants.

Then on the 15th of March the defendants laid an information before the Middlesex magistrates against the plaintiffs for contravening the Public Health (Buildings in Streets) Act, 1888, and a summons was issued directing the plaintiffs to appear before a court of summary jurisdiction.

The statement of claim was delivered on the 18th of April, and was met by a defence which in paragraph 11 said: "The defendants, having regard to the provisions of the said Act of 1888, deny that upon the true construction of the plaintiff company's Acts, the Waterworks Clauses Act, 1847, and the other Acts incorporated with the company's said Acts, the plaintiff company is entitled to erect their said engine-house or any other buildings they may think proper for the purposes of their said works upon any portion of the piece of land in the statement of claim specified without the consent of the defendants." Paragraph 13 said: "The defendants object to the bringing of this action against them by the plaintiff company and submit the same is entirely without precedent and will contend at the trial: (*a*) That this court has not, having regard to the matters hereinbefore mentioned and to the provisions of the Judicature Acts, and the rules of the High Court made thereunder, any juisdiction to make the declaration prayed for herein. In the alternative (*b*) That the court in the exercise of its discretion ought not to make the said declaration, but that the plaintiff company should be left to establish their defence (if any) before the special tribunal entrusted with the determination of the question involved in pursuance of the statutes in that case made and provided subject to their right of appeal to a Divisional Court of the High Court of Justice provided for by section 45 of the Judicature Act, 1873, the decision of which said court is by section 47 of the said statute made final and without appeal." A summons was taken out asking for leave to have a question of law raised by the defence decided before the action was further proceeded with and an order was made to that effect. The Master's note was: "The notice dated the 7th of April, 1898, in this action is adjourned into court on the preliminary objection of paragraph 13 (a) of the defence."

When it came before the judge it was pointed out that the alternative claim in paragraph 13—namely, paragraph 13 (*b*) was not mentioned in this note, and his lordship's view was that from that point of view the order was imperfect, and that the second alternative ought necessarily to be considered by the court—namely, whether, supposing there was jurisdiction to make an order, the court, in the exercise of its discretion, ought to make the declaration; and it was agreed ultimately at the conclusion of the argument on the 9th of June that the materials which the judge should be called upon to exercise his discretion upon should be put before him, and the case stood over till the 14th for this purpose, when the evidence was discussed.

Meantime, on the 9th of May the summons taken out by the defendants had come on before the magistrates. It was found by the magistrates, and the fact was not really in dispute, that this building of the plaintiffs did project beyond the front main wall of the house or building on either side, and the magistrates inflicted a fine on the plaintiffs. The plaintiffs applied for a special case with a view to taking the matter before a Divisional Court.

Bosanquet, Q.C., *Macmorran, Q.C.*, and *R. G. Glen*, for the plaintiffs.—The Public Health Act, 1888 (51 & 52 Vict. c. 52), s. 3, repeals section 156 of the Public Health Act, 1875. Ord. 25, r. 5, provides that a declaration may be made, though no other relief is asked for. The objection taken to your lordship's jurisdiction is that as the Public Health Act, 1888, provides one tribunal, no other can be resorted to. But that is not in accordance with the view of the Court of Appeal in *Lord Auckland* v. *Westminster Local Board*, 20 W. R. 845, L. R. 7 Ch. App. 597, *per* Mellish, L.J., at p. 607. That case was commented on by the late Master of the Rolls in *Kerr* v. *Corporation of Preston*, 25 W. R. 265, 6 Ch. D. 463. *Hendon Local Board* v. *Pounce*, 38 W. R. 377, 42 Ch. D. 602; *St. George's* v. *Ballard*, 43 W. R. 409, [1895] 1 Q. B. 702, are cases where an action was brought by a local board to restrain proceedings which are forbidden by this section: *Robinson* v. *Local Board of Barton Eccles*, 32 W. R. 249; 8 App. Cas. 798; *Barlow* v. *Kensington Vestry*, 34 W. R. 521, 11 App. Cas. 257. [STIRLING, J.—This case differs from *Lord Auckland's case* in this, that there is no power here to pull down.]

Jenkins, Q.C., and *Courthope Munroe*, for the defendants.—We submit that this is not a proper case for the court to make a declaration of right, notwithstanding the fact that no relief is claimed. The point which is in question in this case will be decided by another tribunal. The defendant board have not acted unfairly in any way, and the plaintiffs have not been prejudiced at all. The defence of *res judicata* applies in this case. The exact point has been decided by a court of exclusive jurisdiction. [They referred to *Robinson* v. *Barton Local Board*, 21 Ch. D. 621; *Rex* v. *Hutchins*, 29 W. R. 724, 6 Q. B. D. 300; *North-Eastern Railway Co.* v. *Dalton Overseers*, 14 Times L. R. 421; *Stannard* v. *Vestry of St. Giles, Camberwell*, 30 W. R. 693, 20 Ch. D. 190.] As to ord. 25, r. 5, we submit that the Judicature Acts and Rules of Court do not enable any relief to be given which could not have been obtained before the passing of those Acts: *In re Mill's Estate*, 35 W. R. 65, 34 Ch. D. 24; *Brooking* v. *Maudsley*, 36 W. R. 664,

38 Ch. D. 636; *Baxter* v. *London County Council*, 63 L. T. 767, 39 W. R. Dig. 63.

They also referred to *Powell* v. *Kempton Park Racecourse Co.*, *ante*, p. 8, [1897] 2 Q. B. 242.

Bosanquet, Q.C., in reply.—I admit that the case of *Kerr* v. *Corporation of Preston* is an authority against me, but the question is whether at this date it is a controlling authority. In *Lord Auckland* v. *Westminster Local Board* the exact opposite was decided. I rely on *Robinson* v. *Barton Local Board*, and *Barlow* v. *St. Mary Abbott's, Kensington*. [*Jenkins, Q.C.*, referred to the latter case in the Court of Appeal, 32 W. R. 966, 27 Ch. D. 362.] *Stannard* v. *Vestry of St. Giles', Camberwell*. The question here is one of rights to real property, and questions of that sort were never intended to be dealt with by magistrates at all. As to the defence of *res judicata* the magistrates have found two facts, but a finding of fact cannot create an estoppel at law: *Banter* v. *London County Council*.

[The case then stood over till the 14th of June to give the judge an opportunity of hearing the evidence which was read on that day.]

STIRLING, J., stated the facts as above and continued: Now the question is, ought I to allow this action to go on? The statement of claim and the writ simply asks for a declaration without any other relief whatever. The form of the action is justified by an appeal to ord. 25, r. 5: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not." Now the last sentence of that rule is expressed in the very widest terms. "The court may make binding declarations of right whether any consequential relief is or could be claimed or not." It is said, however, that these wide words must be read with some limitation, and it is suggested that the court has no authority notwithstanding that rule to make any declaration in a case in which either before or after the Judicature Act no relief could be given by the court. I am not called upon, it seems to me, to decide on this occasion whether any such limitation is to be read into the rule. I am not satisfied in this case that there is no jurisdiction—that there is an entire absence of jurisdiction to give consequential relief, at all events in the present state of the authorities.

Now the material authorities appear to me to be three. The first is the case of *Lord Auckland* v. *The Westminster Local Board*. That arose, not under this Act—on which there appears to be no decision—but under the Metropolis Management Amendment Act, 1862. That contained two clauses of a very similar nature to section 3 of the Public Health Act, 1888. Section 74 provided for what I may call rectifying the general line of the street when buildings were pulled down, and it provided that it should be lawful "for the Metropolitan Board of Works to require the same to be set back to such a line, and in such a manner for the improvement of any street as the said Board shall direct, provided that the said Board shall make compensation to the owner of such building for any damage and expenses which he may sustain and incur thereby." Then section 75 was an enactment that "no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses, in which the same is situate, in case the distance of such line of buildings from the highway does not exceed 50 ft., or within 50 ft. of the highway, when the distance of the line of buildings therefrom amounts to or exceeds 50 ft., notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintendent architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish, or the Board of Works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons, to answer such complaint, and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing." The Westminster Local Board of Works were taking, or threatening to take, proceedings before a magistrate under section 75, and the contention of Lord Auckland, who was the owner of the lands in respect of which the proceedings were to be taken, was that the case fell not within section 74, but within section 75; and Malins, V.C., and the Court of Appeal, consisting of James and Mellish, L.JJ., were of opinion that the case did not fall within section 75, but within section 74, and consequently that a magistrate before whom a summons was taken out under section 75 would have no jurisdiction whatever to deal with the case, that section not being applicable. Both the Vice-Chancellor and the Court of Appeal granted an injunction in very wide terms, which I have got before me, and which I think it is right to say, as it does not appear in the report, included an injunction to restrain the Board of Works from taking any proceedings for the purpose of compelling the plaintiff or his builder, or any person employed by him, to abstain from erecting buildings on the land in question, and also to restrain the board, their attorneys, solicitors, and agents, from taking proceedings for the purpose of recovering from the plaintiff or his builders penalties under the Metropolis Management Amendment Act, 1862. The ground on which that is put by James, L.J., is this: "The plaintiff, Lord Auckland, comes to this court and complains that a public body threaten, and intend, under colour of certain great powers given them by Act of Parliament, to take and pull down some buildings which he has a right to erect, and is about to erect, on his own property. He complains that by these threats they have embarrassed him in the application of his property to the purpose he desires, and have in fact prevented him from erecting his building, because they tell in plain terms that if he does build they will put in force the powers of their Act and pull down his building." Then he says: "It seems to me to be the same kind of case as those well-known cases in which this court has exercised its jurisdiction by restraining railway companies from proceeding to take land which they had power to take for one purpose for some other purpose for which they were not entitled to take it; or to take part of a house only where the law obliged them to take the whole of it. In those cases the court has stopped them at once and granted an injunction, because

they were about to exercise their powers in a manner that was oppressive or in a manner that was illegal. I have no doubt, therefore, that this is a case within the jurisdiction of this court, and that it is a case proper for this court to decide once for all instead of obliging Lord Auckland to go before a magistrate and discuss before him the question of jurisdiction and the difficult construction of these Acts of Parliament, and then to carry the case to the Court of Queen's Bench by *certiorari*, or to take some other step to get it finally decided." [His lordship also read the judgment of Mellish, L.J., and continued:] Certainly that is an authority, as it seems to me, of the Court of Appeal stated by two very eminent judges that this court has jurisdiction to grant an injunction in a proper case to restrain a public authority with power to sue for penalties from proceeding before the magistrate to recover those penalties. That decision has been criticised by Sir George Jessel, sitting as Master of the Rolls, in the case of *Kerr* v. *The Corporation of Preston*. There he refused an application which was made by the plaintiffs, who were owners of a house, to restrain the corporation of Preston from taking summary proceedings before a justice of the peace for recovery of penalties under the Public Health Act, 1875, on the ground that the plaintiffs had set forward their building without written consent from the defendants under section 156 of the Public Health Act, for which section 3 of the Act of 1888 is now substituted. The Master of the Rolls said: [His lordship read the judgment and continued:] The Master of the Rolls, I presume, had the report of *Lord Auckland's case* before him, but I do not know that he was aware of the form of the order as it appears in the registrar's book, which was actually made in *Lord Auckland's case*. I confess it does seem to me that at all events in the mind of Mellish, L.J., the question was present, and I have little doubt, also, that it was present to the mind of James, L.J. However, the criticisms of so eminent a judge as Sir George Jessel are of great weight, and, of course, weight must be given to them in any consideration of tht subject; but this remark is to be made, that Sir George Jessel sitting as Master of the Rolls and not in the Court of Appeal could not overrule the decision of the Court of Appeal in *Lord Auckland's case*.

Now, the third case with which I have to deal is the subsequent one of *Stannard* v. *The Vestry of St. Giles', Camberwell*. That, again, was a case in which there was an application of a similar character to this, though not precisely the same. It related to a question with regard to a drain. There a dispute had arisen between the local board and the builder about a drain which the builder in the course of erecting some buildings interfered with, and they gave notice to him that they would enter upon his land and reinstate the drain. They afterwards abandoned that intention, and took proceedings against him before the magistrate. The plaintiff then brought an action against the defendants claiming an injunction to restrain them from trespassing on his land, and from proceeding against him before the magistrate. In the statement of claim the plaintiff did not in terms allege that the defendants threatened and intended to trespass on the land, and it was there held by the Court of Appeal that as no intention to commit a trespass was proved or alleged, the plaintiff had not made out his case for injunction upon a trespass, and that being so the court had no jurisdiction to restrain the proceedings before the magistrate. I have read that from the headnote, but perhaps it goes a little beyond the judgments which were given in the Court of Appeal. The facts must be taken to be that the local authority in that case simply threatened to proceed before the magistrate. They did not threaten to take the law into their own hands and to enter upon the plaintiff's land to make any alteration in the drain. Sir George Jessel, who presided in the Court of Appeal, said: [His lordship read the judgment, and continued:] Then he goes on to discuss *Hedley* v. *Bates*, where he himself, sitting at the Rolls, had granted an injunction in a case in which he considered the magistrate had no jurisdiction. It is to be observed that in that case the proceedings before the magistrate had taken place and they had been decided adversely to the plaintiff in that case, and thereupon the court refused to interfere. Upon that ground both the Master of the Rolls and Sir James Hannen, and the present Master of the Rolls proceeded in this case of *Stannard* v. *The Vestry of St. Giles', Camberwell*.

Now, that being the state of the authorities, and I think, of all the authorities relevant to the question, I do not think it would be right for me to say that there is absolutely no jurisdiction in the court to restrain proceedings before the magistrate. In this case, as in the case of *Stannard* v. *The Vestry of St. Giles*, there is no evidence, and indeed there is not only no evidence but no allegation in the statement of claim, that the defendants, the urban district council, threaten or intend to enter upon the plaintiff's lands; and it was admitted by the plaintiff's counsel during the argument that the allegations in that respect could not be improved or added to. They simply show an intention to proceed before the magistrates, as indeed is also shown by the correspondence to which I have called attention. There is, therefore, no ground for the interference of the court upon the footing that the defendants threaten or intend to do any illegal Act. All that it is shown they threaten or intend to do, and that which they have done, is to proceed before the magistrates in the way which is pointed out by section 3 of the Statute.

Now, whether or no there be jurisdiction in the court to restrain by injunction such an application, it seems to me that the granting of an injunction in such a case is a matter which ought to be done with the greatest possible caution, and I respectfully adopt the language of the Master of the Rolls in that case: "Where the Legislature has pointed out a mode of proceeding before a magistrate it is not a general rule for another court to interfere and stop that proceeding by injunction." I desire to add in the present case, that in contests between local authorities and private owners it seems to me that that rule ought to be adhered to somewhat strictly. In these matters as to building lines the Legislature has provided a cheap and short mode of obtaining a decision on the point in question, and it appears to me that it would be a matter of regret if a different and more expensive mode of obtaining a decision were to be habitually resorted to or resorted to in the absence of any very special circumstances. I confess my own experience, sitting here as a judge, leads me to believe that vestries and other local authorities are sometimes too ready to embark in costly litigation without any equivalent benefit to the public or the ratepayers whom they represent; and I should be sorry if either private individuals or the vestry were, when a cheap and speedy mode of settling a dispute is provided by the Legislature, to resort to a more expensive one.

I think, therefore, that in the exercise of the discretion which is vested in the court it ought, even as regards the granting of an injunction, to be very slow to grant an injunction against taking proceedings before the magistrate when the Legislature has pointed out that as the proper mode of proceeding; and *à fortiori* it seems to me that when the court

is simply asked to make a declaration of right, without giving any consequential relief, the court ought to be extremely cautious in making such a declaration, and ought not to do it in the absence of any very special circumstances.

That brings me to the question whether upon the materials before me any special circumstances are shown, and in my judgment there are not.

I have already pointed out the parties were at arm's length on the 21st of December, 1897, and the writ was not issued until March. In the meantime the council, which, it appears, only meet once a month, were watching the proceedings, and on the 23rd of February, 1898, the council's officer gives notice that in the February meeting of the council the matter was to be brought before them. It is to be observed, as they themselves point out in the correspondence, proceedings cannot be taken until the house has been built and the written notice has been given to discontinue the offence. The letter of the 23rd of February, which I have referred to, was simply obviously preliminary to giving that notice.

Now the waterworks company, having had this notice on the 21st of December, proceed to build. They say they have expended a large sum of money in building. It might have been open to them, and I think they would have stood in a better position, if on the 1st of January or on the 11th of January they had issued the writ, before they had expended any money. There might have been something to be said then, but they chose to go on building, knowing that the council threatened proceedings, till they got notice on the 23rd of February that the council were about to move in the matter. It is not till then that the plaintiffs do issue their writ. This is a case in which, in the exercise of the discretion of the court, the court ought not either to interfere by way of injunction or to make a declaration in accordance with the prayer in the statement of claim, but the matter ought to be left to the decision of the tribunal which has been pointed out by the Act of Parliament, and which will lead to an adjudication on the rights, by a Divisional Court, which, it seems to me, is a very proper mode of deciding this question, as similar questions have already been decided by Divisional Courts on similar applications.

I think, therefore, I ought to express my opinion on the matter which is now adjourned before me, that the court, in the exercise of its discretion, ought not to make the declaration which is asked for.

Action dismissed with costs.

Solicitors, *Bircham & Co.; Kent & Son.*

Q. B. Div.
(Wills and Kennedy, JJ.) May 17, 24.

REG. *v.* FRY AND OTHERS (JUSTICES) AND STOKER. *Ex parte* MASTERS. (*a.*)

Justices—Criminal law—Practice—Two informations—Separate offences—Hearing of second information before giving decision of first—Legality of conviction.

M., a licensed victualler, was charged on two informations with two separate offences. The first with permitting drunkenness on his premises on the 7th of February, 1898; *and the second with selling on the 8th of February intoxicating liquor during closing hours. The justices heard the first information, and decided to convict, but did not announce their decision until they had heard the second information, which they dismissed; they then convicted on the first information. In acting on each information the justices proceeded solely on the evidence applicable to that information.*

Held, that the conviction was good.

Hamilton *v.* Walker, 40 *W. R.* 476, [1892] 2 *Q. B.* 25, *discussed.*

In this case a rule *nisi* had been obtained for a writ of *certiorari* to quash a conviction.

From the facts stated in the affidavits it appeared that one Masters, a licensed victualler, was charged before the justices of the county of Somerset on three informations with three separate offences, the first with permitting drunkenness on his premises on the 7th of February, 1898; the second, with selling on the 8th of February intoxicating liquor during closing hours; and the third, with keeping his premises open on the same date after closing hours.

The justices heard the first information first and unanimously decided to convict, but they did not announce their decision, as they desired to hear the other informations before doing so. They, therefore, proceeded to hear the second information, and this they dismissed, whereupon the police superintendent in charge of the prosecution decided not to proceed with the third charge.

The justices then announced their decision on the first information, and fined the defendant five pounds and costs and ordered his licence to be endorsed. The justices, in an affidavit filed by them, stated that they were not in any way influenced in adjudicating on the first information by the evidence given on the hearing of the second information, and that they only applied to the first charge the evidence given on the hearing of the first information.

Danckwerts (*F. E. Weatherley* with him) showed cause.

Eldon Banks (*H. H. Gregory* with him), in support of the rule.—Where a man is put in peril on a criminal charge he is entitled to have a decision on that charge before another charge against him is heard and evidence given which might prejudice his case. Each offence must be dealt with and decided separately. If justices adjourn their decision on a first charge and proceed to hear evidence on a second charge, which evidence might prejudice their minds as regards the first charge, they at once lose all jurisdiction to convict on the first charge.

Cur. adv. vult.

May 24.—WILLS, J., read the following judgment of the court: We are of opinion that this rule should be discharged. We should be sorry to give any countenance to the notion that justices may mix up two criminal charges and convict or acquit in one of them with any reference to the facts appearing in the other. Such a course would be contrary to law; and, undoubtedly, as a general rule, it will be prudent and right for justices to avoid any course which reasonably bears the aspect of such a mistake. If a *primâ facie* case is made out that such an error has, or may have been, committed, it will in general lie upon the justices to show very clearly that it has not been committed.

On the other hand, we should be equally sorry to throw any doubt upon the right of the justices in any case, for reasons of justice arising out of the circumstances of the case itself and for its better determination, to adjourn or to postpone their decision; and, if their discretion in this respect be honestly exercised, and not, directly or indirectly, with the view of throwing in facts or evidence which have no legitimate bearing on their decision, it must not be interfered with.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

In this instance we think the case put forward against the proceedings of the justices is completely answered. It is impossible, in considering the weight to be given to what the justices said and the effect to be given to what they did, to leave out of sight the fact that their chairman is a great lawyer, of long judicial experience and as thoroughly capable of appreciating the impropriety involved in any mixing-up the evidence in the several cases which were heard before the decision upon the first was pronounced, and of dealing with each case separately and upon its own merits, as we ourselves are. It is most unlikely that a bench of justices whose deliberations were guided by him should have been permitted to fall into such an impropriety of procedure as is suggested by the appellant.

We entirely accept the statement that the justices were, at the close of the evidence and speeches in the first case, unanimously of opinion that there should be a conviction in that case; and we accept it none the less because, with that caution which we might expect from the chairman when speaking of matters which had happened some weeks earlier, they so state "to the best of their recollection." We entirely accept, also, their statement that they applied to this case the evidence that was given in reference to it and none other. It may be added that in these cases the circumstances were such that it was singularly easy to keep the case in which they convicted apart from the other two, which related to a different date and involved different charges. The extent of the penalty to be awarded in the case in which they were unanimous as to conviction might not improperly be influenced by what might be learnt by the justices in the course of the two other cases. Indeed, Mr. Bankes, the counsel for the appellant, admitted in the course of the argument before us that if the amount of the penalty was the only matter involved in the postponement of the judgment there was nothing illegitimate or improper in the proceeding. We cannot doubt that, inasmuch as the justices had made up their minds in the first case to convict, the only question then left unsettled was the amount of the penalty to be imposed; and that they forebore immediately upon the close of the first case to publish their decision as to conviction or acquittal only on account of the obvious inconvenience of splitting the publication into two parts.

The case of *Hamilton* v. *Walker* was relied upon by the applicant for the *certiorari*, as to which a word must be said. It is reported in four different reports, [1892] 2 Q. B. 25, 61 L. J. M. C. 135; 8 Times L. R. 531; and 56 J. P. 583. [It is also reported in 40 W. R., at p. 476.] Of these by far the most complete is that in 56 J. P. 583, to which I therefore refer. In that case Hamilton was summoned before the justices on two summonses—first, for delivering to one Farrell a number of indecent advertisements to the intent that they should be delivered and exhibited to certain inhabitants, &c.; secondly, for that Farrell exhibited to certain inhabitants, &c., certain indecent advertisements, and that Hamilton aided, abetted, counselled, and procured Farrell to do so. The magistrates heard the first summons and were asked to dismiss it, but they said they would hear the second summons before doing so, and, having heard it, they convicted on both. The court held that neither conviction could be supported. Both Pollock, B., and Vaughan Williams, J., held that the first was bad because the statute (Jervis's Act) requires that each case shall be heard on its own merits and on the evidence given under that one information. As to the second conviction. Pollock, B., held that it was bad for the same reason as the first, and Vaughan Williams, J., upon a totally different ground—viz., that if the first case had been decided first the defendant could have set up *autrefois convict* as an answer, and had been deprived of the opportunity of doing so. Pollock, B., however, said, "I do not go so far as to say that the justices might not reserve their judgment after hearing the evidence" (upon the first case). . . . "Here there is nothing to show that the justices, in acting on each information, proceeded on the evidence applicable solely to that information."

In the present case there is most explicit evidence, coming from a deponent whose assurance upon this point is most satisfactory and conclusive, that, in regard to the information now in question, the parties proceeded solely upon the evidence applicable to it, and it is clear that the ground of the decision in *Hamilton* v. *Walker*, as stated in the judgments of both the learned judges who formed the Divisional Court, does not exist in the present case, and its existence is negatived by the affidavit to which we have referred. The same observation applies to the judgment of Pollock, B., in respect of the second information before him. The reason given by Vaughan Williams, J., for holding the second conviction bad has no application whatever to the present case.

There is, therefore, no conflict between our present decision and that given in *Hamilton* v. *Walker*, and it becomes unnecessary for us to express any opinion as to whether we should assent to the reasons given by the members of the Divisional Court for the judgment given in that case.

This rule must be discharged with costs.

Rule discharged.

Solicitors against the rule, *Gascotte, Wadham, & Bradbury*, for *O'Donoughue & Anson*, Bristol.

Solicitors in support of the rule, *Bell, Brodrick, & Gray*, for *Hirst & Sandford*, Bristol.

Q. B. Div.
(Wills and Kennedy, JJ.) } May 19.

THE MAYOR, &c., OF MANSFIELD (*Appellants*) v. BUTTERWORTH (*Respondent*). (*a*.)

Local government—Private street works—Objection by frontagers — Insufficiency and unreasonableness — Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *s.* 7 (d).

The appellants, an urban authority, passed a resolution under section 6, *sub-section* 1, *of the Private Street Works Act*, 1892, *to do what were "private street works" within that section. Such works did not include the widening of the particular street in question. Specifications and plans were prepared, and the appellants passed a resolution approving the same. The respondent, a frontager in the said street, objected, the ground of his objection being that the proposed works were "insufficient or unreasonable" within the meaning of section* 7, *clause* (d), *of the Act. It was proved before the justices that the proposed works were necessary and proper for the user of the street as a street. The justices held that the proposed works were "insufficient or unreasonable" within section* 7, *clause* (d), *on the ground that the street was too narrow and that the proposed works did not include the widening of it; and accordingly allowed the objection.*

Held, that the jurisdiction of the justices upon an objection under section 7, *clause* (d), *was limited to determining whether the proposed works were sufficient*

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

to effect the purpose proposed to be effected; and that the order of the justices should be quashed, as they had based their decision upon other considerations—viz., the widening of the street.

This was a case stated under the provisions of the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), and the Summary Jurisdiction Acts, 1857 (20 and 21 Vict. c. 43) and 1879 (42 & 43 Vict. c. 49), by justices of the peace of the county of Nottingham, sitting at the Mansfield Police-court as a court of summary jurisdiction in and for the Mansfield Petty Sessional Division of the said county, upon the application of the appellants, who were dissatisfied with the justices' determination in point of law upon the hearing on the 17th day of January, 1898, of the matter of certain objections made by the respondent under section 7 of the Private Street Works Act, 1892, to certain proposals of the appellants with reference to a street called "Quarry-lane," situate within the borough of Mansfield and the said Mansfield Petty Sessional Division.

Upon the hearing of the matter of the said objections the following facts were either admitted or proved in evidence:

1. The appellants were the mayor, aldermen, and burgesses of the municipal borough of Mansfield, and were the urban sanitary authority under the Public Health Acts for the said borough. The respondent was the agent for and on behalf of the trustees of a charity called "Bellamy's Charity," who were the owners of a piece of land in the said borough having a frontage adjoining and abutting upon Quarry-lane for a length or extent of about 200 yards.

2. The Private Street Works Act, 1892, was duly adopted by the appellants, and came into force in and applied to the urban sanitary district of the borough of Mansfield on the 25th of March, 1894.

3. In October, 1896, the appellants resolved under and in pursuance of section 6, sub-section 1, of the Private Street Works Act, 1892, to do private street works—namely, to sewer, level, pave, metal, flag, channel, and make good, and to provide proper means for lighting part of Quarry-lane, which is a "street" within the meaning of section 5 of the said Act and the Public Health Acts. A specification of such works, with plans and sections and an estimate of the probable expenses of the work and a provisional apportionment of the estimate of the estimated expenses among the premises liable to be charged therewith, was prepared by the appellants' surveyor and submitted to the appellants, who, by resolution, approved the same, and such resolution was published and copies thereof were served on the owners of the premises liable to be charged, and the approved specification, plans and sections, estimate and provisional apportionment, were kept deposited at the appellants' offices, open to inspection in the manner prescribed by, and in all respects so as to comply with, the provisions of section 6 of the said Act.

4. Within one month from the first publication of the said resolution the respondent, under and in pursuance of section 7 of the said Act, by written notice, dated the 5th of June, 1897, and duly served on the appellants, objected to the proposals of the appellants on the grounds contained in section 7 (*d*) of the said Act, which are "that the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive."

5. The appellants duly complied with the provisions of section 8 of the said Act in order to have the said objections heard and determined by a court of summary jurisdiction.

6. The proposed works were intended to be done over a part of the said street about 677 yards in length. For several years past there had been a considerable traffic, both vehicular and foot traffic, over and along such part of the said street and such traffic had increased during the past twelve months and was increasing in consequence of the erection (still in progress) of a street of houses on land abutting on and adjoining Quarry-lane, but at a further distance from Mansfield than the land belonging to the said trustees. Vehicular traffic between the said new street of houses and Mansfield passed through Quarry-lane and over the portion thereof on which it was proposed to execute the works above referred to. There was no made roadway or footpath and no foundation to the road, which was uneven, with very deep ruts, but there was a footpath irregularly demarcated with rough stones. There were no sewers to carry off the sewerage of the houses erected and in course of erection in the said new street or of the houses adjoining Quarry-lane, and there was no provision for lighting. In wet weather the said Quarry-lane was almost impassable, and it was frequently in a foundrous condition and dangerous to persons using it, either by night or by day, with horses and carts or on foot. The average width of the said street during the said 677 yards was about 16ft., and for several yards opposite the respondent's land the width was about 12ft. (inclusive of the rough footway referred to, which was 3ft. in width). At all other points in the street where the respondent's land did not join Quarry-lane its width was from 14ft. 6ins. to 16ft.

7. It was admitted that the estimated expenses stated in the provisional apportionment were not excessive.

8. In support of the objections counsel for the respondent contended that inasmuch as it was not part of the plan of the appellants' proposed works that Quarry-lane should be widened opposite any part of the said land of the said trustees, but that the said works should be executed whilst retaining Quarry-lane at its present width, such proposed works would be insufficient and unreasonable having regard to the requirements of vehicular traffic as existing at the present time, as well as the probable requirements of such traffic in future, and that the insufficiency and unreasonableness meant by the statute had reference to the probable requirements of future vehicular traffic as well as and in addition to the requirements of present vehicular traffic.

9. Counsel for the appellants contended that it could not be found that the proposed works were insufficient and unreasonable within the meaning of section 7 of the said Act on the ground only that the justices considered the said street ought to be widened before any works were done and that the insufficiency and unreasonableness meant by the statute must be in respect of the nature and character of the proposed works having regard to the present condition of the street and the traffic over it.

The justices were of opinion that the proposed works were insufficient and unreasonable, on the ground that the existing width of the highway (that is to say, 9ft. of roadway and 3ft. footway) at the point before mentioned was insufficient for a highway, and that such works, or any part thereof, ought not to be done unless and until the said street was made wider, and they therefore, having visited and viewed Quarry-lane at such point, ordered and adjudged that the said works were insufficient and unreasonable on the ground that such works proposed involved the retention of the present width of the said street without enlargement. The question for the opinion of the court was whether the justices could find, on the grounds above stated, that the proposed works were insufficient and unreasonable within the meaning of section 7 (*d*) of the Private Street Works Act, 1892.

W. Appleton, for the appellants.—In this case the principal question depends upon the construction of the words "insufficient and unreasonable" in sub-section (*d*) of section 7 of the Private Street Works Act, 1892. The road in which the proposed works were to be done is a "street" within the meaning of that Act and the Public Health Acts. By section 6 it is provided that the urban authority may pass a resolution to do certain street works, and that the surveyor shall prepare the specifications and estimate, and the provisional apportionment of the estimated expenses among the persons liable to be charged therewith. Then sub-section (*c*) of that section provides that those specifications, &c., may be approved by resolution. Section 7 then goes on to say that owners of premises liable to be charged may lodge objections, and sub-section (*d*) gives as one of the grounds for doing so, that the proposed works are "insufficient and unreasonable." The respondent lodged an objection on this ground, and the justices, purporting to act under the powers given them by section 8, quashed the resolution to carry out the proposed works. This they had no authority to do. The words "insufficient and unreasonable" refer to the work itself, its quality and character, and the power given to the justices is only to quash the resolution approving of the specifications, &c. Throughout the Act there is no trace of any intention to give them jurisdiction to quash the original resolution.

Chester, for the respondent.—The justices took a practical view of the case. They viewed the road, and came to the conclusion that it was unreasonable to leave it so narrow while carrying out the proposed works. It is necessary to have regard to the probable increase of traffic, and in that respect the proposed work is "insufficient." Then again the unreasonableness comes in, as it would be unreasonable to perpetuate the narrowness of this road by carrying out expensive works. The power given to quash the resolution, refers to the first resolution in section 6—namely, the resolution that certain works shall be done. "Unreasonable" applies to the whole matter; it does not apply only to the plans and specifications.

Appleton replied.

The following cases were referred to: *The Corporation of Sheffield* v. *Alexander and Others*, 63 L. J. M. C. 206; *The Corporation of Sheffield* v. *Anderson and Others*, 64 L. J. M. C. 44, 43 W. R. Dig. 106.

WILLS, J.—The questions raised in this case are certainly of some little difficulty. We have had the advantage of an elaborate and carefully-considered argument, and in the end I have arrived at a tolerably clear conclusion in my own mind, notwithstanding the apparent difficulty presented by the language used in parts of the legislation.

Now, the Act of 1892 provides that where any street is not, to the thinking of the local authority, in a proper condition, they may resolve that certain works shall be done, which comprehend the works which have been ordered to be done in the present case. Then, after that, their surveyor is to prepare plans and specifications, and they are to pass a resolution approving of the plans either as submitted to them by the surveyor, or in some modified condition, and then, upon that being done, public notice is to be given and opportunities are to be given to the persons affected to object, and then the objectors are finally to be heard before a court of summary jurisdiction; and the nature and the extent of the objections which may be urged of the matters which are taken into consideration are to be found in section 7. Certain of these objections, two of them at all events (see sub-sections (*a*) and (*b*)), beyond all doubt, go to the root of the whole scheme, because they are objections which in point of fact, if the facts support them, go to establish a state of things in which the jurisdiction of the local authority to pass any resolution never existed. That is very much as it was under the Public Health Act. Under section 150 of that Act the vestry or public body might pass any resolutions it liked as to the sewering and paving the streets, and might proceed to apportionment, but if they tried to enforce it and it turned out that the thing which was called a street was not a street, the whole foundation of the proceedings failed, and the persons proceeded against, escaped. These two classes of objections are undoubtedly preserved by section 7 of the Act of 1892. But that does not conclude the case here, because we have got to see, even if the objection is of that character, what it is that the magistrates have power to do. They have power under section 8 to quash the resolution. When one comes to look at the scheme of the sections which precede section 8, which gives this power to quash the resolution, and to look more particularly to the fact that under section 7 there is a large class of objections which can only apply to the plans and specifications and so on, I think it is impossible to doubt that the whole of the jurisdiction the magistrates have with regard to any resolution is to quash the resolution which approves the plans and sections. It gives just as effectual protection to the person who ought not to be proceeded against because this is not a street, as if the original resolution was quashed; because the result is, if the second resolution be quashed, that the original resolution then stands without any machinery for carrying it into effect; and, therefore, as far as sub-sections (*a*) and (*b*) are concerned in section 7, it appears to me that the Act simply provided a cheap and summary remedy in case a mistake had been made as to calling the place a street when it ought not to have been called a street, instead of the much more elaborate, roundabout, and expensive proceeding which would be necessary to give the person sought to be charged the same protection under the Public Health Acts.

Then we come to what we are specially concerned with in the present case—that is to say, the objection arising under sub-section (*d*): "That the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive." At first sight the objection to the proposed works might seem to be an objection of the same class as that under sub-sections (*a*) and (*b*), and as going to the root of the whole thing. I think, however, that the language is quite capable of another construction, because "the proposed works" might very well mean the proposed works as proposed and specified in the resolution; and it seems to me more natural, looking at the class of objections which are taken, to consider that Parliament did not mean to interfere with the power of the local bodies to adopt, and definitively to adopt, the scheme as a whole, as a thing required to be done, and only meant to give protection in case what they proposed to do in order to carry out what was deemed to be necessary should be found to be insufficient, which means of necessity, as it seems to me, that the works are insufficient to carry out the purpose which is proposed to be effected by the works; and that it does not mean that they are insufficient with regard to some matter which might make a better scheme for the neighbourhood in general, if other things which are totally outside the character of the works as regards their sufficiency in producing their effect be brought into consideration. The word "insuf-

ficient," therefore, seems to me to point exclusively to a comparison between what has been ordered to be done and the means of effecting it.

Now we come to "unreasonable." "Unreasonable" is undoubtedly a wider word, and I think it does give the magistrates jurisdiction to say, as regards the scheme taken as a whole, whether it is unreasonable or not that the thing in question which has been resolved to be done should be done. I think that follows from the decision in *Sheffield Corporation* v. *Anderson*, which is a decision in the Court of Appeal, where they held that, where the premises were already sufficiently drained, a resolution approving plans which cast a large expense on people for effecting further drainage, was unreasonable; and I think there is no reason whatever to quarrel with such a construction as that. If the magistrates had found here that they considered that the works ought not to be done at all—that is to say, that the street did not require them for the purposes of a street for which it was to be used, and that the houses did not require them them for the purposes for which drainage is carried out, namely, for sanitary purposes and for the health and convenience of the people who live in the houses and neighbourhood—and if they had found that the scheme was unreasonable on that ground, then I think there was jurisdiction to disapprove of it, and that to quash or to amend the resolution which approved the plans and specifications would have been well within their jurisdiction. But I think, on carefully considering what they have said and what they have not said, it is pretty plain that they take no objection of that kind, indeed they find a state of things which renders these works absolutely necessary if the street is to continue to be safely and properly used as a street. I think that what was thought was, that it would be a very good thing to have the road made wider, and that they could—I do not use this expression in disrespectful sense—put the screw on the local authority and compel them to widen the street by refusing their assent to the scheme, and declaring that the plans and specifications were insufficient and unreasonable. It is quite plain from their describing these works as insufficient, when it is admitted that they are proper for the purpose of effecting what they propose to effect and at no unreasonable cost, that they have misunderstood the limits of the expression "insufficient," and that they have brought into play considerations as to the sufficiency of the general scheme for the good of the public in general, which is quite, I think, beyond their powers. I think, in the same way, that Mr. Appleton is right in saying that when we come to look very carefully through their findings and what they say about the contentions which were urged before them, that they mean to say very much the same with regard to the unreasonableness, and that they only find it unreasonable because they think that the corporation ought to throw into their improvements something else—namely, the widening of the street, which could only be done under other powers and not at all by the machinery which is provided by this Act of 1892, which is now under consideration. Therefore, as they have asked us in terms to quash their order if we think that they have applied the wrong principles, I think that they have applied the wrong principles, and that there is no ground for saying that if they had applied the right principles and considered whether this was reasonable with reference to the state of the street and the things required to be done in it, and sufficient or insufficient with respect to the works proposed to effect the object proposed they certainly would have dismissed the appeal which was before them. I think, therefore, that this order must be quashed and this appeal allowed with costs.

KENNEDY, J.—I have upon the whole, although my mind has fluctuated a good deal in the course of the argument, come to the same conclusion that my brother has stated. I have only this to add, that in my view, reading the case stated, fairly, I think that it is sufficiently plain that the justices used the words "insufficient" and "unreasonable" in such a way as to show that the ground of unreasonableness was insufficiency. Now insufficiency, I should think, reading the sections fairly together, must mean the insufficiency of the proposed works to carry out the object for which these works are proposed. I do not think it can mean that you may object to any insufficiency. For example, supposing that it was a sewerage scheme, it could not mean that you ought to have included in it also light. I have taken what one may call a broad instance of it, merely to point my view. I think here that they were holding the scheme unreasonable, not in reference to the street as a street wanting paving, lighting, and sewering, but because the plan proposed did not go further and say the street is also at the same time to be broadened. If I had thought that, fairly read, there was a real doubt upon the case that that was what they meant, I should have preferred it going back, but I think, on the whole, by their repeated use of the words—and not going out of the case to anything which we have been told by counsel—they must refer to insufficiency in the way of not including widening, and that appears to me to be outside their power.

Order quashed and appeal allowed.

Solicitors for the appellants, *Torr & Co.*, for *John Harrop White*, Mansfield.

Solicitors for the respondent, *J. & R. Gole*, for *Pashley & Hodgkinson.*

Q. B. Div.
(Wright and Kennedy, JJ.) May 12, 13.

REG. v. DR. TRISTRAM, JUDGE OF THE CONSISTORY COURT OF LONDON. (a.)

Ecclesiastical law—Faculty—Application to open coffin—Jurisdiction of Chancellor—Licence of Home Secretary—Prohibition—Burials Act, 1857 (20 & 21 *Vict.* c. 81), s. 25.

A Consistory Court has jurisdiction to issue a faculty for the removal of remains in consecrated ground, and has also jurisdiction to issue a faculty authorizing the opening of the coffin for the purpose of inspecting its contents.

If it is necessary that a licence should be obtained from the Home Secretary before a coffin can be opened for such a purpose as was contended by the interveners (on which point the court gave no decision), that licence, being in addition to, and not in substitution of, the faculty required to be obtained from the ecclesiastical court, would be inoperative unless and until the ecclesiastical faculty had been duly issued.

Rule *nisi* for a prohibition.

A petition was presented to the judge of the Consistory Court of the Diocese of London for a faculty to open a grave in consecrated ground, and to open and examine a certain coffin in order to ascertain whether the said coffin contained any human remains, and, if it did, to ascertain whether these remains

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

were the remains of one Thomas Charles Druce, whose body was alleged (falsely according to the petition) to be buried in the grave.

The petition was made for the purpose of procuring the verification of some evidence, which had been obtained by the petitioner with a view of taking legal proceedings to set aside the will of the said Thomas Charles Druce, on the ground that no probate of the will ought to have been granted, as the supposed testator did not die until long after the date at which he was said to have been buried.

Legal proceedings in the Court of Probate had not, however, at the date of the petition, been actually commenced.

On the 17th of February, 1898, Dr. Tristram, judge of the Consistory Court, delivered judgment, granting a faculty. The practice of that court is to grant a faculty on *ex parte* applications where *primâ facie* grounds entitling the petitioner to the faculty are shown, but such faculty is directed to lie in the office for fifteen days, and if, during that time, any person interested in the subject-matter of the faculty enters a *caveat* against its issue, the court dissolves it, and an action between the petitioner and the intervener is directed to be tried.

On the 15th of March notice was served on the petitioner that such *caveat* had been entered on the 12th inst.

On the 29th of March the intervener obtained a rule *nisi* for a writ prohibiting the Consistory Court from granting the faculty, on the ground that since the Burials Act, 1857, the Consistory Court had no jurisdiction to issue faculties to open graves until the order of the Home Secretary was obtained, and that even if it had jurisdiction, such jurisdiction extended only to cases where a body was to be removed from one consecrated burial place to another, and did not extend to opening graves for the purpose of identifying the remains therein.

A rule for a writ of prohibition was thereupon obtained at the instance of Druce's executor and certain other persons who were said to be interested under the will.

The decision of the court depended mainly upon what was the effect of section 25 of the Burials Act, 1857, on the ancient jurisdiction of the Consistory Court with regard to granting faculties for opening graves, and also upon the general rules relating to prohibition.

Section 25 is as follows: "Except in the case where a body is removed from one consecrated place of burial to another by faculty granted by the ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body which may have been interred in any place of burial, without licence under the hand of one of her Majesty's principal Secretaries of State, and with such precautions as such Secretary of State may prescribe as the condition of such licence; and any person who shall remove any such body or remains contrary to this enactment, or who shall neglect to observe the precautions prescribed as the condition of the licence for removal shall, on summary conviction before any two justices of the peace, forfeit and pay for every such offence a sum not exceeding £10."

The petition alleged certain facts as to the man having been seen alive after the date of his alleged burial. The rule for the prohibition raised six points: (1) As to the jurisdiction of the ecclesiastical courts prior to the Burials Act, 1857. (2) As to how that Act affected the jurisdiction of such courts. (3) As to the licence of the Secretary of State. It was submitted that the Legislature had not substituted the licence for the order of the ordinary, but had provided it as an additional security. (4) It was submitted that prohibition was not the proper remedy, but an appeal from the decision of the Chancellor, because the matter was not wholly foreign to the jurisdiction of the Chancellor's Court. (5) The application for a prohibition was premature. The applicants had the opportunity of arguing the question in the Chancellor's Court, and they ought to do so. (6) The construction of section 25 of the Burials Act, 1857, contended for by the applicants for the prohibition was greatly against public interest; it would affect the position of coroners and all Chancellors in the land.

Arnold Statham and *Campbell Johnstone* showed cause.—All that the learned judge of the Consistory Court had done was to grant a faculty upon an *ex parte* application, and that his decision could be reversed if anybody intervening showed that, upon the merits of the question, the faculty would not be granted. In accordance with the practice of the court, the order had been in the office for fifteen days to give time for intervention, and, although the other side had declined to enter an appearance for fear of recognizing the jurisdiction of the court, they had actually intervened, and were in a position even now to have the case heard upon its merits. Further, that a faculty of this nature was not without precedent: see *Sarah Pope's case*, 15 Jurist 614, also a precedent in 2 Oughton 331, and the protection of corpses buried in consecrated ground had repeatedly been recognized by the civil courts: *Foster* v. *Dodd*, 16 W. R. 155, L. R. 3 Q. B. 67, at p. 77; *Maidman* v. *Malpas*, 1 Hagg. Cons. 205, at p. 208; *Hutchins* v. *Denziloe*, 1 Hagg. Cons. 170, at p. 172; *Adlam* v. *Coulthurst*, L. R. 2 Adm. & Ecc. 30, at p. 38, 16 W. R. Adm. Dig. 16. Prior to the Burial Acts the Ecclesiastical Courts would have had sole jurisdiction in a matter of this kind, and the statute, they submitted, did not deprive the Consistory Court of its ancient jurisdiction. The Legislature had not substituted the licence of the Home Secretary for that of the ordinary, but had provided that his licence should be added as an additional safeguard. At any rate, prohibition was not the proper remedy, which was by way of appeal. Moreover, the application for a prohibition in this case was certainly premature, as it ought not to have been made until the question of jurisdiction had been decided in the Court of Appeal. The construction sought by the applicants for the rule to be placed upon the section would involve grave public mischief and far-reaching consequences that the Act of Parliament could never have intended to have effected. There were numerous decisions which showed that from very early times the Ecclesiastical Courts had exercised exclusive jurisdiction over all churches, churchyards, and consecrated burial-grounds, and, according to law, there could be no removal of any body from any church or consecrated burial-ground without a faculty from the ordinary. Formerly bishops exercised the jurisdiction of the Ecclesiastical Court: *Sharpe's case*, 5 W. R. 318, Dearsly and Bell C. Cas. 160. On the point that prohibition was not the proper remedy *Wanmouth* v. *Collins*, 2 Ld. Raymond's Rep. 850; *Ex parte Williams*, 4 B. & C. 313; *Denaby* v. *Manchester, &c., Railway Co.*, 3 Nev. & Macn. Ry. Cas., at p. 443; *Serjeant* v. *Dale*, 2 Q. B. D., at p. 564; 25 W. R. Dig. 106; *Martin* v. *Mackonochie*, 4 Q. B. D., at p. 731, 28 W. R. Dig. 80, were referred to. The scheme of the Burial Acts was to preserve the jurisdiction of the Ecclesiastical Courts: see (48 Geo. 3 c. 75); Burial Act, 1852 (15 & 16 Vict. c. 85); Burial Act, 1853 (17 & 18 Vict. c. 87); Burial Act, 1855 (18 & 19 Vict. c. 128); Burial Act, 1859 (22 Vict. c. 1). If a licence from

the Home Secretary were here necessary, a faculty from the ordinary was necessary too, and the court could not prohibit the Ecclesiastical Court from granting it before the civil licence was obtained; that, even if the Ecclesiastical Court had no jurisdiction to grant the faculty, that point must be taken before the Ecclesiastical Court itself and be overruled there before a prohibition could issue to the Queen's Bench.

Bargrave Deane, Q.C., G. G. Phillimore, & H. O. Buckle, in support of the rule.—Under the Burials Act, 1857, it was a condition precedent to the granting of any faculty for moving a body that the licence of the Home Secretary should be obtained, except in the case where the application was to remove a body for re-interment in some other consecrated ground. That was not the nature of the present application. These being the terms of the statute, Dr. Tristram had no jurisdiction to grant the faculty in the absence of a licence from the Secretary of State, since the application did not come within the express exception referred to in the statute.

THE COURT decided that the rule *nisi* must be dissolved.

WILLS, J.—I think the rule must be discharged with costs, for if in this case the licence of the Secretary of State is necessary (which is a question we need not decide) there is nothing in section 25 of the Burials Act, 1857, to make its grant a condition precedent to the issue of a faculty by the ordinary, which clearly must be issued before any steps can be taken by this court in the matter. In that case the faculty would be inoperative till the licence was obtained, just as the licence of the Secretary of State would, if given before the faculty, be inoperative till the faculty of the ordinary was obtained. A writ of prohibition is only to be granted if the judge of the Consistory Court has no jurisdiction or is doing something contrary to law. It seems clear that if the application is not for the purpose of re-interring a body in some other consecrated ground, then a faculty could not be carried into effect until a licence to do so has also been obtained from the Home Secretary. The Consistory judge has exercised jurisdiction on these matters from very ancient times, and there is ample authority for us to hold that his jurisdiction was not restricted to cases of mere removal of a body for burial purposes. So far, all that has happened is that the Ecclesiastical Court has granted a faculty which would have to be carried out according to the law and according to the provisions of the Act of 1857, under which a licence, if needed, of the Home Secretary would have to be obtained. The petition for the faculty has not been heard and determined in the Ecclesiastical Court, but merely a provisional faculty, since dissolved, was issued on an *ex parte* application. Till it was heard and determined, the application for the rule was premature, even if the Ecclesiastical Court has not jurisdiction. Moreover, the applicants who have obtained the rule can be heard on the merits of the faculty in the Ecclesiastical Court, and if the learned judge decides against them they would still have a remedy by way of appeal from his decision.

KENNEDY, J.—I would point out that if the applicants had entered an appearance when they intervened the order in question would have gone, and they could have been heard as to the merits of the case by the Consistory judge. The order that had been obtained was obtained *ex parte*. It follows, therefore, that if they had availed themselves of their rights to intervene when the order was finally granted, and it then appeared that the licence of the Home Secretary was necessary, and it had not been obtained, any person who acted upon the faculty would have been liable to be proceeded against under the section.

Rule discharged.

Solicitors for the interveners, *Freshfield & Williams.*

Solicitors for the respondent, *MacArthur & Co.*

Q. B. Div.
(Wills and Kennedy, JJ.) } May 9.

PAYNTER v. WATSON. (a.)

Metropolis—Building—Rebuilding on old site—Certified plans of old building—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 41, 43.

A person intending to erect a domestic building on the site of a domestic building existing at the commencement of the London Building Act, 1894, *may by section* 43 *of that Act submit to the district surveyor for certification "plans showing the extent of the previously-existing domestic building in its several parts," and on getting a certificate of the accuracy of the plans may build, provided he does not deviate in any respect from the certified plans, without regard to the restrictions imposed by the Act upon the erection of new buildings.*

Held, that the plans which he must get certified under that section are not confined to ground plans or basement plans, but include plans showing every part of the building in every direction in which it extends.

Case stated by a metropolitan magistrate.

The appellant was Major George Paynter; the respondent was the district surveyor of the district of St. George's, Hanover-square North. The case was stated on an appeal to the magistrate from a notice of objection served by the district surveyor under section 150 of the London Building Act, 1894. The appellant had served a building notice under section 145 of the Act on the district surveyor, and had annexed thereto the plans and sections of the new buildings which he proposed to erect on the site of Nos. 12 and 13, Grafton-street. These plans showed that the new domestic buildings would not cover any ground that was uncovered before, but the arrangement of the upper floors was such that a certain amount of the old existing air space would be occupied by the new buildings, which were to be higher and to contain more cubic feet than the old.

The magistrate found that the plans of the proposed new buildings did deviate in certain respects, and particularly in regard to height, from the old buildings, and he held that the word "deviate" in section 43 (2) applied not only to the ground covered by the old buildings, but also to that of the buildings in respect to alterations on the several floors, and he accordingly affirmed the surveyor's objection.

It was contended by the appellant that the only plan required by the Act to be certified was a plan showing the extent of the previously-existing building in its several parts on the basement, and that sections or elevations showing the height were unnecessary, and that the fact that other plans, sections, and elevations had been sent to and certified by the surveyor in no way affected the legal position of the appellant, and that, as no more land was to be occupied by the intended buildings than was occupied by the old building, the appellant could rebuild without contravention of section 43 of the London Building Act,

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

1894, and that the notice of objection by the surveyor was therefore bad.

It was contended by the respondent that in order to comply with section 43 the appellant was bound to submit to the respondent plans of the old building showing its extent in its several parts, including the height, width, and depth thereof, and that he was not entitled to deviate in any way from the said plans without the consent of the London County Council or of the tribunal of appeal.

The magistrate being of opinion that the respondent's contention was correct, dismissed the appeal subject to a case for the opinion of the court.

The London Building Act, 1894, s. 43, is as follows:

"Where any person intends to erect a domestic building . . . abutting upon a street on the site of domestic buildings existing at the commencement of this Act,

"(1) It shall be lawful for such person before commencing to erect the intended domestic building to cause to be prepared plans showing the extent of the previously-existing domestic building in its several parts . . . and to cause such plans to be submitted to the district surveyor, who shall (if reasonably satisfied with the evidence of their accuracy) certify the same under his hand, and such certificate shall be taken to be conclusive evidence of the correctness of the plans. Such person may then erect the intended domestic building, but so that no more land shall be occupied by the newly-erected building than was occupied by the previously-existing domestic building as so certified. If such person fail to submit such plans . . . and the district surveyor or the tribunal of appeal refuse to certify the accuracy of the same, such person shall on rebuilding be bound by the preceding provisions of this part of this Act."

"(2) If a person erecting the intended domestic building shall desire to deviate in any respect from the plan or plans certified by the district surveyor, it shall be lawful for him to apply to council, who shall sanction such deviation on such conditions as they may think fit."

Macmorran, Q.C., and *Poyser*.—The plans that must be passed by the surveyor are ground plans only, and the words in section 43, "in its several parts," do not refer to the different floors of the building, but are intended to include any possible outlying portions in the yard at the rear. Having got his plans certified, the building owner may proceed to erect his new building, subject to conditions imposed on him as to height by section 47. The whole object of section 43 was to give a building owner rebuilding on an old site a dispensation from the provisions of section 41 as to the minimum air-space to be left at the rear of a new building.

Avory and *Daldy* for the respondent.—Section 43 is one of a group of sections (sections 41-52) forming Part V. of the Act, headed: "Open spaces about and height of buildings." By section 41 all new buildings must be so built as to leave air-space from the ground-floor upwards. It follows, therefore, that if a person, having got his ground plan approved, chose to rebuild the upper part of his premises with various alterations, he might erect a new house which would not meet the requirements of the statute at all, although he claimed to be merely rebuilding an old one. If he wants to encroach upon air-spaces previously existing, he must first get permission of the county council. The words "so that no more land shall be occupied" do not cut down the effect of the preceding paragraph of the same sub-section.

WILLS, J.—I cannot bring myself to entertain any doubt whatever in this case. The question depends on what is meant by "plans showing the extent of the previously-existing domestic building in its several parts" in sub-section 1 of section 43. The words would be a most extraordinary synonym to employ if intended to refer to the ground plan or to the plan of the portions of the ground, or the portions under the ground occupied by the building only. Moreover, that is not the natural meaning of the words. The meaning appears to me clear—namely, that it is to be a complete set of plans that will show what the old building was. Why is that enacted? It seems to me to be for this reason—that if the person who has got an existing set of buildings, which may be utterly in disregard of a great many of the provisions of the Act, chooses to rebuild them exactly as they were, he gets the protection of the section with the cardinal condition attached that no more land is to be covered; and I daresay the parties have been quite right in assuming that the real meaning of that condition is that no land shall be occupied by buildings which was formerly uncovered.

Then sub-section 2 makes it perfectly clear what the object was for which the plans were to be submitted and certified. The words "If a person erecting the intended domestic building shall desire to deviate in any respect from the plan or plans certified by the district surveyor" cannot possibly mean shall merely desire to deviate in the one respect of occupying different spaces of ground. The sub-section means what it says—that if he desires to deviate in any respect he is subject to the jurisdiction of the county council. I cannot see anything unreasonable in that. I cannot doubt that the magistrate has put the right construction on section 43 of the Act, and that its real intention is that if the building owner desires in any respect to alter the character or outline, or to alter in any way his old building, so as to impose a greater burden upon the persons, whoever they may be, who are affected by the building, whether neighbours, tenants, or anybody else, then he is to submit to the jurisdiction of the county council, who give or withhold their permission to erect the intended building according as they deem such permission to be consistent or inconsistent with public interest.

KENNEDY, J.—I am of the same opinion. The first sub-section of section 43 is intended to carry out the Parliamentary purposes specified in the marginal note to the section, "Saving for certain domestic buildings on old sites." If a man wishes to rebuild on an old site, he has first of all to prepare "plans showing the extent of the previously-existing domestic buildings in its several parts." Those plans are not confined to the ground plan, but must mean plans showing every part of the building in every direction in which it extends. The argument of the appellant would have had no colour at all had it not been for the second paragraph of sub-section 1. It may be as Mr. Avory has suggested that that proviso as to no more land being covered was inserted merely *ex abundanti cautelâ*; but I think it was intended to lay down that so far as the occupation of a greater space of ground was concerned, no deviation from the certified plans, however small, could be considered too trivial to require the consent of the county council.

Appeal dismissed.

Solicitors for the appellant, *Sandilands & Co.*

Solicitors for the respondent, *Blaxland.*

Court of Appeal.

From Q. B. Div. (Lindley, M.R., and Chitty, L.J.) — June 30; July 1, 7.

ATLAS METAL CO. v. MILLER. (a.)

Practice—Costs—Taxation—General costs of action—Costs of counter-claim.

Where the plaintiff is ordered to pay the costs of the action, and the defendant to pay the costs of the counter-claim, only costs actually occasioned by the counter-claim can be charged to the defendant, and the general costs of the action must not be apportioned between the plaintiff and the defendant, but must all be paid by the plaintiff.

Appeal from Channell, J., at chambers.

The material facts are sufficiently stated in the judgment of Lindley, M.R.

Bousfield, Q.C., Bray, Q.C., and *Newton Crane*, for the defendants, who appealed, cited *Saner* v. *Bilton* (*No.* 2), 27 W. R. 472, 11 Ch. D. 416; *Mason* v. *Brentini*, 29 W. R. 126, 15 Ch. D. 287; *Shrapnel* v. *Laing*, 36 W. R. 297, 20 Q. B. D. 334; *In re Brown, Ward* v. *Morse*, 31 W. R. 936, 23 Ch. D. 377.

Eldridge, for the plaintiffs, cited *Finska* v. *Brown*, 7 Times L. R. 578, W. N. [1891], p. 116.

Bousfield, Q.C., replied.

Cur. adv. vult.

July 7.—The judgment of the court was read as follows by

LINDLEY, M.R.—In the action the plaintiffs sought to recover damages from the defendants for a libel by the defendants on the plaintiffs. The defendants defended the action, and by a counter-claim sought to recover damages for a libel on themselves by the plaintiffs. The action was tried with a jury, who found a verdict for the defendants on the claim, and for the plaintiffs on the counter-claim, and judgment was entered accordingly for the defendants on the claim with costs, and for the plaintiffs on the counter-claim with costs. The costs have been taxed, and the taxing-master, following what he understood to be the rule laid down in *Shrapnel* v. *Laing* has apportioned some of the costs of the action between the plaintiffs and defendants. The defendants complain of this, and contend that none of the costs of the action ought to be thrown on them. Channell, J., at chambers, upheld the master's decision, and the defendants have appealed to this court.

The defendants rely on *Saner* v. *Bilton* (*No.* 2), which was approved and followed by the Court of Appeal in *Mason* v. *Brentini* and *In re Brown, Ward* v. *Morse*, and still more recently in the unreported case of *Russell* v. *Russell* (19th of January, 1898), which was an appeal from the Divorce Court. Having carefully studied these cases and compared them with *Shrapnel* v. *Laing, Hewitt* v. *Blumer*, 3 Times L. R. 221, *Finska* v. *Brown*, and the earlier case of *Baines* v. *Bromley*, 29 W. R. 245, 6 Q. B. D. 197, we are unable to see any conflict in principle between them. If attention is paid to the points really decided by them, there is no decision that a plaintiff who has to pay or to receive the general costs of an action can throw on his opponent, or have thrown on himself, any part of such costs. On the other hand, there are decisions that no such apportionment can be made. In *Baines* v. *Bromley* and in *Shrapnel* v. *Laing* the late Master of the Rolls expressed his opinion that costs common to both claim and counter-claim should be apportioned, and he suggested that even the costs of the writ might be so dealt with (see 20 Q. B. D. 339), because the defendant got the benefit of his counter-claim by means of the writ issued by the plaintiff. But Lord Esher was careful to add that it was unnecessary to decide such questions, as they did not arise.

We will make another preliminary observation before examining the decisions more closely. We have not to consider how an order should be drawn up so as to give the general costs of an action in which there is a claim and a counter-claim to that party who recovers more than is recovered from him. It is unnecessary to consider such cases as *Lowe* v. *Holme*, 31 W. R. 400, 10 Q. B. D. 286; and *Lund* v. *Campbell*, 33 W. R. 510, 14 Q. B. D. 821. In such cases the judge who tries the action without a jury has greater power over the costs than a judge who tries an action with a jury. In the present case judgment has been pronounced and drawn up, and all we have to do is to construe and give effect to it. Whether an action is brought in one division of the High Court or another, whether it has been tried with a jury or without a jury, the construction and legal consequences of the judgment when drawn up must in principle be the same, although the costs to be taxed may be different in the one case from those in the other.

Now let us take the judgment in this particular case. There were some separate orders as to costs, but it is unnecessary to refer to them. By the judgment as drawn up the plaintiffs have to pay the defendants the costs of the action, not some of them or some portion of them, but all of them. There are no separate issues in the action the costs of which have to be borne by the defendants. In considering what are costs of the action, the counter-claim, as distinguished from the defence, ought to be disregarded. The costs of the action ought to be taxed as if there were no counter-claim. Whether both parties fail (as in *Saner* v. *Bilton, Mason* v. *Brentini*, and *Russell* v. *Russell*), or whether both succeed (as in *Baines* v. *Bromley, Ward* v. *Morse, Shrapnel* v. *Laing*, and *Hewitt* v. *Blumer*), or whether one fails and the other succeeds, can in principle make no difference.

This was pointed out and decided in *Ward* v. *Morse*; and *Baines* v. *Bromley* and *Shrapnel* v. *Laing* in no way conflict with that decision. In *Baines* v. *Bromley* the defendant recovered on his counter-claim more than the plaintiff recovered on his claim; but the order gave the plaintiff the costs of the action, and he was held entitled to them accordingly. No question of apportionment was raised or decided, although Lord Esher in his judgment stated what in his opinion ought to be done as regards costs common to both claim or counter-claim. *Shrapnel* v. *Laing* and *Hewitt* v. *Blumer* were precisely similar cases, and are open to precisely similar observations.

In *Finska* v. *Brown* the plaintiff recovered on his claim more than the defendant recovered on his counter-claim. The plaintiff got the costs of the action, but he had to pay the costs of the counter-claim. He sought to escape from the foregoing rule, and wanted the whole costs of the litigation. But the Court of Appeal, following *Shrapnel* v. *Laing*, decided against him. All the authorities agree so far—*i.e.*, they all decide that a plaintiff who is to pay or be paid the costs of his action is to pay or be paid the whole of such costs as if there were no counter-claim.

Next, as to the counter-claim. The defendants have to pay the costs of this, and the counter-claim is to be treated as an independent cause of action, and, to use Lord Esher's words (20 Q. B. 338), as if

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

the claim did not exist. This last expression, however, is calculated to mislead if not explained and properly understood. What are costs of a counter-claim? The answer must be, the costs occasioned by it. No costs not incurred by reason of the counter-claim can be costs of the counter-claim. The fact that if there had been no action the costs of the counter-claim would have been larger, because the defendant would then have had to issue a writ and take other proceedings, does not make costs not incurred costs incurred; and in considering what the costs of a counter-claim really have been in any particular case the costs saved by not bringing a cross-action cannot be treated as costs incurred. The introduction of counter-claims has given litigants advantages in this respect. Counter-claims, although cross-actions for all purposes of procedure and evidence, cost less than actions, and the party who has to pay the costs of a counter-claim gets the benefit of the cheaper procedure. To include in the costs of a counter-claim any costs not occasioned by its being a counter-claim, but saved by its being what it is, appears to us wrong in principle and opposed to *Saner* v. *Bilton* and *Ward* v. *Morse*. If Lord Esher really meant to express a contrary opinion, we cannot agree with him. We are satisfied that there is no decision to that effect.

But as pointed out by Lord Esher, there may be costs brought in for taxation which have been incurred partly in support of, or in opposition to, a defence, and partly in support of, or in opposition to, a counter-claim—*e.g.*, where there is a defence of set-off equal to the plaintiff's demand, and a counter-claim for more than the plaintiff's demand. In such cases the taxing-master must apportion the costs as best he can, and fix the amount applicable to the defence and the amount applicable to the counter-claim. Where there are no separate issues requiring special treatment the costs of the defence will be costs of the action; the costs attributed to the counter-claim will be costs of the counter-claim. Costs common to both defence and counter-claim must necessarily be dealt with in this way. But to do this is very different from apportioning what are properly costs of the action, and such costs when ascertained must be paid by the party ordered to pay them. They cannot have been increased by the counter-claim, and no part of them can be properly regarded as costs of the counter-claim.

In the present case the master has lost sight of those principles, and has apportioned some costs which are properly costs of the action, and has thrown some part of them on the defendants. In other instances he has tried to bring about a fair apportionment by equalizing the amounts allowed to each party, so as to set one off against the other. The result is that the defendants receive less than they ought in respect of the costs of the action, and pay more than they ought in respect of the costs of the counter-claim. The case must therefore go back to the master in order that he may review his taxation in accordance with the principles above explained, which are in accordance with all the previous decisions when carefully examined. The costs of this application, both here and below, will be reserved until we know the result of the taxation.

Solicitors, *Indermaur & Brown; Sugden & Harford.*

From Q. B. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) July 4.

PHILLIPS v. THE LONDON SCHOOL BOARD.
COCKERTON v. THE SAME. (a.)

*Elementary education—School board—Superannuation fund—Deductions from salaries of teachers—*Ultra vires*—Elementary Education Act,* 1870 (33 & 34 *Vict. c.* 75), *s.* 35.

A school board established a fund, to be formed by means of deductions from the salaries of the teachers, for the purpose of providing superannuation allowances for the teachers. The board did not contribute to the fund nor insure its solvency, but they administered it under the advice of a superannuation committee, and they incurred certain expenses in the working of it.

A teacher who, by an agreement in writing with the school board, had contracted to come under the superannuation scheme and to permit deductions from her salary to be made, subsequently brought an action to recover the amount of the deductions so made.

Held, that the contract between the plaintiff and the school board was not illegal as being ultra vires *of the board; and that even if the board had acted in any way* ultra vires *in administering the fund the plaintiff was not entitled to recover.*

Judgment of Wright *and* Kennedy, JJ., *ante*, p. 155, *affirmed.*

Appeals from the judgment of a Divisional Court (Wright and Kennedy, JJ.), on the hearing of two appeals from the Westminster County Court, *ante*, p. 155.

The two actions were brought by Miss Phillips and Mrs. Cockerton to recover from the London School Board the amounts of certain deductions which had been made from their salaries while they were teachers in the service of the board. The facts of the two cases are set out *ante*, p. 155.

The county court judge held that the plaintiffs were not entitled to recover the deductions, and gave judgment for the defendants in each case.

The Divisional Court affirmed the decision of the county court judge.

The plaintiffs, by leave, appealed to the Court of Appeal.

Jelf, Q.C. (*Organ* with him), for the appellants.—The superannuation scheme was *ultra vires* of the school board, and in consequence of that there was a total failure of consideration for the contracts entered into by the plaintiffs, and the plaintiffs are entitled to claim a return of the money paid by them: Price on *Ultra Vires*, 3rd ed., p. 38; *Colman* v. *Eastern Counties Railway Co.*, 10 Beav. 1; *East Anglian Railway Co.* v. *Eastern Counties Railway Co.*, 11 C. B. 775; *Hattersley* v. *Earl of Shelburne*, 15 W. R. 881, 31 L. J. Ch. 873; *In re Phœnix Life Assurance Co., Burges and Stock's case*, 10 W. R. 81[illegible], 31 L. J. Ch. 749; *Tomkinson* v. *South-Eastern Railway Co.*, 35 W. R. 758, 35 Ch. D. 675.

Lord Coleridge, Q.C., and *A. J. Ram*, for the respondents.

Cur. adv. vult.

July 4.—A. L. Smith, L.J., read the following judgment: This is an action brought by a teacher who for many years was in the service of the London School Board to recover from that board the sum of £32 6s. 8d., being the amount of contributions voluntarily subscribed by her towards a superannuation

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

fund promoted and carried on by the school board for the benefit and aid of the plaintiff and their other *employés* desirous of subscribing thereto. The plaintiff now seeks to get back the money which has been so paid by her to this fund, and which has been applied by the board according to her directions, as being money had and received by the defendants to the use of the plaintiff, and in the alternative she claims arrears of salary, and she has brought her action in the county court in that behalf. The learned county court judge—his Honour Judge Lumley Smith—gave judgment against the plaintiff, and the Divisional Court, consisting of Wright and Kennedy, JJ., have affirmed his judgment, and the plaintiff now appeals to us against the decision of the Divisional Court. In the year 1888 the School Board for London started the scheme for superannuation allowances to their *employés* in case of their becoming disabled by permanent infirmity of mind or body, and took from those desirous of joining the scheme 2 per cent. upon the amount of their respective salaries for the formation of the necessary fund. It may also be stated that the board has been desirous of obtaining from Parliament authority—(*a*) to defray the expenses of the management of the fund, (*b*) to guarantee the safe keeping of the same, but as yet has not obtained that authority. It cannot be doubted that, had the defendants been individuals and not the creation of statute, there could have been no pretext for saying that the plaintiff could recover back the subscriptions voluntarily paid by her for the purpose of this fund, which subscriptions had been applied to such fund in accordance with her directions and desires. Her contract with such a defendant would be a perfectly lawful contract, and if authority were needed, which it is not, Lord Watson's judgment in *Hewlett* v. *Allen*, 42 W. R. 670, [1894] A. C. 383, has only to be referred to as to this. But it is argued on behalf of the plaintiff that, although this may be so, as the school board is the creation of statute and can therefore only exercise the powers conferred upon it by statute, and as nowhere in the statute creating the board is to be found the power either to undertake to administer a trust, which, it is said, the school board is doing by collecting, holding, and administering the subscriptions, upon the advice and recommendation of a committee on superannuation, composed of the chairman of the board, five representatives elected by the board, and five representatives elected by the subscribers to the fund, or to pay ratepayers' money towards the expenses of carrying out the scheme, which it is said the school board is also doing, therefore the board is acting *ultra vires*, and consequently this action is maintainable, for there has been a total failure of the consideration as to the purposes for which the moneys have been subscribed by the plaintiff to the fund. By section 35 of the Elementary Education Act, 1870, which is the Act regulating the school board, it is enacted that "A school board may appoint a clerk and a treasurer and other necessary officers, including teachers required for any school provided by the board, to hold office during the pleasure of the board, and may assign them such salaries or remuneration, if any, as they think fit." The point as to the board having used ratepayers' money towards the expenses of the scheme, which was the point argued before the county court and the Divisional Court, is in my judgment untenable, for the contract between the plaintiff and the board makes no provision that the board shall use any of the ratepayers' money in carrying out the scheme, and, if they do so, that in no way makes the contract between the plaintiff and the board illegal, and the suggestion that the contract between the plaintiff and the board is *ultra vires* fails, and I agree with the Divisional Court upon this point.

But the other point, which came up during the argument in this court, still remains to be dealt with, and for the purposes of this case I will assume that the school board has contracted with the plaintiff to administer a trust by undertaking to administer the funds of the superannuation scheme in the manner above mentioned, and that no provision can be found in the Act authorizing the board to do this. I say I will assume but not decide that this is so, for in my judgment, even if this be so, it will not entitle the plaintiff to maintain this action either for money had and received, as being money paid without consideration, or for arrears of salary. If an action for money had and received would lie, the case of *Lamb* v. *Great Northern Railway Co.*, 39 W. R. 475, [1891] 2 Q. B. 281, approved of in this court in *Hewlett* v. *Allen*, 41 W. R. 197, [1892] 2 Q. B. 662, was wrongly decided, and I am not by any means prepared to hold that it was. But, assuming that what the board is doing is not authorized by statute, either as regards expending ratepayers' money in the management of the scheme or without spending such money as regards the administration of a trust, can the plaintiff recover back the subscriptions she has heretofore voluntarily made to this fund, which have been applied to the purposes thereof in strict accordance with her mandate? This fund has been in existence from the year 1888 to the present time, and during the years 1889 to 1897 inclusive the plaintiff has been a voluntary subscriber of 2 per cent. of her salary to this fund, thus earning her right during all this time to come upon the fund, when, according to the scheme, upon her becoming disabled by permanent infirmity of mind or body, she would be entitled to do so. The other numerous subscribers to the fund, amounting, it is said, to 10,000 persons, were in like position as the plaintiff, the subscriptions of all going in aid of those who became incapacitated. I find that during this period—*i.e.*, from 1889 to 1897—£7,175 has been paid by way of superannuation allowances to teachers and officers of the School Board when disabled, and that such allowances are continuing to be paid, and that upon the 25th of March, 1897, this fund had a balance in hand of £94,861. That the plaintiff has for years voluntarily contributed to this fund and acquiesced in its being managed and applied as it has been is beyond dispute. If the plaintiff was in a court of equity, what right would she have after this acquiescence now to demand back her subscriptions, which have been and are being dealt with in the way she has always desired, to the prejudice of the other subscribers who desire to continue to subscribe thereto and thus be protected in case of becoming disabled? She could have no such right after her acquiescence if she was in a court of equity. If she goes into a court of law, as she has done, and seeks to recover back her subscriptions as money had and received, which cause of action is applicable when the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which render the receipt a receipt by the defendant to the use of the plaintiff (see *per* Lord Mansfield in *Moses* v. *Macferlan*, 2 Burr. 1005), what must she prove? She must prove that she handed the money she seeks to recover back to the defendants for a purpose, and that they have not applied it to that purpose, and that there has therefore been a total failure of consideration at the time she brings her action. This she cannot prove, for it is not the truth, for during all the time she has been subscriber to the fund she has had the right to a grant according to the provisions of the scheme,

Upon these grounds this action fails, as does also the action brought by Mrs. Cockerton. If the plaintiff can establish that the school board by reason of being the creation of statute cannot in the circumstances of the case administer the fund, it may be that the plaintiff by pursuing the proper course might obtain the appointment of a fit person for the purpose of administering the fund, or it may be that she might obtain a distribution of the fund between the different contributors according to their respective interests therein, but, though I offer no opinion thereon, she cannot maintain an action for money had and received to get back the subscriptions she has voluntarily for years subscribed to the fund and which up to action brought have been and were being applied to the very purposes for which she made her subscriptions, and during all which time she has had the right of participation in the scheme according to its terms and conditions; nor can she bring an action for arrears of salary, for no arrears exist. In my judgment the appeals in both actions must be dismissed with costs.

RIGBY, L.J., read the following judgment: The plaintiffs in these actions, Miss Phillips and Mrs. Cockerton, were formerly teachers in the employment of the School Board for London, and each of them brought her action in the county court for Westminster for the recovery, either as money had and received or as unpaid salary, of sums amounting to 2 per cent. on the total annual amount of their respective salaries, deducted each year during their employment, as contributions made by them to a superannuation fund arising from subscriptions made by officers of the school board. The county court judge dismissed both actions, and his decision was confirmed by a Divisional Court, consisting of Wright and Kennedy, JJ. Each of the plaintiffs appealed on leave given by the Divisional Court, and the appeals were argued together.

The grounds on which the appeals were based were substantially as follows—that the superannuation scheme, in furtherance of which the contributions of 2 per cent. were made, was in the nature of an insurance business carried on by the school board; that the carrying on of such a business by the board was illegal, as being *ultra vires;* that every part of the scheme was rendered illegal as being ancillary to the main illegal scheme; and that there was as a consequence a total failure of consideration entitling each plaintiff to a return of her contributions.

On the 24th of March, 1893, the School Board for London, through their clerk, sent to their officers and teachers, in the form of a series of resolutions numbered 1 to 8, a superannuation scheme with provisions for putting it into operation. The following resolutions and parts of resolutions are all that seem material for the purposes of these appeals: "(1) That every officer appointed on or after the 25th of March, 1893, be appointed subject to a deduction of 2 per cent. from his or her salary, the amount so deducted to be carried forward to the account of the superannuation fund. (2) That every teacher now in the service of the board be given the option until the 25th of March, 1893, of joining the superannuation fund, subject to the condition stated in resolution 1. . . . (4) That in the case of every teacher now in the service of the board who is not desirous of joining the superannuation fund under the conditions contained in resolution 2, the amounts already contributed to the fund be repaid, together with its accumulated interest, less the deduction of actual management expenses, upon condition that a receipt is given abandoning all further claims upon the fund. (5) That the board adhere to the following resolution of the 31st of March, 1892: 'That the board should continue their application to Parliament for authority (*a*) to defray the expenses of the management of the superannuation fund, and (*b*) to guarantee the safe keeping of the same'; but will make no contribution to the benefits or insure the solvency of the funds. (6) That pending the receiving of Parliamentary powers the board administer the superannuation fund upon the advice and recommendation of a committee of superannuation, consisting of members of the board and representatives of the various sections of the officers of the board. Also that for future applications for superannuation the scale of benefits prescribed by the following resolutions (here the then existing resolutions as to superannuation allowances are set forth) be suspended until aforesaid Parliamentary powers have been obtained, and that the committee of superannuation be empowered, after actuarial advice has been taken, to substitute therefor such a scale of benefits as the fund is able to provide, and shall, upon receipt of such Parliamentary powers, further review the new state of circumstances in reference to the contributions and benefits. (7) That the superannuation scheme constituted under the foregoing resolutions be put into operation as from the 25th of March next for all officers of the board who shall at that date be entitled to claim superannuation allowances under the above resolutions, and that it be referred to the finance committee to carry out this and the preceding resolutions. (8) That the committee on superannuation be constituted as follows: The chairman of the board *ex officio;* five representatives to be elected by the board; five representatives to be elected by subscribers to the fund—namely, one head teacher to be elected by the head teachers, three assistant teachers, one at least of whom shall be an assistant mistress, to be elected by the assistant teachers; one member of the non-teaching staff to be elected by the non-teaching staff."

As might be gathered from the above resolutions a superannuation fund had already been set on foot by the board, and resolutions with reference thereto had from time to time been passed by the board, but since both the appeals before us are concerned only with the superannuation scheme constituted under the resolutions above set forth, it is not necessary to refer to the terms of any earlier resolutions. The subscribers to the existing fund to whom the resolutions were sent were requested to exercise the option (1) of joining the superannuation fund under the conditions stated in resolution No. 2; or (2) of withdrawing their contributions to the fund on the terms prescribed in resolution 4.

The plaintiff in the first action, who had already subscribed to the superannuation fund, elected to join the fund under the conditions stated in resolution 2, and thus voluntarily submitted during the time whilst she continued to be a teacher to the deduction from her salary of 2 per cent., in accordance with resolution 1.

The plaintiff in the second action was appointed after the 25th of March, 1893, and therefore had, without the exercise of any option on her part, within the operation of resolution 1. Each plaintiff continued to be a teacher before bringing her action. The deductions were regularly made from the salaries of both appellants whilst they continued to be teachers, but neither of them received or ever became entitled to receive any payment out of the superannuation fund.

Turning now to the consideration of the superannuation scheme set forth in the resolutions, in order to determine the relations of the respective appellants to the school board and the other

scribers thereto, if the school board, as contended by the appellants, undertook the duty of insuring them against certain risks, and has carried on the business of insurance, a business which certainly is not within the powers of the school board, a grave question might arise. But a careful examination of the resolutions shows these contentions to be unfounded. The school board in the case of the first appellant invite, and in the case of the second appellant impose as a condition of her employment, a subscription to the superannuation fund, but enter into no contract of insurance in either case. By the express terms of resolution 5 they made it plain that they would not contribute to the benefit of the fund or even insure its solvency. It is true that by resolution 6 they undertake the duty of administering the fund in the limited manner pointed out by that resolution. It is also true, as was pointed out in the argument, that they have allowed their paid officers to devote a portion of their time towards the service of the fund, and have incurred certain expenses in relation to the working of it; but there is nothing in the scheme to indicate that they intended to take any obligation upon themselves in regard to any such last-mentioned matters.

It may be, however, that the undertaking of the duty of administering the fund in the manner pointed out in resolution 6, or in the manner in which that obligation has been interpreted in practice, was a matter *ultra vires* the school board. It does not appear necessary now to decide any such question, since it may for the purposes of this case be assumed, without actually deciding it and without affecting the actual conclusion arrived at, that in the matters now referred to the board was acting *ultra vires*. This action of theirs would, however, in no way alter the essential nature of the superannuation scheme, which was the creation by the subscribers themselves of a fund which was to supply, in accordance with the directions of the superannuation committee, all the relief to which any subscriber could ever be entitled. The insurance scheme was, in fact, in the nature of a mutual insurance, and not an insurance by the board at all. The scheme was not originated in order that the board might administer it; but the administration by the board was ancillary to and not really necessary for the purposes of the scheme. If the board were restrained from administering the fund, the main purposes of the scheme could still be carried out successfully. It would be unreasonable to hold that the whole scheme failed because a subsidiary, and so far as the real objects of the scheme are concerned unessential, and even it may fairly be said an unimportant, part of it could not be carried out without a departure by the school board from their statutory powers. If the school board could not properly act as trustees, the remedy would be, not to declare the trust invalid, but to appoint other trustees. The court never permits a trust to fail for want of a trustee. Independently of the question of *ultra vires*, there could not be any ground for granting the plaintiff the relief claimed. Each subscriber paid his or her contribution to the fund for a purpose common to him or her and all other subscribers. The whole fund, by agreement of all the subscribers with one another, became liable for the payments which, under the advice and directions of the superannuation committee, might become payable to those of them whose expectation of benefit ripened into actual claims. It would be wrong to say that subscribers who received nothing from the fund had no consideration for their contributions. It was, of course, well known that some of them would never earn a superannuation grant; but that fact lies at the root of every scheme of mutual insurance. Those who do not earn a grant help to pay those who do, and it is the possibility of a grant, and not the grant itself, which forms the true and sufficient consideration for the contribution.

No difference arises between the cases of the two plaintiffs. Miss Phillips, as already stated, voluntarily elected to contribute to the fund. Mrs. Cockerton, coming in under resolution 1, could not, owing to the rule laid down, exercise any option. There appears to be no sufficient reason why, in fixing the remuneration of a teacher, the school board should not stipulate that 98 per cent. only should be paid in cash, and the remaining 2 per cent. by way of contribution for the benefit of the teacher to the superannuation fund; and that was, in substance, what was done here.

VAUGHAN WILLIAMS, L.J., read the following judgment: I agree that both these appeals ought to be dismissed. I have really very little, if anything, to add to the judgment of Wright, J. I do not feel at all satisfied that the school board have done anything *ultra vires*. Section 35 of the Elementary Education Act, 1870, empowers the school board to appoint officers and teachers to hold office during the pleasure of the board, and to assign them salaries or remuneration as they think fit. I see nothing in these words to prevent the school board, if they think that they will get better service thereby, making it a condition of service that the officers and teachers shall take their remuneration partly in deferred salary and that this part of the salary so deferred shall be devoted to a superannuation fund. The board may well think that officers and teachers who are willing to devote a portion of their remuneration to prudent provision for the future will be likely to render better service to the board. Assuming this view to be correct, that the board may make this condition in respect of the remuneration which they assign, I cannot see that it is *ultra vires* in the board to take upon themselves the duty of administering the superannuation fund, or to employ the clerical staff of the board at the expense of the board for the purpose of administering the fund. The whole thing seems to me incidental to the employment and remuneration of the staff. The fact that the board have chosen to apply for Parliamentary powers does not make that *ultra vires* which in itself is not *ultra vires*. No question arises as to guaranteeing the fund, because the board have not done this. I also agree that neither Miss Phillips nor Mrs. Cockerton can recover from the board, even assuming that the board has done that which is *ultra vires*, moneys which with their consent have been paid to a fund to which other persons have subscribed upon the basis of mutual subscription.

Appeal dismissed.

Solicitors for the appellants, *Baker & Nairne.*

Solicitor for the respondents, *C. E. Mortimer.*

From Q. B. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) June 8.

HOME MARINE INSURANCE CO. v. SMITH. (a.)

Insurance—Marine—Ship—Open cover—Re-insurance—Contract for sea insurance—Policy—Sum or sums insured—Stamp Act, 1891 (54 & 55 *Vict.* c. 39), *s.* 93.

A marine insurance company made a claim under an

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

open cover of re-insurance subscribed by the defendant and other underwriters at Lloyd's on excesses over certain amounts upon certain risks taken by the plaintiffs. By the terms of the open cover £4,000 was specified as the limit of excess taken on any one ship, and £400 was specified as the defendant's proportion of this limit. The other underwriters' proportions were also specified, but beyond this there was no statement of the sum or sums insured.

Held, that this open cover was a contract for sea insurance within the meaning of section 93, sub-section 1, of the Stamp Act, 1891; but that it was not valid as a policy, because it did not specify the sum or sums insured as required by sub-section 3.

Appeal from a judgment of Mathew, J.

This was an action brought by a marine insurance company against an underwriter at Lloyd's to recover £350 16s. 5d. under a contract of re-insurance contained in a document called an open cover.

The plaintiffs alleged that by this contract the defendant and several other underwriters at Lloyd's agreed to re-insure the plaintiffs to the extent of the excesses over certain amounts, limited as therein agreed, upon risks which the plaintiffs had then taken, or might take, on goods by vessels of certain named steamship lines. The plaintiffs had, as original insurers, paid £5,008 4s. 5d. for a total loss in respect of certain goods covered by the re-insurance contract. The excess which fell upon the re-insurance contract was £3,508 4s. 5d., and the plaintiffs claimed the defendant's proportion of that excess. In the alternative the plaintiffs claimed that they were entitled to have issued to them by the defendant a duly subscribed policy in respect of the said goods, and to recover under such policy when issued.

The defendants contended, *inter alia*, that there was no contract of re-insurance expressed in a policy sufficient to satisfy the requirements of section 93 of the Stamp Act, 1891.

Section 93 enacts as follows: "(1) A contract for sea insurance . . . shall not be valid unless the same be expressed in a policy of sea insurance . . . A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months."

The document in question was, as far as is material, as follows: "Open cover. 30/6/96. Dawson Brothers" (the plaintiffs' brokers). "Cash. Steamer or steamers. United Kingdom and (or) Continent and (or) America. West Indies. Merchandise. Re-insurance. Rates as *per* indorsement. Free of general average and York-Antwerp rules. Deviation clause. Old or new bill of lading, including all risks from warehouse, lighterage, and until delivered at destination. Negligence clause. £4,000." The last-mentioned sum was explained to be the limit of excess taken on any one ship. On the face of the document appeared the proportions of this limit taken by the several underwriters, and initialled by them. The defendant's proportion was £400. On the back of the document was a list of the steamship lines on which excesses on goods were insured. The document was not stamped.

By an order made at chambers it was directed that the question as to whether the requirements of the Stamp Act were satisfied should be tried as a preliminary question.

MATHEW, J., gave judgment for the defendant.

The plaintiffs appealed.

Carver, Q.C., and *J. A. Hamilton*, for the plaintiffs.—First, this is a valid policy of sea insurance. The requirements of s. 93, sub-section 3, are complied with. The sum or sums insured are not specified with absolute exactness; but they are specified with as much exactness as is possible in a contract of this nature. It may therefore be stamped as a policy on payment of the penalty prescribed by section 95. Secondly, in the alternative, this is not a contract for sea insurance at all, and therefore section 93 does not apply. It is merely a contract that, when certain risks arise, there shall be a contract of insurance.

Joseph Walton, Q.C., and *Scrutton*, for the defendant.—This document is a contract for sea insurance, but it is not a valid policy because it fails to specify the sum or sums insured as required by sub-section 3 of section 93: *Ionides* v. *Pacific Insurance Co.*, 21 W. R. 22, L. R. 6 Q. B. 674, L. R. 7 Q. B. 517, 28 W. R. C. L. Dig.

A. L. SMITH, L.J.—I am of opinion that this appeal fails, and it fails upon one point, with which alone I will deal. We have to consider a document which is called an open cover; or it might be called a slip. The question is whether, no policy having been issued, the plaintiffs can maintain an action upon this slip. Now, what is this slip or open cover? It certainly does not cover anything except marine risks. The intention of the parties conveyed by this document is quite clear. It is initialled by the underwriters to cover the Home Marine Insurance Co. as regards excesses which they had undertaken or might undertake upon goods by certain ships. I have not the slightest difficulty in saying that that is the meaning of this document and that it is a contract for sea insurance. A contract of re-insurance as regards marine risks is exactly the same thing as a sea insurance and nothing more or less.

That being so, the question arises whether this document, this open cover or slip, comes within the provisions of the Stamp Act of 1891. I say nothing about other slips, because they are not before me. The contention is that this document sins against the provisions of section 93, sub-section 3, of the Stamp Act, because, it being a contract for sea insurance, as I am clear it is, that sub-section enacts that a policy of sea insurance shall not be valid unless it specifies the sum or sums insured. Now, what sum or sums insured are specified in this document? None. The only limit to be found in the document is the limit that all the underwriters together are not to be called upon to pay more than £4,000 as regards any one ship. I say it is perfectly impossible upon the face of this document to say that it specifies the sum or sums insured so as to come within the provisions of section 93, sub-section 3, of the Act of 1891, so as to be a valid contract.

I am of opinion this is amply sufficient to support the judgment of my brother Mathew. I think, therefore, that this appeal must be dismissed, and that it ought to be declared that the plaintiffs cannot sue on this document.

RIGBY, L.J.—I am of the same opinion. Many points of interest have been discussed during the argument, but I will only deal with one point which appears to me to be fatal to the plaintiffs' claim. We have here an open cover in form resembling, in some respects an ordinary slip; in others it differs considerably from an ordinary slip. The first question is whether it is a contract for sea insurance. Section 91 of the Stamp Act, 1891, deals with policies of insurance generally. Sections 92-97 deal with policies of sea insurance, and sections 98 and 99 deal with policies of insurance except policies of sea insurance. That this document falls within

sections dealing with policies of sea insurance, and not within those dealing with policies except policies of sea insurance, I do not think can be a matter of doubt. It is a contract for sea insurance in a particular form—that is to say, a re-insurance of the original underwriters in respect of that interest which they acquire by undertaking the original liability. It is an insurance on the excess, and the risks that are insured against are marine risks. I cannot see my way out of it, that it is a contract for sea insurance both in the ordinary sense of the words and also within the meaning of this Act. Now, to be a valid contract for sea insurance it must be expressed in a policy of sea insurance, and a policy of sea insurance is not valid unless it specifies the sum or sums insured. Here the amount of the insurance is in no way dealt with, as far as I can see, except by saying that it shall not exceed £4,000 on any one steamer. If the document complied with the terms of section 93, it might perhaps be treated as a policy, but inasmuch as there is that vital defect in it, that it by no means mentions the sum insured, it must in my opinion be treated as null and void.

VAUGHAN WILLIAMS, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Tippetts & Son.*

Solicitor for the defendant, *James Ballantyne.*

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — May 16.

ATTORNEY-GENERAL *v.* STRANGE. (*a.*)

Estate duty—Exemption—Husband and wife—Income of wife's fund settled on husband for life—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 21 (5).

By a marriage settlement after-acquired personal property of the wife was settled upon trust (in the events that happened) for the husband for life, with remainder to the wife, the survivor, absolutely. The husband having died after the commencement of the Finance Act, 1894,

Held, that section 21, *sub-section* (5), *of that Act did not apply, and that estate duty became payable immediately upon the husband's death.*

This case raised a question as to the construction of section 21 (5) of the Finance Act, 1894, whereby, in certain events therein specified, estate duty is not to be payable until the death of the survivor of husband and wife.

By an indenture dated the 14th day of January, 1846, and made between James N. Strange of the first part, the defendant Charlotte M. Strange (then C. M. Eyre) of the second part, Dame Louisa Strange of the third part and certain trustees of the fourth part, being a settlement made in contemplation of a marriage then intended and shortly afterward solemnized between the said J. N. Strange and C. M. Strange, certain sums of consols and other personal property partly reversionary and partly in possession were settled upon trust to pay the income thereof to the said J. N. Strange for life and after his decease to the said C. M. Strange for life, with remainder as to the capital of the said trust funds for the children of the marriage as therein mentioned; and in the said indenture was contained a covenant by the said J. N. Strange and C. M. Strange to vest, any personal property to which the said C. M. Strange was then or should during the then intended marriage, or the said J. N. Strange in her right should, at any one time by gift, bequest, or otherwise become entitled of the value of £200 or upwards, other than a life interest only, and other than specific chattels not producing income, in the trustees or trustee for the time being of the said indenture, upon trust and to the intent that the same might be laid out by such trustees or trustee upon some of the stocks, funds, and securities prescribed by the said indenture, and that the stocks, funds, and securities upon which the same might be so laid out and the dividends, interest, and annual produce thereof might be held by such trustees or trustee upon trust to pay the income thereof unto the said J. N. Strange or his assigns during his life, and after his decease to the said C. M. Strange, or her assigns during her life, and from the decease of the survivor of them upon trust, if the said C. M. Strange should survive the said J. N. Strange then after his decease in trust for the said C. M. Strange, her executors, administrators, and assigns, but if she should die in his lifetime, then after his decease upon such trusts and for such purposes as the said C. M. Strange should by will appoint, and in default of appointment upon trust for her statutory next-of-kin.

The said C. M. Strange became entitled at different dates during the said coverture to personal property within the meaning of the covenant as to after-acquired property above set forth, and such property was got in by the trustees of the settlement and duly invested by them.

The said J. N. Strange died on the 1st of November, 1894, whereupon the said C. M. Strange became absolutely entitled to the investments representing such after-acquired property, and she accordingly required the trustees to transfer the same to her.

The case came before the court upon an information by the Attorney-General stating that estate duty under the Finance Act, 1894, became payable in respect of the said after-acquired property as property passing upon the death of the said J. N. Strange, but that the said C. M. Strange and her trustees refused to pay it, contending that no estate duty had become payable in respect of the property bound by the said covenant to settle other or after-acquired property by reason of the provisions of section 21 (5) of the said Act, but the information charged that the last-mentioned sub-section did not apply, the said C. M. Strange having become entitled, not to the income only, but to the capital of the property in question. The information prayed that it might be declared that upon the death of the said J. N. Strange estate duty became payable upon the principal value of all property coming within the terms of and bound by the said covenant to settle after-acquired property of the said C. M. Strange as property passing on the death of the said J. N. Strange.

By section 21 (5) of the Finance Act, 1894, it is enacted that: "Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the commencement of this part of this Act, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, estate duty shall not be payable in respect of that property until the death of the survivor."

The case came before Vaughan Williams and Kennedy, JJ., sitting as a Divisional Court, on the 12th of August, 1897, when their lordships held that the case fell within the exemption, and that estate duty would not be payable until the death of Mrs. C. M. Strange.

Against that decision the Attorney-General appealed.

Sir R. E. Webster, A.G., Sir R. B. Finlay, S.G.,

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

and *Vaughan Hawkins*, for the Attorney-General.—In the first place the sub-section does not apply at all because this property was in fact settled by the husband; it only came into settlement under his covenant. Secondly, on the construction of the section we submit that the judgment in the court below gives no effect to the word "income." There is no need to read into the section the word "only." The object of the section is only to postpone payment when a wife succeeds, on the death of her husband, to the income of her own property.

Dicey, Q.C., and *Butcher, Q.C.*, for the respondents.—The case exactly falls within the words of the Act. Can it be said that the widow has not the income because she has the *corpus*.

Sir R. E. Webster, A.G., was not called upon to reply.

LINDLEY, M.R.—In my opinion the interpretation of the Act is plain, and I am somewhat astonished that there is any difference of opinion about it. The settlement is plain enough. It is a settlement of certain personal estate upon trust for the husband for life, and after his decease it goes to the wife for life. But the settlement goes on to provide that if the wife survives then the property is to be held for her absolutely. The wife has survived the husband, and therefore, in the events that have happened, her life interest is absolutely immaterial, it merged in her absolute ownership. She became absolutely entitled to the property, and she has called upon the trustees to hand it over to her. The trustees had no choice, and were bound to hand it over. If they refused and she brought an action against them to compel them to transfer they would have to pay the costs—that is clear. I turn now to the Finance Act, 1894. It is admitted that the taxing sections (1 and 2) cover the case. Then comes the question, Does the case fall within any exemption? The answer to that question depends on the construction of section 21 (5). [His lordship read the section.] In the events which have happened in this case the husband was entitled until his death, and on his death the wife became absolutely entitled to the property—to the whole property—not to the income of it at all.

Two things are spoken of in the section, "income of property" and property, and the expression "income" of property is always used in the Act in contradistinction to the property itself. It is true in a sense that upon the death of her husband this lady became entitled to the income of the property because she became entitled to the *corpus*, but that is not the sense in which the expression is used. To hold otherwise would be merely to play upon words. The case is too clear for argument and the appeal must be allowed.

RIGBY, L.J.—First of all as to this settlement. In my opinion the meaning of it is clear, and in the event which has happened the wife surviving became absolutely entitled to this property.

Then as to section 21 (5) of the Finance Act. It is reasonably plain that the case contemplated is that of successive titles to the income of property as distinguished from titles to the property itself. You have to read in a most unnatural manner the words "becomes entitled to the income of the property settled by such survivor" in order to accede to the respondent's argument, and must read it as meaning "becomes entitled to the income of the property or to the property itself." That is clearly not what was meant. I agree that the appeal must be allowed.

COLLINS, L.J.—I am of the same opinion, and have nothing to add.

Solicitors, *The Solicitor of Inland Revenue; Hunters & Haynes.*

From Q. B. Div.
(A. L. Smith and Chitty, L.JJ.) } May 11.

LUMSDEN v. BURNETT. (a.)

Inland revenue — Income tax—Distress — Costs and charges—Man in possession—Constructive possession—Abandonment of possession—57 Geo. 3, c. 93, s. 1, Schedule—7 & 8 Geo. 4, c. 17—Taxes Management Act, 1880 (43 & 44 *Vict. c.* 19), *s.* 86.

Where a distress is made upon the goods of a taxpayer for unpaid income tax not exceeding £20, the collector is not entitled to charge 2s. 6d. a day for a man in possession, if the man has only been in constructive possession and not in real possession of the goods distrained upon, unless the taxpayer, in order to avoid the inconvenience of having a man in real possession, has expressly agreed to pay that sum.

Appeal from the judgment of a Divisional Court (Day and Lawrance, JJ.) on an appeal from the Lambeth County Court.

The action was brought against a collector of Queen's taxes, who had distrained upon the plaintiff's goods for unpaid income tax, to recover damages for alleged illegal distress, and also to recover the sum of 15s. which had been paid by the plaintiff under protest as a charge for a "man in possession."

The question in this appeal was whether, when the amount of income tax due does not exceed £20 the collector is entitled to charge 2s. 6d. a day for a man in possession, where the man has not been in real possession but only in constructive possession of the goods distrained upon.

The circumstances under which the distress was levied are set out in the judgment of A. L. Smith, L.J.

The period of five days mentioned in section 86, sub-section 4, of the Taxes Management Act, 1880, having expired, the collector began to remove some of the goods, and thereupon the plaintiff, under protest, paid the collector the sum of £1 11s. 4d., being 13s. 4d., the amount of income tax, 3s. levy fee, and 15s. charge for man in possession for six days.

The county court judge held that there had been an illegal distress, that there had been an abandonment of the distress by the collector, and that the 15s. had been illegally charged, and he gave judgment for the plaintiff for £3 15s.—being £3 damages for illegal distress and 15s. for money illegally charged.

The Divisional Court reversed the decision of the county court judge.

The plaintiff appealed.

Bowen Rowlands, Q.C., and *W. Addington Willis*, for the plaintiff.

Macmorran, Q.C., and *Lincoln Reed*, for the defendant.

May 11.—A. L. SMITH, L.J., read the following judgment: The amount in dispute in this appeal is insignificant, but the point raised is of some practical importance, and the case has acquired the name of "The Walking Possession Case." It raises the question whether a collector of income tax, when he distrains upon the goods of a taxpayer for unpaid income tax which does not exceed £20 (in this case amounting to the sum of 13s. 4d.), is entitled to levy upon the taxpayer, in addition to the tax due, 2s. 6d. a day for a man in possession, amounting in this case to 15s.—*i.e.*, six days at 2s. 6d. per day, when in truth and in fact the man has not been really in possession, but at the most has been in constructive possession of the goods distrained. The facts are

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

these. In the early part of January, 1897, the tax-collector, who is the defendant, left with the taxpayer, who is the plaintiff, a printed document which the plaintiff himself designated as being the "customary demand note." It is a document headed in large type, "Income Tax, House Duty, and Land Tax payable on or before the 1st of January, 1897." The document states the amount of duties payable for the year 1896-97 by the taxpayer, which in the present case was duty under Schedule D at 8d. in the pound, amounting in all to 13s. 4d. At the foot of this demand note, in large type, are the words, "This notice must be produced at the time of payment or sent with the remittance." Although the plaintiff was served with this demand for payment of income-tax, he wholly disregarded it and did not pay the 13s. 4d. due and demanded, Time went on without the tax being paid, and on the 29th of April, 1897, the tax-collector, accompanied by a man, went to the plaintiff's premises armed with two printed documents, the one being a document headed "Queen's Taxes, Arrears Warrant," which, when filled up as it subsequently was, gave the taxpayer notice that the collector had upon that day seized and distrained upon the taxpayer's goods and chattels for income tax, Schedule D, 13s. 4d. due upon the 1st of January, 1897, and also that, unless that amount, together with the charges attending the distress, was paid within five days from the 29th of April, 1897, the goods and chattels seized would be sold according to law. The charges mentioned in this document, in addition to the tax of 13s. 4d., were "levy, 3s.," "man, 2s. 6d. per day." The "inventory of goods seized" was thus filled in—"Shop, eight pair trousers." The other printed document which the collector then took with him to the plaintiff's house was the following: "To Mr. H. E. Burnett, 24, Queen's-road, S.E."—this is the name of the defendant, the collector—"or whom it may concern, —I hereby authorize you to re-enter at any time upon the premises . . . by force or as you may think fit, and to break open doors or windows for the purpose of taking possession under your warrant of distress; and I also undertake not to move away or allow to be moved away from the said premises any of the goods and chattels which are now therein until the amount levied for, together with all costs and charges of maintaining the levy, are duly paid and settled. And in the event of the man now in possession quitting the said premises temporarily or from any cause whatever previous to the removal by you of the said goods from the above-mentioned premises or the distraint being otherwise satisfied, it shall not be considered in any way an abandonment of the levy. I also undertake not to replevy the said goods and chattels, and not to bring any action or actions at law against you or either of you, or prefer any indictment, for any of your proceedings in this matter. Dated this day the 29th of April, 1897." The only person the tax-collector and his man found upon the plaintiff's premises upon the 29th of April, 1897, was the taxpayer's daughter, a child about 13½ years of age, whose signature the tax-collector then obtained to the printed document above-mentioned, having first demanded the tax of 13s. 4d. from her. This child had no authority whatever from her father, the plaintiff, to sign this document, then for the first time produced by the tax-collector, and, indeed, the father never knew of this document, nor that his child had signed it, till long afterwards, when the tax-collector was insisting that the taxpayer should pay him 2s. 6d. per day for the man having been, as he alleged, in possession for six days amounting to the 15s. then claimed by him. Upon his 29th of April, 1897, the collector, accompanied by the man as before stated, distrained upon the eight pair of trousers in the shop, and left the document headed "Queen's Taxes, Arrears Warrant" filled up as before mentioned upon the plaintiff's premises. The collector and his man then left the plaintiff's premises, taking with them the document signed by the plaintiff's child, neither the collector nor the man remaining in possession of the goods distrained, though it appears that during the six days the man daily returned to the neighbourhood to keep, as he said, watch on the premises, and to see that nothing was removed; and this man also stated that sometimes he was in possession of two houses in one day. It seems to me, for reasons hereafter, that the findings of fact of the learned county court judge, if they be findings of fact, are wholly immaterial to the decision of this case. If material, I could not agree with some of them, for in my opinion they are not only founded upon no evidence at all, but are directly contrary to the undisputed evidence in the case. For instance, the county court judge in his judgment states that no demand for the tax due was made upon the taxpayer other than the demand upon the child upon the 29th of April, 1897, ignoring altogether the service of the demand note on or about the 1st of January, 1897, and the continued and deliberate non-payment by the plaintiff of the tax due till the distress was made upon the 29th of April, 1897. Again, this continued non-payment the county court judge holds to be no evidence of a refusal to pay, for he holds that there was "no refusal to pay the tax in the sense intended by the Act of Parliament," whatever that may mean. The county court judge also states that the defendant levied a distress which was in the first instance improper; and that he afterwards abandoned it by not having a man in possession in such a way as to make it continuous possession. We held in this court not long since in the case of *Bagshawes (Limited)* v. *Deacon*, *ante*, p. 618, after full argument and discussing amongst other authorities *Ackland* v. *Paynter*, 8 Price 95, *Swann* v. *Earl of Falmouth*, 8 B. & C. 456, and *Eldridge* v. *Stacey*, 12 W. R. 51, 15 C. B. N. S. 458, that, where a sheriff goes out of possession, and the point arises as to whether he has abandoned possession or not, the question always is one of fact, and is whether the sheriff by going out of possession as he did has abandoned the possession. A sheriff in some circumstances may go out of possession and again re-enter without having abandoned possession, and the question always is whether what he has done amounts to an abandonment of possession. Although the document signed by the child in this case clearly does not bind the plaintiff and is no evidence against him, yet it is strong evidence to show that the collector did not abandon possession, and his employing and paying a man to go and see that the goods distrained were not removed affords corroborating evidence, if it were needed, that he went out with the intention of returning and not of abandoning possession. But these findings of the county court judge are immaterial to the real question he had to try, which is the right of the collector, apart from agreement, to levy upon the plaintiff for the 15s. for the man said to have been in possession, when the distress was for an amount not exceeding £20. This question has to be decided upon the statute regulating distresses for income-tax not exceeding £20, which appears to have been altogether overlooked by the county court judge, and is not alluded to by the Divisional Court, who decided the case upon the question whether there had been an agreement by the taxpayer to pay the 2s. 6d. per day whether the man was in real possession or not, of which, in my opinion, with

submission to the Divisional Court, there was not a tittle of evidence. I am not aware of any Act of Parliament regulating the charges to be made when the sum distrained for exceeds the sum of £20, but from text books of repute I find that for such expenses the general practice appears to be to charge 1s. in the pound for the levy and 3s. 6d. per day for the man in possession. But there is an Act of Parliament which regulates what is to be charged by a collector for distress for income tax when such unpaid tax does not exceed £20, and this is the Act of 1827 (7 & 8 Geo. 4, c. 17). The matter stands thus: By the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), section 86, sub-section 1, it is enacted that "If a person refuses to pay the sum charged upon him by virtue of the Tax Acts or this Act on demand made by the collector . . . such collector may and he is thereunto authorized and required for non-payment thereof to distrain . . . the person so charged by his goods and chattels . . . without any further authority from the commissioners for that purpose than the warrant to such collector delivered on his appointment." By sub-section 4 it is enacted that every distress levied by a collector shall be kept for the space of five days at the costs and charges of the person so refusing to pay; and, by sub-section 5, if such person does not pay the respective sums of money so due within the five days, the distress after appraisement may be sold by the collector for payment of the said money, and the overplus coming by the said distress (if any there be) after deducting the said money and also the costs and charges of taking, keeping, and selling the said distress, shall be restored to the owner. The question arises, What are these costs and charges? This brings me to the Acts of 1817 and 1827. By the Act of 1817 (57 Geo. 3, c. 93), after reciting that "divers persons acting as brokers and distraining on the goods and chattels of others . . . have of late made excessive charges to the great oppression of poor tenants and others," it is enacted that "from and after the passing of this Act no person whatsoever making any distress for rent where the sum demanded and due shall not exceed the sum of £20 for and in respect of such rent . . . shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold or from the tenant distrained on . . . any other or more costs and charges for and in respect of such distress or any matter or thing done therein than such as are fixed and set forth in the schedule thereunto annexed and appropriated to each act which shall have been done in the course of such distress; and no person or persons whatsoever shall make any charge whatsoever for any act, matter, or thing mentioned in the said schedule unless such act shall have been really done." In this schedule, which is headed "Schedule of the limitation of costs and charges on distress for small rents," is set forth as follows: "Levying distress, 3s.; man in possession per day, 2s. 6d." Ten years afterwards, in the year 1827, by the Act of 7 & 8 Geo. 4, c. 17, all the provisions of the Act of 57 Geo. 3, c. 93, which related to distraining for rent not exceeding £20 were extended to any distress or levy made for assessed taxes, or any other rates and taxes whatever where the sum demanded and due for such taxes should not exceed the sum of £20. What, then, are the charges which can be made for a distress for income tax, when an amount not exceeding £20 is due? It is clear that in such a case by the statute the charge for a man in possession may be made of 2s. 6d. per diem, but only if the act for which the charge is made has been really done—*i.e.*, if the man charged for has really been in possession. In the present case at the most the man charged for at 2s. 6d. per day has but been in constructive possession, and it is impossible to hold that constructive possession is the same thing as real possession, for the one is a reality and the other is not. For instance, how can there be real possession by one man of two, six, eight, or ten houses upon the same day? The thing is impossible. As, however, the statute 7 & 8 Geo. 4, c. 17, is a statute in favour of a taxpayer owing income tax not exceeding £20, I do not see why such a taxpayer may not agree with a collector, if the former desires neither to pay the tax due nor to suffer the inconvenience of having a man in real possession, to pay the 2s. 6d. per diem to the collector, even though the man does not remain in real possession, but unless such an agreement is made I am clear that the collector cannot claim the 2s. 6d. per day if the man does not remain in real possession. It is for these reasons I think, there being no agreement to the contrary, that the tax-collector cannot charge 2s. 6d. per day for the man who has not been really in possession of the goods distrained, when the income tax due amounts, as in this case, to less than £20. I think, therefore, that this appeal must be allowed with costs to the appellant here and below.

CHITTY, L.J., read the following judgment: I am of the same opinion. Upon the undisputed facts there was, first, a valid demand for the tax; secondly, a refusal to pay; thirdly, a right to distrain for the tax; and, fourthly, a valid distress actually levied for the amount of the tax, 13s. 4d., and the levy fee, 3s. The question of abandonment of the possession of the goods seized is one of fact. The document signed by the plaintiff's daughter does not bind him as an agreement; the daughter's signature was without any authority express or implied on his part. But the document is of importance on the question of abandonment. It shows an intention on the part of the defendant not to abandon the possession but to retain it. Taking into consideration the document, but merely for the limited purpose above stated, and the other undisputed facts relating to the watching of the shop by the defendant's man and his occasional entrances to see that the goods had not been removed, I say unhesitatingly that possession was not abandoned. As to the law on the subject it is sufficient to refer to *Swann* v. *Earl of Falmouth*, a case of distress, and to the recent case in the Court of Appeal of *Bagshawes* (*Limited*) v. *Deacon*, relating to the analogous case of the sheriff.

The real and important question in this appeal is whether the defendant was entitled to the charge of 2s. 6d. a day for the man in possession. By virtue of the statutes already referred to, the statute of 57 Geo. 3 is made applicable to a distress for income tax; and, inasmuch as the sum due for income tax did not exceed £20, that statute applies to this case. As appears from the preamble, the mischief against which the Act was directed was the oppression of poor tenants and others by excessive charges exacted in levying distresses. The enactments of the first section are clear, direct, and stringent. Where the sum demanded does not exceed £20, the section prohibits the having, taking, or receiving any other or more costs and charges for and in respect of the distress or any matter or thing done therein than such as are fixed by the schedule and appropriated to each act which shall have been done in the course of such distress, and the section concludes by declaring emphatically that "no person or persons whatsoever shall make any charge whatever for any act, matter, or thing mentioned in the said schedule unless such act shall have been really done." Clearly, then, the charge of 2s. 6d. for "man in possession per day"

cannot be lawfully made where the possession is merely constructive or notional; to render the charge lawful within the Act the possession must be real or actual. In this case the possession of the defendant's man was constructive merely and not real.

Had the document signed by the plaintiff's daughter and taken away by the defendant been signed by the plaintiff or by his authority the case would have stood differently. The statute does not preclude the tenants and persons for whose benefit it was made from contracting themselves out of these benefits. It would often be to the advantage of the person, upon whose goods the distress is levied for a sum which he is not prepared to pay at once, to get rid of the inconvenience of having the bailiff's man in actual possession; and I can see no valid reason why he should not be at liberty to contract to pay the 2s. 6d. a day for the man in constructive possession. To hold that he cannot so contract would inflict upon him an unnecessary inconvenience.

Appeal allowed.

Solicitor for the plaintiff, *A. H. Williams.*

Solicitor for the defendant, *H. M. Ody.*

High Court of Justice.

Chan. Div. Stirling, J. — June 30; July 1, 9.

CROYSDALE *v.* SUNBURY-ON-THAMES URBAN DISTRICT COUNCIL. (*a.*)

Local government — Sewer made for profit — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 13 (1)— *Highways Act,* 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 66, 67.

The word "profit" in section 13 (1) *of the Public Health Act,* 1875, *is not to be restricted to a direct money payment, and where a sewer is made, not for sanitary or mere ordinary drainage purposes, but in order to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, it will be deemed to have been made for the profit of the occupier within the meaning of that section.*

This case raised the question whether a certain line of pipes formed a sewer within the Public Health Act, 1875, and, if so, whether it fell within the exception of section 13 (1) as being a sewer made by a person for his own profit.

The plaintiff was the owner of a house and grounds in Sunbury, known as Hooke House, including a field situated on the west side of a road known as Green-street, which runs nearly north and south. The said field slopes downward from Green-street and then rises again. In the dip are two ponds, the larger of which was formerly a gravel pit. On the west side of Green-street (in that nearest to the field) was at one time an open ditch from which there ran down to the pond a line of pipes which discharged into the pond. The end of this line of pipes next to the ditch was protected by a grating at a level of more than two feet below the surface of the road while the end next the pond projected to the extent of six inches or thereabouts.

The defendants became the urban authority of Sunbury on the 3rd of December, 1894.

In August, 1896, a portion of the ditch near the grating had become filled by an accumulation of rubbish which completely covered the grating so that there was nothing at the road to indicate the existence of it or of the line of pipes.

In December, 1896, the plaintiff, with a view to filling up the pond, removed the line of pipes so far as it existed on his own land.

Subsequently the defendants entered on the plaintiff's lands and cut a trench between the ditch and the field for the purpose of running off the surface water from Green-street. The present action was thereupon brought, and by the statement of claim the plaintiff claimed "(1) a declaration that the defendants are not entitled without the leave or license of the plaintiff to drain the surface water from Green-street or from any of the roads or streets in the parish of Sunbury-on-Thames into the plaintiff's said pond or land, or to lay down or make on the plaintiff's said land or use any drain, pipe, or trench for any such purpose, and (2) an injunction."

Butcher, Q.C., and *Austen-Cartmell,* for the plaintiffs.—These pipes do not constitute a sewer within the definition contained in section 4 of the Public Health Act, 1875, they fall within the exemption of section 13 (1), and do not vest in the local authority. In *Durrant* v. *Branksome Urban District Council, ante* p. 134, [1897] 2 Ch. 291, sections 16 and 17 were read together; the decision there was on section 16 and does not apply to the present case. If the defendants in fact made this drain, they did so by committing a trespass, and the drain will not vest in the defendants: *Meaden* v. *West Cowes Local Board,* 40 W. R. 676, [1892] 3 Ch. 18. In *Ferrand* v. *Hallas Land and Building Society,* 41 W. R. 580, [1893] 2 Q. B. 135, Lopes, L.J., gives, as an illustration of a sewer made for profit, the case of a drain for irrigation purposes; that is practically our case. Neither are the defendants justified by the Highway Act of 1835, ss. 66 and 67. This pond forms no part of the system of drains within their control: *Croft* v. *Rickmansworth Highway Board,* 39 Ch. D. 272, 37 W. R. Dig. 84.

Macmorran, Q.C., and *Elgood,* for the defendants.—Section 67 of the Highway Act, 1835, must apply to drains other than those within the control of the local authority: *Denny* v. *Thwaites,* 2 Ex. D. 21, 25 W. R. Dig. 120. The defendants have power to make watercourses, and so long as this pond is in existence they have the right to drain into it, therefore *Croft* v. *Rickmansworth Highway Board* does not apply. This is not a sewer made for profit: *Minehead Local Board* v. *Luttrell,* 42 W. R. 667, [1894] 2 Ch. 178.

Butcher, Q.C., replied.

STIRLING, J., stated the facts as above set forth and proceeded as follows: The defendants at the trial justified their acts under (1) the powers conferred as the urban district authority by the Public Health Act, 1875; (2) their powers as the highway authority under section 144 of that Act and the Highway Act, 1835. [His lordship then referred to the evidence, and came to the conclusion that the line of pipes was laid down between the pond and the road in 1858 or 1859 by the then tenant of the field for the purpose of getting a better supply of water in the pond for the use of the cattle and other stock feeding in the field, and that subsequently the surveyors of highways from time to time caused the rubbish deposited at the ditch end of the pipes to be removed, but that it was not established that such surveyors repaired or even cleaned the pipes themselves, and proceeded:] The first question is whether the defendants can justify what they have done under the powers conferred by the Public Health Act, 1875. The sections relied on are sections 13-17. It is in the first place contended that the pipes vested in the

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

defendants by virtue of section 13. It is established by *Durrant* v. *Branksome Urban District Council* that the sewers to which the provisions of the Act apply include sewers for the removal of surface water as well as those for carrying off what is ordinarily termed sewage. That being so, the pipes constitute a sewer within the definition contained in section 4, for they do not fall within the exception in that section of "drains" vested in or under the control of any "authority having the management of roads," and not being a local authority under the Act—the defendants being themselves the highway authority for the district.

It is, however, contended for the plaintiff that they fall within the first exception in section 13—viz., sewers made by any person for his own profit. The meaning of this exception has been considered in several cases. In *Minehead Local Board* v. *Luttrell* it was held that sewers constructed by a landowner for the use of persons by whom he was to be remunerated by a direct money payment for the use of them fall within the exception. The word "profit," however, is not, in my opinion, to be restricted to a direct money payment. This was laid down in *Ferrand* v. *Hallas Land and Building Society*, both by Lopes, L.J. (pp. 141-2) and by A. L. Smith, L.J. (p. 144). When the object of making the sewer is not either for sanitary or mere ordinary drainage purposes, but to enable the land to be occupied more profitably or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, it seems to me that the sewer is made for the profit of the occupier. In the present case the field was not adequately supplied with water for the use of the cattle fed in it; the tenant, in order to avoid the expense of bringing water from some other source of supply and to enable him to use the field for feeding cattle made this line of pipes, and I think he did so for his own profit within the meaning of the section.

Section 16 was referred to, but whatever may be done hereafter the defendants have not as yet brought themselves within its terms. So far as the evidence goes no report was obtained from a surveyor, nor any notice given to the owners and occupiers previously to the acts complained of nor down to the present time.

It is then to be considered whether the defendants derive any sanction for their acts from the Highway Act, 1835. The clauses relied on are sections 66 and 77. The former authorizes the highway authorities to "make, scour, cleanse, and keep open all ditches, gutters, drains, watercourses, and also to make and lay . . . trunks, tunnels, plats, or bridges . . . in and through any lands adjoining or lying near to any highway." That section, however widely it is construed, only authorizes the making and keeping open of ditches and drains in and through lands adjoining a highway and does not authorize the discharge of the contents of any ditch and drain into such lands. Unless, then, the pond can be treated as part of the drainage system under the control of the authorities those sections do not empower the defendants to discharge the surface water into the plaintiff's pond, and the case of *Croft* v. *Rickmansworth Highway Board* shows that the pond cannot be so regarded. In my judgment, therefore, this defence also fails the defendants.

It was lastly contended that an injunction ought not to be granted because the defendants may hereafter put in force the powers conferred in section 16 of the Public Health Act, 1875. At present, however, they do not show that they are in a position so to do. Down to this time they had been in the wrong; there ought therefore to be a declaration that the defendants are not entitled without the leave or license of the plaintiff or in due exercise of the powers conferred by the Public Health Act, 1875, to drain the surface water from Green-street or from any of the roads or streets in the parish of Sunbury-on-Thames into the plaintiff's said pond or land, or to lay down or make on the plaintiff's said land, or to use any drain-pipe or trench for any such purpose; and an injunction to restrain the defendants, their servants and agents, except with such leave or license or in exercise of such powers as aforesaid, from draining such surface water into the plaintiff's said pond or using or permitting any drain-pipe or trench to remain laid down or made for any such purpose as aforesaid, and from trespassing on the plaintiff's said premises.

Solicitors, *J. J. Freeman; Charles Jupp.*

Chan. Div. } Stirling, J. } June 15, 16.

LIFE INTEREST AND REVERSIONARY SECURITIES CORPORATION *v.* HAND-IN-HAND FIRE AND LIFE INSURANCE SOCIETY. (*a.*)

Vendor and purchaser—Sale by mortgagee under statutory power—Requisition by purchaser as to whether power exercisable—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 21), *ss.* 19, 20, 21 (2).

The protection conferred on a purchaser from a mortgagee selling under his statutory power of sale by section 21 (2) *of the Conveyancing Act*, 1881, *is given only to a purchaser who has obtained a conveyance, and accrues only after a conveyance has been made. Consequently a purchaser is not precluded from requiring such a mortgagee-vendor to show that his power of sale is exercisable, and the vendor is bound to answer such a requisition.*

Dicker *v.* Angerstein, 24 *W. R.* 844, 3 *Ch. D.* 600, *distinguished.*

This was a vendors' action for specific performance of an agreement to purchase a reversionary interest for £2,000.

In the course of the action a question arose as to the admissibility of certain evidence which really turned on the construction of sections 19, 20, and 21 (2) of the Conveyancing Act, 1881.

The facts were as follows: The contract was entered into on the 17th of December, 1896, and the day fixed for completion was the 25th of January, 1897. The contract contained the usual provision that objections and requisitions in respect of title should be sent to the vendors' solicitors within ten days from the delivery of the abstract and that all objections and requisitions not delivered within that time should be deemed to be waived. The vendors were selling as mortgagees, under a power of sale contained in a mortgage which was dated the 22nd of April, 1896, and was granted by H. C. Simonsen to J. B. Chapman to secure the repayment of £150. On the 23rd of October, 1896, Chapman transferred this mortgage to the vendors. The mortgage contained a covenant by the mortgagor to pay the principal sum on the 19th of June then next together with interest from that date in default of payment. Then followed an assignment of the mortgaged premises subject to a proviso for redemption on payment of the said sum of £150 on or before the said 19th of June next, or if after the said 19th of June then with interest thereon according to the foregoing covenant in that behalf from the said 19th of April next. And the deed contained the following power

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

of sale: "Provided always and it is hereby agreed and declared that the power of sale conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, shall apply to this security so as to be immediately exercisable on default by the mortgagor in the payment of the principal moneys or interest hereby secured at any time after the said 19th day of April next without the restrictions in the said Act contained as to giving notice or otherwise without any further consent on the part of the mortgagor or any other person or persons."

The purchasers took the objection that the power of sale was not exercisable till the 19th of April, 1897. The vendors replied that the 19th of April was a clerical error for the 19th of June, and offered to indemnify the purchasers against any liability in this respect. The purchasers declined to complete on this footing, and the vendors commenced the present action.

At the trial it was contended for the first time on behalf of the plaintiffs that, assuming the power contained in the mortgage deed ought to be read as it stood, they could, nevertheless, make a good title by virtue of the powers of sale conferred on mortgagees by the Conveyancing Act, 1881. The plaintiffs called no evidence in support of their case. The defendants maintained that, assuming the statutory power to exist, which they denied, it could not be exercised, the notice required by section 20 of the Conveyancing Act not having been served on the mortgagor. They called Mr. Chapman, who was the managing clerk of the plaintiffs' solicitor and the original mortgagee, and put to him this question: "Did you give notice to the mortgagor requiring payment of the mortgage money due under the deed of the 22nd of April, 1896?" The question was objected to.

Jenkins, Q.C., and *Ribton*, for the plaintiffs.—The question is irrelevant. A *bonâ fide* purchaser from a mortgagor selling under his statutory power is amply protected by the Conveyancing Act, 1881, and is not entitled to make any requisition as to whether the power is properly exercisable in the absence of any ground for the contrary belief. In any case the objection has been taken too late.

They referred to *Selwyn* v. *Garfit*, 38 Ch. D. 273, 35 W. R. Dig. 137; *Dicker* v. *Angerstein*, 24 W. R. 844, 3 Ch. D. 600; *Upperton* v. *Nicholson*, 19 W. R. 733, L. R. 6 Ch. App. 436; *In Re Scott and Alvarez's Contract*, 43 W. R. 694, [1895] 2 Ch. 603.

Butcher, Q.C., and *P. M. Walters*, for the defendants.—As to whether they were too late to take the objection, no requisitions having been made on this point, referred to *In Re National Provincial Bank of England and Marsh*, 43 W. R. 186, [1895] 1 Ch. 190. [They were stopped by the Court.]

STIRLING, J.—I am asked really upon a formal question as to the admissibility of evidence to decide a somewhat important practical question of law. The question arises in this way. An action was brought by vendors for specific performance. The vendors claim to be mortgagees of one Simonsen under a mortgage. By the contract for sale the date fixed for completion is the 25th of January, 1897. A defence is put in, by paragraph 4 of which the defendants deny that the plaintiffs were on the 25th of January, 1897, or at any time previously to that date, or that they are now entitled to sell the mortgaged premises comprised in the indenture of mortgage.

Now, upon the abstract being delivered the objection was raised that the power of sale which is expressly contained in the mortgage deed was inapplicable. I will assume, although I am not going to decide it, that that objection was well founded. The purchaser adhered to that objection and in consequence this action was brought, the defence I have mentioned was put in, and there was a counter-claim by the purchaser for a return of the deposit. At the trial it was suggested, as far as I understand it, for the first time that a title may be made otherwise than under the express power contained in the mortgage deed. That deed provides that the power of sale conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, shall be immediately exercisable on default by the mortgagor in the payment of the principal moneys or interest thereby secured at any time after the said 19th of April, 1897, without the restrictions in the said Act contained as to giving notice or otherwise. So that the power of sale did not arise until a date subsequent to that fixed for completion. Now it is suggested that there is another power of sale which arises under the Conveyancing Act, not in the manner provided for by the deed, without the restrictions contained in the deed, and without any further consent on the part of the mortgagor, but subject to the restrictions and in fulfilment of the requirements contained in the Act. The case stands thus: the plaintiffs, very properly, simply put their case and take their stand on the deeds and documents. The defendants do not call any evidence in the first instance either of the defendants themselves or by any person acting for them, but they call the managing clerk of the plaintiffs' solicitor, who happens himself to have been the original mortgagee, and he is asked this question, which is objected to: Did you give any notice to the mortgagor demanding payment under the mortgage of the 23rd of April, 1896? The object of that is to show or to prove the issue raised by the defence that the plaintiffs had not, on the 25th of January, 1897, any title to sell. The answer to that is twofold. First of all, that there was title to sell; and, secondly, that having regard to the conditions of the sale the purchasers were too late to raise any such objection, and that a good title is shown according to the contract. Now, the first question is one of very considerable importance and turns on the provisions of the Conveyancing and Law of Property Act, 1881, ss. 19, 20, and 21. Section 19 provides: [His lordship read the section, and continued:] I observe as to that that the power of sale arose when the mortgage-money became due, that is here the 20th of June, 1896, and therefore it is possible that the power of sale had arisen. Section 20 provides: [His lordship read the section, and continued:] Now, if the case rested there, as a matter of construction that would prevent the mortgagee exercising his power of sale except under one of the events mentioned in section 20, and I apprehend that apart from the provisions of section 21, which I have still to consider, that the power of sale would not truly exist unless it were shown that one or other of the events mentioned in section 20 had occurred, The object of the purchasers in putting the question is to show that none of these events have occurred, and consequently that the vendors on that construction of the Act had no power to sell. If the question stood with reference to sections 19 and 20 I should be of opinion that the purchasers were right in that view, and that they could not be compelled to take the title unless the vendors satisfied them that one or other of the circumstances mentioned in section 20 had occurred, so that the power of sale was exercisable. But reliance is placed on the provisions of section 21 (2). Now, that requires to be carefully considered. It runs thus: [His lordship read the section, and continued:] And the way in which the objection to the question is put is that it is irrelevant

on the ground that, having regard to this provision of the Act, the vendor can make a good title to a purchaser "who has no notice that no case had arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised." That in point of fact the Act confers a power to "sell to that description of purchaser whom I may call a *bonâ fide* purchaser, and that the remedy of any person interested by reason of any improper or unauthorized irregularity in its exercise is in damages only. That view was taken of a power in *Dicker* v. *Angerstein*. Now, I have to observe that the power there was a very much wider one than that conferred by the Act. It was there stated thus: "That upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers shall not be bound to see and inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety or expediency of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale the same shall, as far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf and be valid and effectual accordingly, and the remedy of the mortgagor, his heirs or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, or of any impropriety or irregularity whatsoever in any sale, shall be in damages only."

Now, I observe, first of all, that that power applies to any sale purporting to be made in pursuance of the power, and, secondly, that it empowers the purchaser on such a sale and declares that he shall not be bound to inquire whether the event has happened, and provides that, notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall be deemed to be within the power of sale and that the remedy shall be in damages only. There the question arose, not between a vendor and purchaser, but between a purchaser and mortgagor or his assigns, and the decision of Jessel, M.R., was that the purchaser had a title even although the whole of the mortgage debt had been paid off at the date when the power of sale purported to be exercised. The ground on which the Master of the Rolls puts it is this: "It appears to me that this is put in about as plain language as you can put it, that the right to sell shall be so absolutely vested in the mortgagee as to give a good title to the purchaser—that is, to a *bonâ fide* purchaser, which this gentleman is—notwithstanding that the power of sale is not really exercisable, if it purports to be in exercise of the power, which this sale was, it is to be deemed within the power, which means that the remedy of the mortgagor is against the mortgagee in damages, which is supposed to be a sufficient protection to the mortgagor; and no doubt, in the case of a solvent mortgagee, it is a very efficient protection. But, then, it is said it does not apply to the case where the power of sale is not exercisable because the mortgage has been paid off. The answer is that it applies to that case as well as to every other. It is a case in which it is still a sale purporting to be made, although the mortgage money has been handed over, and the mortgagor has not taken either the precaution of getting back the mortgage deed, which he could have got back, or of getting a reconveyance or an indorsement, which would have the same effect." Now, the Master of the Rolls did not decide there that the purchaser could not have taken objection or could not have made inquiry whether the power had become exercisable. There would be something to say on that because the provision is: "Notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, so far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf, and to be valid and effectual accordingly." It might be suggested that the clause was merely for the protection of the purchaser and did not extend the power of sale. I read, however, the judgment of the Master of the Rolls as implying that that is not the true view, but that it did extend the power, where there was impropriety or irregularity, in favour of the purchaser, which means the person who had entered into the contract for purchase. Now let me contrast that with the provision in the Conveyancing Act. That provides that "Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable." That gives protection only to the purchaser who has obtained a conveyance, and the protection accrues only after the conveyance has been made. I am asked to hold that in the case of a purchaser who might have been able safely to take a conveyance at the date fixed for completion he is yet to be precluded from inquiring whether a vendor was in a position to exercise the power of sale. I cannot ascribe such an effect to the provisions of section 21 (2) of the Act, which appears to me to be applicable only when a conveyance has been made. And these provisions appear to me to leave the purchaser, as between himself and the vendor, free to raise any objection which can properly be made as between them. As I have said, not only do the provisions not take effect until a conveyance is made, but what is protected is the title of the purchaser and not the title of the vendor. It seems to me that the true construction of the three sections of the Act which I have read is that they confer protection on only the purchaser who has obtained a conveyance without knowledge of any irregularity. In my judgment the vendor is bound to show, notwithstanding this clause of section 21, upon request of the purchaser, that his power of sale was exercisable, and secondly, that if the purchaser had made at the proper date a requisition to that effect the vendor would have been bound to answer it. Then it appears that the contract contains a clause in the very usual form for limiting the time for making requisitions. It is urged that it is now too late to make such a requisition. The answer of the purchasers to that is: "That may be so; but we take upon ourselves the burden of proving the allegation in the defence that at the date fixed for completion the plaintiffs were not in a position to sell. If that be so, we may not be able to recover the deposit, but we can resist specific performance." Therefore the question put is admissible and relevant, and I think it ought to be answered.

[The question was then put. Mr. Chapman replied that early in October, 1896, he instructed Mr. Stanley-Jones, who acted as his agent in the matter, to serve notice on the mortgagor demanding payment, and that such notice was served. Counsel for the defendants, being unable to elicit from the witness any particulars as to the nature of the notice, applied for an adjournment for the purpose of calling Mr. Stanley-Jones, but this was refused. STIRLING, J., in delivering judgment upon the whole case, held, first, that though the word "April" in the proviso for redemption required alteration to "June," the repetition of the word in the power of sale did not lead to any such manifest absurdity or incongruity as to justify the court in altering it, and that, consequently, the power

of sale in the deed did not arise till the 19th of April, 1897; secondly, that no contrary intention was expressed in the deed so as to prevent the application of the power conferred by the Conveyancing and Law of Property Act, 1881, between the 19th of June, 1896, and the 19th of April, 1897, subject to the restrictions in the Act; thirdly, that the defendants had failed to prove that the requirements of the Act had not been complied with. In the result his lordship gave judgment for specific performance, but without costs, and dismissed the counter-claim also without costs.]

Solicitors, *H. Stanley-Jones*; *Nicholl, Manisty, & Co.*

Chan. Div. }
Romer, J. } July 7, 8.

STRANGWAYS *v.* READ. (*a.*)

Lunacy—Maintenance—Committee of person—Liability to account—Allowance paid quarterly in advance—Death of lunatic before expiration of quarter.

Payment was made quarterly in advance by the committee of a lunatic's estate to the committees of the person of a fixed annual sum which the master had allowed for the lunatic's maintenance, but the order in lunacy did not expressly authorize payment to be made in advance. The lunatic having died shortly after the beginning of the fourth quarter, for which the allowance had been paid in advance as usual, the executors of the lunatic brought an action against the committees of the person to recover so much of the said quarterly allowance as had not been expended in the maintenance of the lunatic.

Held, that, inasmuch as the lunatic was only maintained for nine months and a few weeks, and the committees of the person had received a whole year's allowance, the lunatic's executors were entitled to recover such part as could not be said to have been properly expended by the committees in her maintenance, regard being had to the provisions of the order in lunacy.

The observations of Lord St. Leonards in In re Ponsonby, 3 *Dru. & War.* 27, 31, 2 *Connor & L.* 30, 32, *must be considered to be made with regard to the ordinary case where the lunatic is properly maintained for the whole year.*

Action.

By an order in lunacy dated the 24th of March, 1896, Isabella R. Read and the defendant, Constance R. Read, were appointed committees of the person and the official solicitor was appointed committee of the estate of Mrs. P., widow, a certified lunatic, and there was allowed for her maintenance £2.500 per annum from the 29th of January, 1896. The said order provided (*inter alia*) that the said defendant, as one of the committees of the person, should be at liberty to reside with the lunatic and to have the use of the lunatic's leasehold residence and stables in London, together with her furniture, horses, carriages, and other effects there, and the said defendant resided there accordingly until the death of the lunatic. After the date of the said order the committee of the estate paid to the committees of the person, out of the estate of the lunatic, the allowance of £2,500 per annum for her maintenance by equal quarterly payments, each payment being made in advance for the convenience of the committees of the person, and it was not disputed that the lunatic was always properly maintained until she died.

On the 26th of October, 1896, the sum of £625 in respect of the said maintenance allowance for the quarter ending the 29th of January, 1897, was paid to the committees of the person. On the 11th of November, 1896, the lunatic died.

The plaintiffs, who were the lunatic's executors, claimed that the defendant, Constance R. Read, and the estate of the said Isabella R. Read (who died in May, 1897) were jointly and severally liable to repay to the estate of the lunatic the proportionate part for the period subsequent to her death of the £625 paid for the quarter's allowance, or in the alternative to repay the £625, less any sums properly paid for the lunatic's maintenance between the 29th of October, 1896, and her death, with an inquiry in the latter alternative as to the amount of such sums, and payment in either alternative of any amount found due to the plaintiffs.

Proceedings had been first taken in lunacy, and the master made an order in those proceedings, but his order was discharged by the Lord's Justices sitting in lunacy, whereupon the above action was commenced by the executors.

Neville, Q.C., and *R. J. Parker*, for the plaintiffs.—The allowance ought to be dealt with on the footing of its accruing *de die in diem*, and the plaintiffs are entitled to an order on that principle for repayment by the defendants of a proportionate part of the last advance. If that is not so, they are entitled to be repaid so much as was not properly paid for the lunatic's maintenance. How can the defendants retain the whole year's allowance when they did not maintain the lunatic for a year, and payments have in fact had to be made by the plaintiffs which ought to have been paid by the defendants if the lunatic had lived and been maintained by them for the year? This belongs to the class of cases indicated by Lord Cairns, L.J., in *In re French*, 16 W. R. 657, L. R. 3 Ch. App. 317, in which he said the court clearly would have jurisdiction to direct an inquiry and account and to make some consequential order upon the committee of the person (see L. R. 3 Ch. App., pp. 318-320), because it is clear that there could be no expenditure for the lunatic here after her death. The order did not authorize any payments in advance, and such payments were not regular. They were made for the convenience of the committees of the person, and no right to retain can be founded on the fact of the whole quarter's allowance having been paid under the circumstances.

Farwell, Q.C., *S. Dickinson*, and *E. F. Buckley*, for the defendants.—The doctrine of equity in regard to money paid for maintenance of infants or lunatics is that no account can be required of any surplus if the duty is properly performed: *Jodrell* v. *Jodrell*, 14 Beav. 397, at p. 411. The scheme of the order here contemplated that the defendants should keep the lunatic for no more than nine months, and they therefore performed the whole liability imposed on them. [ROMER, J.—In taking an account regard should be had to the time for which the lunatic was intended to be maintained by the defendants under the order in lunacy.] In any case the defendants cannot be ordered to repay anything if, as is admitted to be the case, the lunatic has been properly maintained: *In re Ponsonby*, 3 Dru. & War. 27, p. 31, 2 Connor & L. 30, p. 32, per Lord St. Leonards, referring to *Grosvenor* v. *Drax*, 2 Knapp. 82. The principle is explained by Jessel, M.R., in *In re Weld*, 30 W. R. 385, 20 Ch. D. 451. The remuneration of the committee is within the purview of the order, so there is no equity. The true view of the allowance is that it was a quarterly allowance. But whether it were annual or quarterly what remains of the advance must be treated as savings out of the allow-

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

ance which the defendants are entitled to keep for their own benefit. It was necessary to make the payments in advance, and there was, therefore, no impropriety in them. In order to succeed the plaintiffs must show a contract to return part of the advance if the lunatic died in the period for which the advance was made.

They also cited *Whincup* v. *Hughes*, 19 W. R. 439, L. R. 6 C. P. 78.

ROMER, J.—This is a novel point, and one of considerable difficulty; but, after considering the matter, I have come to the conclusion that the plaintiffs are entitled to such relief as I will hereafter indicate.

I will first take the order of the 24th day of March, 1896, and see what it authorized. It authorized the committee of the estate to pay the committees of the person a sum of £2,500 per annum from the 29th of January, 1896, for the maintenance of the lunatic; and, if it is looked at, it will be clear that that sum was fixed with reference to a whole year's maintenance, and not to the maintenance for any portion of a year. For example, one of the items of the scheme under which the total of £2,500 per annum was arrived at was this: "Board for nine months at £12 a week, £520"; because it was contemplated, having regard to the other part of this order, that the lunatic would not, in fact, be maintained at the expense of the committees of the person for the full fifty-two weeks of the year. Clearly, therefore, the allowance sanctioned of £2,500 was allowed only as a provision for the maintenance of the lunatic for a year taken as a whole, and clearly it was not an allowance which you could say was an allowance at the rate of £2,500 per annum to be taken or treated as if it was accruing or liable to be paid to the committees of the person *de die in diem*. It was not that, nor, so far as I can see, looking at the face of the order, was it an allowance fixed quarterly, to be paid at the rate of £2,500 per annum. Still less was it an order which sanctioned any payment, so far as I can see, in advance. It certainly did not do so expressly. All that the order did was to justify the committee of the estate, if the lunatic was maintained for a year by the committees of the person, to pay over to the committees of the person the full yearly allowance of £2,500. Now what happened upon that order? There is no other order directing payments to be made quarterly or otherwise, still less any other order sanctioning payments by the committee of the estate in advance. What happened was this: The committee of the estate met the representative of the committees of the person, and it was discussed how the payment should be made; and it was arranged, as a matter of arrangement between the parties, that the committee of the estate should make payments in advance on account—for that is what it really comes to. Now, no doubt that arrangement was come to in the expectation and on the footing that the lunatic would be maintained for the year, and in the expectation that in that case the committees of the person would be entitled to retain the full £2,500 paid. Taken in the light of a mere payment on account in that way, and on that footing and understanding, that was a reasonable temporary arrangement to have been come to between the committee of the estate and the committees of the person; but if it was to be taken as an agreement by the committee of the estate with the committees of the person that quarterly payments should be paid in advance to the committees of the person on the footing that the committees of the person should be able to retain that quarterly payment whether the lunatic was maintained for the full quarter or for the year or not, then I am of opinion that was not justified by the order, and was an improper payment by the committee of the estate. I think it would be justified, when taken on the footing I have indicated, that it was only intended to be taken on the footing and in the expectation of a payment on account of the full yearly maintenance, regarding the maintenance to be made for the year as a whole, and subject, if the lunatic was not maintained for the whole year, that the lunatic's estate should have such rights in that case as ought to have been provided for by express agreement between the parties.

Now, the lunatic was maintained for nine months and a few weeks, but the whole yearly payment has been made, although the lunatic was not maintained for a year; and it is clear from the evidence that, as a matter of fact the committees of the person are claiming to retain the whole yearly allowance, though they did not maintain the lunatic for a year, and though in fact payments have had to be made by the executors of the lunatic which ought to have been paid by the committees of the person if the lunatic had lived during the year and had been maintained by them. I cannot see how, in this case, the committees of the person can claim to retain the whole of the £2,500 as against the executors of the lunatic, and I am certain that the payments were never made by the committee of the estate on that footing to them; and if they had been it would have been unauthorized on the part of the committee of the estate, seeing that the committees of the person well knew under what order this money was paid, and that it was the lunatic's money, or a portion of the lunatic's money, which they are, in my opinion, not entitled to retain to the full extent of the whole yearly payment. That being so it appears to me that in some shape or form the executors are entitled to recover from the committees of the person such portion of that yearly allowance as could not be said to have been properly expended by them for the purpose of the lunatic, having regard to the nature of the allowance made as yearly allowance by the order of the 24th of March, 1896. Although in the form of the order which I propose to make I shall not say anything expressly about it, I think it right to say this. I quite agree, if, the £2,500 having been paid, the lunatic had been maintained for the whole year, that the committees of the person could not have been obliged to account at all for any portion of that £2,500 unless a case had been made against them that they had not properly maintained the lunatic in accordance with the provisions of the order. But the cases which have decided that no account can be taken as against the committees of the person who have received a yearly payment, and duly maintained the lunatic, of what was done by them with the yearly allowance, do not apply to the case before me at all. The cases which show that in the ordinary circumstances committees of the person are not bound to account are liable to this exception. The committees of the person are liable to account, even if they have maintained the lunatic for a year, if, having received the full yearly allowance, it be shown against them that they have not properly maintained the lunatic, and in similar cases.

Now, in estimating what sum ought to be allowed to the committees of the person for the time they have maintained this lunatic, certainly attention ought to be paid to the rate of allowance, and the scheme of allowance provided for by the order of the 24th of March, 1896, and to the other provisions of that order, and probably also to the circumstance that in a case of this kind in making an allowance to the committees of the person it is not intended, so long as the committees of the person discharge their duty, to make them account or to prevent them from

possibly receiving indirectly some benefit from the order. I say that, so that when this inquiry is proceeded with, the committees of the person shall receive no injury. I shall take care myself—the inquiry being proceeded with in my chambers—to see that every just allowance is made to the committees of the person; but I do not think, they not having maintained this lunatic for the year, they can claim properly the whole yearly allowance. So far as I can see there is no authority which prevents my deciding in the way I am doing. The case of *Grosvenor* v. *Drax* is dealt with by Lord Cairns in *In re French*, and I need not again refer to it. But with regard to *In re Ponsonby*, I think the observations made by Lord St. Leonards—where he said of *Grosvenor* v. *Drax* that the great lawyers in the Privy Council who decided that case decided that the committee was entitled to retain the savings of the lunatic's maintenance—must be considered with reference to the ordinary case where the committee has duly maintained the lunatic for the full period for which the allowance was made, and no case was made against the committee of not having properly applied the allowance in accordance with the provisions of the scheme under which the order was made, or not having properly maintained the lunatic. I do not think Lord St. Leonards could have intended to lay down the general proposition that when once the committee has received the lunatic's money he is, under no circumstances, bound to account for the money so received.

I therefore propose to direct an inquiry what sum should be allowed for the maintenance of the lunatic during the time she was maintained, regard being had to the order dated the 24th of March, 1896, and what sums have been paid to the defendants by the committee of the estate on account of the yearly allowance provided by that order. Then there will be liberty to apply in chambers to the plaintiffs for the payment of any balance that may be found due to the lunatic's estate on taking those inquiries. I reserve the costs of the action until it is seen how the inquiries turn out. With regard to the minor point raised that one of the committees of the person died, it appears to me that the receipt by the two committees of the lunatic's money from the committee of her estate was a receipt of moneys in the circumstances, for which they were, both of them, bound to account in equity, and, inasmuch as both received it, the executors of the deceased committee are liable to account just as much as the surviving committee. I have assumed that the executors of the deceased committee admit assets. Is that so? [*Buckley*.—Yes, my lord, that is so.] If not, there must be liberty to apply.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Longbourne, Stevens, & Co.*

Solicitors for the defendants, *Hickin, Smith, & Capel-Cure.*

Court of Appeal.

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) — July 11.

In re CALCOTT AND ELVIN'S CONTRACT. (*a*.)

Bankruptcy—Order of adjudication—Middlesex Registry—Deed or conveyance—Priorities—Middlesex Registry Act (7 *Anne c.* 20)—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 54 (4), 121.

An order under section 121 *of the Bankruptcy Act*, 1883, *whereby a person is adjudicated a bankrupt is not a deed or conveyance within the meaning of the Middlesex Registry Act, so as to require, or be capable of, registration thereunder.*

Decision of Kekewich, J., ante, *p.* 457, *reversed.*

Appeal from the decision of Kekewich, J., *ante*, p. 457.

Under an indenture of the 7th day of February, 1881, certain leasehold properties in Maida Vale, London, were demised to Michael Death for forty-one years.

By two indentures of mortgage dated respectively the 4th of September, 1894, and the 25th of December, 1894, Michael Death mortgaged the said premises to Calcott to secure the repayment of moneys advanced to him by Calcott. These mortgages were respectively duly registered in the Middlesex Land Registry on the 10th of October, 1894, and the 29th of December, 1894. Michael Death made default, and Calcott entered into possession of the mortgaged property, and subsequently on the 16th of November, 1897, in exercise of his power of sale as mortgagee, contracted to sell the premises to Elvin.

Prior to the completion of the sale Elvin ascertained that Michael Death then was and since 1887 had been an undischarged bankrupt, and that he had been adjudicated bankrupt by an order dated the 28th of January, 1887, made under section 20 of the Bankruptcy Act, 1883, and also that on the 29th of January, 1887, an order had been made under section 121 of the same Act for the summary administration of his estate.

The official receiver, who by virtue of these orders became Michael Death's trustee in bankruptcy, had registered no memorial of his title of the premises.

In view of the above facts the purchaser refused to complete his contract.

A summons was issued by the vendor asking for a declaration that, notwithstanding Michael Death's bankruptcy in 1887, the vendor had a good title as mortgagee.

Kekewich, J., held that, as the order of adjudication in bankruptcy of Michael Death had not been registered, the title of the vendor-mortgagee took priority, and was a good title (see *ante*, p. 457).

The purchaser appealed.

Rowden and *A. H. Carrington*, for the appellant, the purchaser.—The vendor has no title as against the official receiver. The official receiver's title is not postponed or in any way prejudiced by non-registration. Under the Trustee Act, 1893, section 12 (4), the person making a vesting declaration is to be deemed the conveying party, but there is no such declaration in the present case. The order of adjudication was made under section 121 of the Bankruptcy Act, 1883, and thereupon the pro-

(*a*.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

perty vests: section 20. A mere adjudication, however made, cannot comply with the rules which have been made as to the method of registration. [CHITTY, L.J. —You can only register what appears upon the deed or will.] It was not the order which passed the property; there is no magic in the word "conveyance": *per* Lord Cairns in *Credland* v. *Potter*, 23 W. R. 36, L. R. 10 Ch. App. 8. Further, in any event this is not such a title as ought to be forced on a purchaser. *In re New Land Development Association and Fagence's* 40 W. R. 551, [1892] 2 Ch. 138; *Burrows* v. *Holley*, 35 W. R. 592, 35 Ch. D. 123, were also cited.

Warrington, Q.C., and *Muir Mackenzie*, for the vendor.—The order appealed from is right. It is the order of adjudication, not merely the Act of Parliament, which passes the property. In *In re Clayton and Barclay's Contract*, 43 W. R. 549, [1895] 2 Ch. 212, the purchaser was compelled to take a title depending on the construction of the Bankruptcy Act, 1883.

Rowden was not called upon to reply.

LINDLEY, M.R.—The question raised is one of very great importance in dealing with property in Middlesex subject to the Middlesex Registry Act. What we have to consider is whether, if a person who has property in Middlesex is adjudicated a bankrupt, the effect of which of course is to transfer his property to his trustee in bankruptcy, the adjudication of bankruptcy is a deed or conveyance which has to be registered under the Middlesex Registry Act of Anne, and which if not registered will be postponed to some subsequently registered deed executed by the bankrupt.

Now, we have all had some experience in conveyancing, and in bankruptcy matters too, but I confess, speaking for myself, that the idea that an adjudication in bankruptcy requires to be registered in Middlesex under the statute of Anne, is an entire novelty to me, and I have never heard such a theory suggested. It does not follow that my recollection is accurate and it does not follow that there is not something in the Act of Parliament which I have forgotten, or which qualifies it, but still it is a novelty to all of us.

Just let us see how the matter stands. The Act of 7 Anne, c. 20, begins with a preamble, which is that by different and secret ways of conveying lands, tenements, and hereditaments, people who are disposed could commit frauds, and so on. Then it enacts, in section 1 (the expressions of which have received a very large construction and interpretation), that deeds and conveyances of lands in Middlesex should be registered. Then there is a section showing what the memorial is to contain. If asked whether an order adjudicating a man a bankrupt is a deed or conveyance, what would anybody say using the language in the ordinary sense? They would say that it is nothing of the sort; nor is it, and no amount of ingenuity can make an order adjudicating a man a bankrupt either a deed or a conveyance. It is an order. There may be some orders, and there are some orders, such as vesting orders, which may amount to a conveyance within the Act, but we have nothing to do with these. All we have to do with is an order adjudicating a man a bankrupt. Now that order is made, and in order to see the effect of it we must look at the Bankruptcy Act, 1883. That Act of 1883 is framed upon lines which are in some respects new. Before 1849 the old machinery involved the execution of deeds of assignment or a conveyance from the bankrupt to his assignee. When that was the machinery adopted those deeds of assignment came within the very words of the statute of Anne, and that statute applied to them. But when that machinery is done away with, when there is no conveyance and no deed of assignment at all, what is there left to come within the fair meaning of the words "deed" or "conveyance" in the statute of Anne?

Now let us consider what we have to deal with under the Bankruptcy Act, 1883. Section 20 is the first one necessary to be referred to, and that says: "Where a receiving order is made against a debtor, then if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged a bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor, or such further time as the court may allow, the court shall adjudge the debtor bankrupt, and thereupon"—that is, upon the adjudication of the debtor to be a bankrupt—"the property of the bankrupt shall become divisible among his creditors," and shall vest in a trustee. That is the effect of the adjudication of the debtor. Now, if we pass on to section 21 we have this: "Where a debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, the creditors may, by ordinary resolution, appoint some fit person, whether a creditor or not, to fill the office of trustee"; and then, upon that person being appointed, a certificate by the Board of Trade is given certifying his appointment. I do not think I need pursue that further.

Then I think the next important section is section 54: "Until a trustee is appointed, the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee."

These are the sections we have to deal with. It follows that the order by which a man is adjudicated a bankrupt, and which by the rules has to be in writing and in a particular form, is simply to the effect that So-and-so has been adjudged bankrupt. Is that a deed or conveyance within the meaning of the statute of Anne? It appears to me to be scarcely necessary to ask the question to obtain the answer that it is not. No doubt the effect of it is that all the property vested in the debtor becomes vested in the trustee, but that does not make the order a conveyance. There is none of the framework of a deed or conveyance, there is no conveying party, no grantor, no grantee, and there is nothing which can by any stretch of imagination convert it from the one to the other. That is the simple answer to this question. It is not a deed or a conveyance. Neither is it a secret document which requires to be brought within the statute of Anne. Anybody can go to the place where a person has been adjudicated a bankrupt and make inquiries. It is neither difficult to find out nor is there anything secret about it at all, and it is not within the mischief. But then a difficulty is created by sub-section 4 of section 54, which, referring to the appointment of a trustee, says: "The certificate of appointment of a trustee" —that is, under section 21—"shall, for all purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly." Why that is put in I am not prepared to say. In order to understand it, it would be necessary to go back more in detail than I have been enabled to do into the previous legislation and trace out and see the reproduction in a modern form of an

old provision which is certainly to be found in the Act of 1849, and, I believe, in some previous Bankruptcy Acts. I have not worked that out, but there is this observation to be made upon it, that in 1883, when the Legislature was saying what should be a conveyance or assignment, they omitted the order of adjudication and said a "certificate"; and here there is no certificate required, in other words there is nothing which can by any fair interpretation be brought within the statute of Anne, and, as I have already said, it is not within the mischief at all.

Then some reliance was placed upon some general language of Lord Cairns in *Credland* v. *Potter*. But Lord Cairns was there dealing with an equitable mortgage and there was the creating of a further charge, and his lordship says it ought to come within the statute of Anne, and I have no doubt says so quite correctly considering the interpretation put upon that statute. It would be straining the language to hold that this adjudication in bankruptcy requires to be registered. The idea is perfectly new, and I say that the contention cannot be supported.

It is therefore quite unnecessary to say anything about forcing on the purchaser a doubtful title or a law suit, or anything of the kind. In my opinion the objection is a perfectly sound one and the vendor has no title against the trustee in bankruptcy. The appeal must therefore be allowed.

CHITTY, L.J.—I am of the same opinion. The contention of the respondent which was accepted by Kekewich, J., is that the order of adjudication was a conveyance within the statute of Anne, and, not being upon the register, this—I cannot say this order, but the conveyance effected by the Act of Parliament—is fraudulent and void. I accept entirely the statement by Lord Cairns in *Credland* v. *Potter* that there is no magical meaning in the word "conveyance," and his lordship there goes on to say it denotes an instrument which carries from one person to another an interest in land. An Act of Parliament would not be within the meaning of that language. Then is the adjudication order, on the true construction of the Bankruptcy Act, 1883, a "conveyance"? In my opinion it is not. Now, the principal sections to be dealt with are the 20th and the 54th. It is by force of the enactment that the property passes, but it passes on the adjudication. It does not pass by virtue of the adjudication so as to make the adjudication order a conveyance. That, I think, is plain on the language of the 20th section, which says "thereupon" the property shall be vested in the trustee. Then as regards section 54, sub-section (4), I think it right to add an observation or two. That fourth sub-section appears historically to be a reproduction under a short form of the 143rd section of the Act of 1849, which was a reproduction almost in words of the enactment in the 1 & 2 Will. 4, c. 56, with the necessary modifications having regard to the change in the mode of passing the bankrupt's property. The Act of Will. 4 allowed the registration, to put it quite shortly, of the appointment of the assignees in bankruptcy. The old statute, as is well known, required a deed of conveyance; then there were again modifications which are also equally well known, resulting at last in a vesting through the statute. But then there were careful provisions introduced to show what should be registered for the purposes of the Registry Act. Now, in section 54 it is the appointment of the trustee which may be registered, and that is to be deemed a conveyance of the property. That was for the sake of convenience. We have therefore in the Bankruptcy Act, 1883, an express enactment with respect to the registration of the appointment of the trustee, but there is no such enactment with regard to the registration of the order of adjudication. It follows that the Legislature had its attention directed to the question of what should be deemed to be a conveyance, and what might registered under the statute of Anne, but it is nowhere said that the order of adjudication is to be deemed to be a conveyance, nor has it said one word about it being registered. I agree with what the Master of the Rolls has said, and I never heard of the registration of an adjudication in bankruptcy. To sum up my remarks on this point, it is by the force of the statute that the property passes, and not by virtue of the order as if it were a conveyance. The result is that I agree with the Master of the Rolls that this order cannot stand on the general point that has been argued.

COLLINS, L.J.—I am of the same opinion, and I cannot usefully add anything to the reasons that have been given.

Solicitors, *Percy C. Ray; G. L. B. Calcott.*

From Q. B. Div. (Bkcy.)
(Lindley, M.R., and Chitty and Collins, L.JJ.) July 8.

In re A DEBTOR.
Ex parte THE DEBTOR. (*a.*)

Married woman—Bankruptcy—Married woman not trading separately from her husband—Receiving order — Marriage after petition presented — Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 5.

A receiving order in bankruptcy cannot be made against a married woman not trading separately from her husband, notwithstanding that she was a spinster when the debt was incurred, judgment obtained, the act of bankruptcy committed, and the petition presented, and when, at a preliminary hearing of the petition, she admitted the debt and the act of bankruptcy.

Appeal by the debtor, a married woman, against a receiving order made by Registrar Giffard.

In December, 1897, proceedings were taken against the debtor, then a spinster, by a person who alleged himself to be her creditor for a sum of over £200.

In January, 1898, the plaintiff obtained judgment for a sum of £212 10s. 2d., respecting debt and costs. The debtor, having failed to comply with the requirements of a bankruptcy notice served by another creditor in November, 1897, in respect of another debt, the plaintiff then presented a bankruptcy petition against her.

The petition came on for hearing on the 22nd of February, 1898, when, the debt and the act of bankruptcy having been admitted, the further hearing was adjourned till the 3rd of March, 1898.

On the 2nd of March, 1898, the debtor was married. In the subsequent proceedings it was admitted that she was not trading separately from her husband.

On the 3rd of March, 1898, the debtor admitting the debt and the act of bankruptcy, and undertaking not to ask for costs against the petitioner if the petition should be dismissed, the hearing was further adjourned. After another adjournment the petition was disposed of on the 24th of March, 1898, when Registrar Giffard, following a decision of

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

Registrar Linklater, in an unreported case in 1894, made a receiving order against the debtor. There was no other decision covering the question which arose in the present case as to the liability of a married woman in such circumstances to be made a bankrupt.

The debtor appealed.

F. Cooper Willis, for the appeal, referred to section 1, sub-section 5, and section 13 of the Married Women's Property Act, 1882; *In re Gardiner, Ex parte Coulson*, 36 W. R. 142, 20 Q. B. D. 248; *Ex parte Holland, In re Heneage*, 22 W. R. 425, 9 Ch. 307; and ss. 6, 7, and 152 of the Bankruptcy Act, 1883.

[COLLINS, L.J., referred to *Ex parte Jones, In re Grissell*, 28 W. R. 287, 12 Ch. D. 484.]

The petitioning creditor did not appear.

LINDLEY, M.R.—I do not think we should gain anything by further consideration of this case. It appears to us that upon the true construction of the Bankruptcy Act, 1883, and the Married Women's Property Act, 1882, the order appealed against cannot be supported, and must be discharged. The case is certainly a peculiar one. An action was brought against this lady, the debtor, before she was married, and judgment was obtained against her. She committed an act of bankruptcy, and a bankruptcy petition was then presented. All that, of course, was regular enough. When the petition came on for hearing she succeeded in inducing the court to let it stand over for a time, and before a receiving order was made she got married; and now she says that no such order can properly be made against her as a married woman.

I think the view of the law put forward on her behalf is the right one. If you look at the Married Women's Property Act, 1882, and at the decisions upon it, such cases as *Ex parte Holland, In re Heneage; In re Gardiner, Ex parte Coulson*; and *Ex parte Jones, In re Grissell*, it is plain that a married woman can be made bankrupt in respect of her separate estate only when trading separately from her husband. The receiving order appealed against must therefore be discharged, but of course without costs.

CHITTY, L.J.—I am of the same opinion.

COLLINS, L.J.—I am of the same opinion.

Order discharged.

Solicitors, *Colyer & Colyer*.

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) — July 4.

In re WHITE.

PENNELL *v.* FRANKLIN. (*a.*)

Solicitor—Executor-trustee—Will—Power to solicitor to make professional charges—Insolvent estate—Creditors' action.

A professional trustee or executor is not entitled to charge profit-costs under a power in a will, if the testator's estate is insolvent.

Decision of Kekewich, J. (ante, *p.* 247, [1898] 1 *Ch.* 297), *affirmed.*

This was an appeal from a decision of Kekewich, J. (*ante*, p. 247, [1898] 1 Ch. 297), that a solicitor-trustee who was empowered by a will to make professional charges was not entitled, on the estate being found insolvent, to any profit-costs of acting as solicitor to the estate as against creditors.

The testator, who died in 1891, appointed Mr. Franklin, a solicitor, with two other gentlemen, trustees and executors of his will. By a clause therein Mr. Franklin was to be allowed all professional and other charges for time and trouble which as a solicitor he would have been entitled to make had he not been an executor.

The testator's estate was insolvent, and the will was proved by Mr. Franklin alone, the other two executors having disclaimed.

An action being brought by creditors against Mr. Franklin as sole executor was defended by him in person, and he acted as solicitor for himself. A summons was then taken out by the creditors for a declaration that the testator's estate being insufficient to pay his debts in full Mr. Franklin was not entitled to any profit-costs by reason of the declaration in the testator's will.

Kekewich, J., following *In re Thorley, Thorley* v. *Massam*, 39 W. R. 565, [1891] 2 Ch. 613, held that the power to make professional charges given by the will was a legacy, and that the executor was, under the circumstances, not entitled to profit-costs.

The executor appealed.

Cozens-Hardy, Q.C., and *J. G. Wood*, for the appellant, used arguments similar to those in the court below.

Farwell, Q.C., and *C. G. Church*, for the respondent, were not called upon to argue.

LINDLEY, M.R.—I do not think it is possible for us to differ judicially from the decision of the learned judge in the court below. This is a creditor's action. The defendant Franklin is a trustee who happens to be a solicitor, and happens to be the only trustee and the only executor of the testator. The two other executors and trustees disclaimed, and must therefore be disregarded. It is impossible to get over the authorities and the principles on which they are based. The estate is insolvent, and the solicitor is seeking to charge profit-costs upon the ground that the will of the testator contains a clause enabling him to do so. Kekewich, J., has declared that, having regard to the insolvency of the estate, the defendant is not entitled to any profit-costs, notwithstanding the declaration contained in the testator's will. Looking at the decision, I do not see how we can come to any other conclusion, and the appeal must be dismissed with costs.

CHITTY, L.J.—I am of the same opinion. I see no escape from the proposition of law laid down by Kekewich, J. The law is that, in the absence of a direction to the contrary, a trustee must give his services gratuitously. The declaration made by the testator is bounty on his part. No one can claim the bounty until the creditors are satisfied. The principle applies not only to solicitor-trustees, but to all trustees, to accountant-trustees, to architect-trustees, and surveyor-trustees; in fact, to all professional trustees.

COLLINS, L.J.—I am of the same opinion.

Solicitors, *S. Franklin; Maitlands, Peckham, & Co.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

From Chan. Div. (Lindley, M.R., and Chitty and Collins, L.JJ.) [and Chan. Div. (Byrne, J.)] — June 1, 7; July 1.

In re DIXON.

TOUSEY *v.* SHEFFIELD. (*a.*)

Solicitor—Costs—Country solicitor—Attendance at hearing in London—Originating summons—R. S. C., 1883, *App. N., Nos.* 173, 174.

The taxing officer has a discretion, in rare and exceptional cases, to allow the costs of the attendance of a country solicitor at the hearing of a cause tried in London even where all the evidence is taken by affidavit.

Per Byrne, J.—*The principles upon which taxation should proceed in a district registry are the same as those acted upon in cases commenced in London.*

Summons.

This was an application to review taxation as between party and party in respect of allowances by the district registrar at Liverpool for the attendances of Liverpool solicitors in London on the hearing of an originating summons, all the evidence having been by affidavit. The originating summons had been taken out in the district registry at Liverpool by persons who were entitled to one-fourth of the estate of John Dixon (deceased) in the matter of the Judicial Trustees Act, 1896, and asked for the removal of the trustees of the estate, who were defendants, on the ground of misconduct, and was equivalent to a hostile action, although commenced by summons. It came on for hearing before Byrne, J., as the judge to whom the Chancery matters of the Manchester and Liverpool district registries were specially assigned, on the 18th of February last, and again on the 26th of the same month. Judgment was delivered on the 26th of March, when the summons was dismissed with costs. During these proceedings Messrs. Tyrer & Co., of Liverpool, as agents for Messrs. Donald & Co., of Carlisle, conducted the case for some of the defendants (including two of the trustees), coming up to London for the purpose; and Messrs. Norris & Sons, of Liverpool, did the same for the third trustee.

Upon taxation before the district registrar at Liverpool, Messrs. Tyrer & Co. brought in a bill of costs which included the following items:

		£	s.	d
161.—Feb. 18.	Attending court when case part heard and adjourned to the 26th inst. . .	6	6	0
62. ,, ,,	Paid railway fare and expenses	5	5	0
164. ,, 26.	Attending adjourned hearing	6	6	0
165. ,, ,,	Paid railway fare and expenses	5	5	0

Messrs. Norris & Sons' bill contained similar items.

The plaintiffs objected to the whole of items 162 and 165, and to so much of items 161 and 164 as exceeded the amount which would have been allowed had the solicitors instructed their London agents to make the attendances to which these items related, and they made the same objection to the corresponding items on the bill of Messrs. Norris & Sons. The registrar allowed these items. The plaintiffs now applied by summons that their objections might be allowed, and that it should be referred back to the district registrar to vary his certificate accordingly.

A. à Becket Terrell, for the applicants.—When a Liverpool solicitor conducts a case in the High Court in London he must do so upon the same terms as any other solicitor practising in the High Court, and cannot charge for coming to court merely because he lives at a distance (ord. 45, r. 27 (43)). The district registry is part of the High Court. Why should his expenses of coming to London be allowed any more than those of a barrister who has to do the same thing? The rule is that the attendance of the country solicitor at the hearing is not allowed: *Ex parte Snow, In re Sherwell*, W. N. [1879], p. 22. This rule is never relaxed in cases where the evidence is by affidavit, as here. The cases of *The Soto*, 41 W. R. 479, [1893] P. 73, and *Bell* v. *Aitkin*, 16 W. R. 704, L. R. 3 C. P. 320, were cases of evidence *vivâ voce*.

F. M. Preston, for some of the respondents.—The registrar has a discretion to allow for these attendances of the country solicitor: *The Soto*; *Bell* v. *Aitkin*; *In re Forster, Ex parte Dickins*, 26 W. R. 915, 8 Ch. D. 598; *In re Storer*, 32 W. R. 767, 26 Ch. D. 189. Here the registrar was right in exercising his discretion in favour of allowing the charges; the case was one where it was specially desirable that the country solicitor who knew all the facts should be present, as charges of gross misconduct were made.

Rotch, for other of the respondents, referred to Vol. 2 of the Annual Practice, 1898, App. N., Nos. 173 and 174, p. 202.

His lordship reserved judgment to consult the taxing-masters.

July 1.—BYRNE, J.—In my opinion, so far as the Chancery Division is concerned, the rules and practice in respect of the taxation of party and party costs are the same in the London taxing-masters' offices and in the offices of the district registrars of Liverpool and Manchester, and I consider that such rules and practice apply in respect of cases heard in London exactly as if proceedings had been initiated in any other district registry than those of Liverpool and Manchester and were taxed in London.

In other words the district registry in Liverpool and Manchester ought to act upon the same principles as the London taxing-masters act in taxing costs where the proceedings have been commenced in district registries in other parts of the country.

I have given the matter careful consideration and have made inquiry of two of the London taxing-masters.

In the result I am satisfied that there is no such hard-and-fast rule as that suggested by the plaintiff's counsel—namely, that in no case where all the evidence is taken by affidavit ought the costs of the attendance of the country solicitor to be allowed.

On the contrary I believe it to be in accordance with the existing practice to allow such costs in certain rare and exceptional cases in the exercise of the discretion of the taxing officer. This discretion ought to be and is exercised with the utmost care and caution. One of the London taxing-masters informs me that he does not think he has allowed such costs on a party and party taxation in more than about half-a-dozen instances. I can well understand that cases do occur where personal fraud or misconduct has been charged and has failed, where all the preliminary proceedings have been taken in the district registry, and where all these facts are known in the offices of the country solicitor, that the taxing officer may fairly consider the presence in London of the country solicitor to be reasonably necessary for the conduct of the defendants' case. At the same time it affords no reason at all for exercising

(*a.*) Reported by R. C. MACKENZIE and NEVILLE TEBBUTT, Esqs., Barristers-at-Law.

the discretion that no London agent has been employed.

If the charges for attendance of the country solicitor are allowed in the rare and exceptional cases referred to, it is not in accordance with the practice as I understand it to allow charges also for the attendance of the London solicitor.

I have confined my remarks to cases arising in the Chancery Division, and I do not consider that I am departing from the general rule laid down in the case of *The Soto*, [1893] P. 73. My view is that upon a party and party taxation the costs of an unsuccessful litigant are not to be increased simply by reason of the opponent client, or his local solicitor in Liverpool or Manchester, electing that such solicitor should attend in London instead of employing a London agent; that no different rule or practice ought to prevail upon taxation before a Liverpool or Manchester district registrar than that prevailing upon taxation in London of the costs arising in any other of the numerous district registries throughout the country; and that the discretion of the taxing officer ought always to be exercised in such a matter (as I have no reason to doubt it is) with very great care and only in exceptional cases. The present case was a very exceptional one, and the discretion of the taxing officer having been exercised with care and after consultation with a most experienced London taxing-master, I am not prepared to interfere with such discretion or to go into the question of the amount of the allowances complained of.

I may add that the Forms 173 and 174 in Appendix N. to the R. S. C., 1883, Annual Practice, vol. 2, p. 202, cited by respondent's counsel, have no bearing upon the present case inasmuch as they do not apply to cases heard in London or Middlesex.

The plaintiff appealed.

A. à B. Terrell, for the appeal.

Preston (*Eve, Q.C.*, with him), for certain defendants.

Rotch, for other defendants.

[The arguments were the same as in the court below.]

LINDLEY, M.R.—I am not disposed to quarrel with the judgment of Byrne, J. Bearing in mind the nature of the proceedings and the very serious character of the attack which was made on the conduct of both the defendants, I do not think it can be said to have been at all unreasonable that the solicitor in the country, who knew not only what was in the affidavits but a great deal more which was not in them, and who was in a position to explain a great many things which might be referred to in the course of so complicated a litigation—I do not think it was unreasonable that he should attend at the hearing in London. On the contrary, I think Byrne, J., was quite right in holding that it was reasonable he should so attend. That disposes of the case. The appeal must be dismissed.

CHITTY, L.J.—The rule as to allowances in such cases as this is not inflexible. The country solicitor's attendance in London may in proper cases be allowed for. Byrne, J., has held, after taking great care, and seeing a London taxing-master, that the circumstances here are very exceptional, and that the allowance ought to be made. Now, though it is more difficult where the case is presented by affidavit to make out that the circumstances are of that exceptional character which justifies the allowance, I think there is no inflexible rule against the allowance even where the case is proceeding upon affidavit evidence. Special circumstances are in any case required, and so the district registrar has certified in the answer he has given to the plaintiff's objections. On these grounds, and on these grounds only, I consider that the appeal fails. I say on these grounds only, because I am not disposed to go into the more general question to which the respondents' counsel was desirous of calling our attention, and on which we have not heard him, so that it would not be right for us to express any opinion adverse to what he has said. We sit here to dispose of appeals, and these considerations are sufficient to dispose of the present appeal. The general questions as to Liverpool and Manchester business, and as to originating summonses issued there and the special privileges they are alleged to have, must therefore be left to be settled hereafter when some case calls for a decision on those points.

COLLINS, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors, *J. F. Harrison & Burton*, Liverpool; *Burton, Yeates, & Hart*, for *Tyrer, Kenion, Tyrer, & Simpson*, Liverpool; *Norris & Sons.*

From Q. B. Div. (Bkcy.)
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) June 10.

In re CLARK
Ex parte SCHULZE. (*a.*)

Married woman — Bankruptcy — Money lent for private purposes—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.

Section 3 *of the Married Women's Property Act*, 1882, *does not apply to a case where money has been advanced by a wife to her husband for a purpose other than that of the husband's trade or business.*

Appeal by a creditor from an order of Wright, J., admitting a proof carried in by the wife of the debtor.

The proof was in respect of money lent to the debtor by his wife for the purpose of defraying household expenses.

The Married Women's Property Act, 1882, s. 3: "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

The wife's proof was admitted for voting purposes by the chairman at the first meeting of creditors. Wright, J., held that the proof was rightly admitted.

One of the creditors appealed.

C. A. Russell, Q.C., and *Hansell*, for the appellant.—The operation of section 3 of the Married Women's Property Act, 1882, is not confined to cases where the wife advances money for the purpose of her husband's trade or business. The effect of the words "or otherwise" is to include advances for other purposes. It is true that in *Ex parte Tidswell, In re Tidswell*, 35 W. R. 669, Cave, J., decided contrary to our contention, but that case is inconsistent with the

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

same learned judge's decision in *Ex parte Nottingham, In re Tuff*, 35 W. R. 567, 19 Q. B. D. 88, and ought not to be followed. *Alexander* v. *Barnhill*, 21 L. R. Ir. 511, 37 W. R. Dig. 5, is in point, and is in the appellant's favour.

Frank Mellor (*Upjohn, Q.C.*, with him), for the respondent.—If the appellant's contention as to the effect of "or otherwise" is right, there was no necessity to mention trade or business at all, for the sections would apply to all loans by a wife to a husband. *Ex parte Tidswell, In re Tidswell*, was followed by Stirling, J., in *Mackintosh* v. *Pogose*, 43 W. R. 247, [1895] 1 Ch. 505.

A. L. SMITH, L.J.—The appellant's contention in effect is that whenever a wife lends money to her husband and he becomes bankrupt, her claim must be postponed until all the other creditors have been satisfied. The question is whether that is the true construction of section 3 of the Married Women's Property Act, 1882. I am unable to read the section in that way, for it entirely ignores the words "for the purpose of any trade or business carried on by him, or otherwise." The section is not dealing with every kind of loan that a wife may make to her husband, but with loans for a particular purpose. The words "or otherwise" do no doubt raise a difficulty, but, speaking for myself, I am of opinion that, whatever the true meaning of those words may be, it cannot be that the limitation as to trade or business is to be cut out. I admit that I do not feel at all positive as to what they do mean. In *Ex parte Tidswell* Cave, J., dealing with this section, said: "I guess, rather than conclude, that the draftsman meant to say, 'any money of the wife lent by her to her husband for the purpose of any trade or business carried on by him, whether alone or in partnership with others, and whether personally or by an agent, &c.,' and that he did not mean to say 'for the purpose of any trade or business carried on by him, or for any other purpose.'" I do not say whether that suggested interpretation is the right one, but I agree with Cave, J.'s, decision that the section does not apply where the money is lent by the wife for purposes other than those of the husband's trade or business.

It is said that *Ex parte Tidswell* is in conflict with *Ex parte Nottingham, In re Tuff*. That is not so, for in the latter case the wife's proof was admitted not against the husband but against a firm of which he was a member. I disagree with the decision in *Alexander* v. *Barnhill* in so far as that case decides that section 3 applies to advances by a wife to her husband for any purpose whatever. I am therefore of opinion that the contention of the appellant fails and the appeal must be dismissed.

RIGBY, L.J.—I am of the same opinion. I confess that I have had great difficulty in coming to a conclusion as to what is the proper construction to be placed upon section 3 of the Married Women's Property Act, 1882. It seems to me to be impossible to give to that section an interpretation which is altogether satisfactory, for there is much to be said against either of the constructions which have been put forward. On the one hand it is contended that the section only applies to the case of a loan by a wife to her husband for the purpose of his business, and the way in which the matter is dealt with does confirm that view, for the Legislature appears to have thought that if a wife is prepared to invest money in her husband's business, it is not fair that she should compete with the other creditors. It is said on the other hand that the section applies to whatever the purpose for which the advance was intended, and that the words "for the purpose of his trade or business" were merely introduced by way of illustration. If that were so, one would have expected to find the word "whether" inserted before those words.

We have been referred to many other passages in the Act where the words "or otherwise" occur, but I do not think these instances afford any assistance, for the difficulty is to ascertain what is the antecedent to the words "otherwise than" in this particular section. The proximate antecedent is "carried on by him," and therefore *primâ facie* the words can be read so as to include any business whether carried on by the husband or by anyone else, but I do not think that the section was intended to have that wide application. On the other hand, if a business carried on by another person is excluded, then any business of the husband's, whether carried on by himself personally or through an agent, would be his business, and so the words "or otherwise" would be unnecessary. I prefer, however, to adopt the latter construction, which appears to me to be the most reasonable, for I do not think that the section was intended to cover loans to the husband for any purpose whatever, and I prefer to say that the words "or otherwise" must in some way or other be intended to be connected with the words "any business carried on by the husband."

VAUGHAN WILLIAMS, L.J.—Although I entirely agree with what has been said by the other members of the court as to the absurd practical result which would follow if the construction of the section contended for by the appellant were adopted, I wish to say that I think that the construction which the court has to-day put upon the section is that which the court ought to arrive at, by applying the ordinary canons of construction, quite independently of the result which would be the outcome of holding that the section applies to every kind of loan by a wife to her husband. The basis of the rule of construction is that general words following particular words must be restricted to the same genus as the particular words. Now, this section commences with a specific proposition, and that specific proposition is followed by the words "or otherwise," and it seems to me that just as general words are restricted to the same genus as the preceding specific words, so when you have a specific proposition in a section you ought in construing that section to assume, unless compelled to the contrary, that the general words are covered by the specific proposition. In fact general words of this sort can hardly avoid being ancillary to the specific proposition, and the general words ought not to be construed so as to do away with the specific proposition with which the section commences.

Appeal dismissed.

Solicitors for the appellant, *Hillberys.*

Solicitors for the respondent, *Arnold & Henry White.*

From Q. B. Div. (Bkcy.) (A. L. Smith, Chitty, and Vaughan Williams, L.JJ.) — April 22, 29.

In re CRONMIRE.
Ex parte WAUD. (*a.*)

Gaming—Contracts for differences—Profits of gambling

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

transactions applied to purchase of stock for investment—Non-delivery of stock—Damages—Deposit of sums as "cover"—"Cover" not used—Right to recover—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

Gambling transactions between the debtor and the respondent in stocks and shares having resulted in the respondent's favour, the respondent directed the debtor to apply the balance due to him in the purchase of certain railway stock for investment. The debtor purchased the stock but died insolvent without having delivered the stock to the respondent.

Held, that the respondent could not prove against the debtor's estate for damages for non-delivery of the stock.

The respondent deposited with the debtor certain sums as "cover" to secure the debtor against loss on the gambling transactions, but as the transactions resulted in the respondent's favour the "cover" was not used for that purpose.

Held, that the respondent was entitled to prove against the debtor's estate for the amount of the "cover."

Appeal from the decision of Wright, J., admitting the proof of one Waud against the estate of the debtor.

The debtor, who had carried on business as an outside stock and share broker under the name of George Gregory & Co., died insolvent on the 16th of April, 1897. An order was made under section 125 of the Bankruptcy Act, 1883, for the administration of his estate and a trustee was appointed.

In the beginning of 1897 the debtor was indebted to Waud in a sum of £375, the result of transactions between them which in form purported to be sales and purchases of stocks and shares but which were in fact contracts for differences only. On the 8th of February, 1897, Waud gave an order to the debtor to purchase £200 Great Eastern Railway Stock for investment. On the same day the debtor telegraphed to Waud: "Sold you 200 Easterns 113⅜ invested," and sent a contract note stating that he had sold Waud the stock "to be taken up." The next day Waud instructed the debtor to pay himself for this stock out of the balance in his hands due to Waud. The debtor acquiesced in this arrangement. On the 3rd of April the debtor sold to Waud £200 Dover "A." Stock, payment for which was also to be made out of the balance held by the debtor. In neither case had the debtor at the date of his death forwarded transfers to Waud although continually requested to do so. Sums of money amounting in all to about £60 had been advanced at different times by Waud to the debtor by way of "cover" on specific gambling transactions, but the "cover" had never been appropriated or required because the transactions in respect of which the various sums had been deposited had resulted in favour of Waud. The return of the "cover" was not demanded till after the making of the administration order.

Waud claimed to prove against the debtor's estate for £347, the balance which was admitted by the debtor to be due and which Waud had directed to be applied in payment of the Great Eastern and Dover "A" Stocks, and for £60 the amount of the "cover."

The trustee rejected the proof. On appeal an issue was directed, and the jury found that the transactions between Waud and the debter were gambling transactions with the exception of the purchases of the Great Eastern and Dover "A" Stocks, which were *bonâ fide* transactions.

On the hearing of the appeal it was agreed that the proof should be amended by making it a claim for damages for the non-delivery of the railway stocks.

Wright, J., held that Waud was entitled to prove against the estate.

The trustee appealed.

Robson, Q.C., and *Macaskie*, for the appellant.—The jury have found that the balances due to Waud from the debtor resulted from gambling transactions. The Gaming Act, 1845, prevents those balances from being recoverable and Waud cannot put himself in a better position by agreeing to take stock instead of a cash payment, or by claiming damages for non-delivery of the stock. The amounts deposited as cover also come within the Gaming Act and cannot be recovered, for they are sums which "have been deposited to abide the event on which any wager shall have been made" within section 18, the event being the rise or fall of the stocks and shares gambled in.

They cited *Universal Stock Exchange* v. *Strachan*, 44 W. R. 497, [1896] A. C. 166; *Strachan* v. *Universal Stock Exchange* (*No.* 2), 44 W. R. 90, [1895] 2 Q. B. 697; *Manning* v. *Purcell*, 3 W. R. 273, 7 De G. M. & G. 55; *Gatty* v. *Field*, 9 Q. B. 431.

H. Reed, Q.C., and *Israel Davis*, for the respondent.—There was a settlement of accounts between Waud and the debtor amounting to an account stated. That is evidence that there was a payment by the debtor to Waud of the amount owing for differences. Wright, J., has found as a fact that there was a payment and that Waud subsequently appropriated the amount to the purchase of the railway stocks. The case, therefore, does not come within the Gaming Act. [They cited *Spargo's case*, 21 W. R. 306. L. R. 8 Ch. App. 407; *Ashby* v. *James*, 11 M. & W. 542.] The sums deposited as "cover" were deposited as security in the event of a loss, which did not occur, and the "cover" was never appropriated or required for the purpose. The Gaming Act does not apply to a deposit made as security for differences: see Lord Herschell's judgment in *Universal Stock Exchange* v. *Strachan*.

They also referred to *Hampden* v. *Walsh*, 24 W. R. 607, 1 Q. B. D. 189; *Varney* v. *Hickman*, 5 C. B. 271; *Diggle* v. *Higgs*, 25 W. R. 777, 2 Ex. D. 422.

A. L. SMITH, L.J.—This is an appeal from the decision of Wright, J., allowing the appeal of Waud from the rejection by the trustee of the debtor's estate of Waud's proof against the estate, on the ground that the claim arose on contracts which were gaming transactions. The transactions between Waud and the debtor may be shortly summarized as follows: The debtor was an outside broker with whom Waud entered into certain transactions which, although in form they purported to be sales and purchases of stocks, were undoubtedly gaming transactions. The result of these transactions was that at a certain date there was a sum of £375 in the debtor's hands which had been won by Waud, and, apart from the Gaming Act, the debtor was indebted to Waud in that amount and bound in honour to pay. The debtor died insolvent, and an order was made for the administration of his estate in bankruptcy. Waud carried in a proof which was rejected by the trustee on the ground that the claim arose in respect of certain contracts which were gaming transactions. On appeal an issue was directed and the jury found that all the transactions which culminated in the balance of £375 were gaming transactions, but that the purchases of Great Eastern and Dover "A" Stocks which were made after the balance of £375 had been arrived at, were *bonâ fide* purchases for the purpose of investment, and were not made for the purpose of gaming. An affidavit has, however, been made by Waud which is in exact accordance with what I should have believed to be the case, and from that affidavit it appears that the two purchases of railway stock were to be delivered

to Waud and accepted in payment of the £375 which the debtor owed him. It is clear, therefore, that the stocks were purchased with the winnings of the gaming transactions, and it is said on behalf of the trustee that Waud's claim cannot be shaped so as to get quit of that fact. An ingenious argument by Waud's counsel as to what the transaction must have been, induced Wright, J., to disregard the account given by Waud in his affidavit as to what the real transaction was. That argument was that there had been an account stated between Waud and the debtor, and that there was, therefore, evidence that there had been a payment by the debtor of the amount of the balance due to Waud appropriated to the purchase of the railway stocks. An account stated may be evidence of payment, but it is not conclusive, and the question is whether there has been payment or not. How can we say in this case that there has been a payment of the money when Waud in his affidavit says that there was not? It seems to me, therefore, that Wright, J., was wrong in holding that Waud could prove against the estate for the £375, and that upon the true facts he cannot recover it from the debtor's estate either as a balance due to him or as damages for the non-delivery of the stock. On this part of the case I think that the judgment of Wright, J., must be reversed.

Then there is another question, as to the £60 deposited by Waud with the debtor as "cover." Now, we know what "cover" is. It is a sum of money deposited with the broker to secure him against loss in the event of a fall in the stock dealt in. There is nothing in this case to show that the word "cover" was not used in the ordinary sense. The law as to such a deposit is very tersely stated by Lord Herschell in *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166, at p. 173: "It is said that although it may be a gambling contract, yet, nevertheless, the very provisions of the section against gaming and wagering prevent the plaintiff recovering the security which he deposited with the defendants inasmuch as it is 'an article of value' deposited with them to 'abide the event of a wager.' That seems to me not to be the case. It was deposited as security against a debt which might arise from a gambling transaction. What the defendants are really seeking is to avail themselves of that security by virtue of a void contract, and it is impossible to say that that was an 'article of value' deposited with the defendants to abide the event of a wager. That was not really the nature of the transaction at all." That is Lord Herschell's opinion in that case in the House of Lords, in which the decision of this court was affirmed. I only wish to add that I am prepared to abide by everything which I said in the second *Strachan case*, but I do not think that that applies to this case. Here £60 was deposited as "cover" with the debtor. The gaming transactions have come to an end, with the result that the debtor's estate still has this £60 which belongs to Waud, and which was never required or used for any purpose, and therefore no answer can be set up to the claim for repayment. No question of appropriation arises here as in *Strachan* v. *Universal Stock Exchange* (*No.* 2), because in this case the object with which the money was deposited has come to an end without any necessity having arisen for the use of the money to secure the debtor. As to this part of the case I think that Waud is entitled to succeed.

CHITTY, L.J.—I am of the same opinion. A proof has been brought in by Waud against the debtor's estate. Waud has in his full and complete affidavit given a natural and reasonable version of what took place. The effect of it is that instead of receiving payment of the £375 which was owing to him he agreed to take instead the railway stock which had been purchased. Wright, J., disregarded that affidavit in favour of an argument addressed to him by Waud's counsel, but it seems to me that Waud ought not to be permitted to show that his affidavit is untrue. It is unnecessary for me to deal further with this point as I fully agree with everything that A. L. Smith, L.J., has said. I agree also with regard to the sums deposited as "cover." They were deposited as security, and the use of the word "cover" makes no difference. On this point the case comes within the decision of Lord Herschell in *Universal Stock Exchange* v. *Strachan*. These sums are free from the taint of gambling, but remain in the debtor's estate. The Gaming Act does not apply, and Waud is entitled to prove against the estate for the £60.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. I only wish to add one or two words as to the money deposited. I quite agree that, having regard to a long series of decisions, it is impossible to contend that the Gaming Act prevents a person from recovering the money deposited in respect of a gaming transaction, and it makes no difference whether the money is deposited with a stakeholder or with the other party to the transaction. The result is that a person seeking to recover such a deposit is relegated to his common law rights. Now, what are those common law rights? As I understand the law, it is not true to say that such a person is entitled at all times to recover the deposit. On the contrary, he is only entitled to recover so long as the transaction is incomplete and the money has not been applied to the purpose for which it was intended when deposited. It is easy to dispose of the case where the depositee is the winner in the gaming transactions, for there nothing remains to be done, and the money can be appropriated in satisfaction of his winnings, and when that has been done it is too late for the depositor to recover. But the case is not so clear when the event has been determined in favour of the depositor. In that case we have to consider when can it be said that the transaction in respect of which the money was deposited has come to an end. It might be said that the transaction never comes to an end until the deposit has been returned, because it would always be true to say that the money has not been dealt with under a gaming contract, and therefore that it is open to the depositor at any time to bring an action to recover back the deposit. I am not sure that I should be prepared to go that length, but fortunately it is not necessary to decide that particular point in this case, because it seems to me that the money here was not deposited as a mere stake to pass to one or other of the parties, according as the event happened, but was deposited as security, the whole or part of which might, according to the event which occurred, have to remain with the depositee or be paid back to the depositor. In point of fact nothing could be done until the parties agreed as to how the deposit was to be dealt with, and I understand from the evidence that there was no agreement as to how the deposit was to be dealt with in the circumstances which have arisen. It follows that the depositor has at a time when the transaction is still executory elected to demand back the sums deposited and to say that he will not go on further with the gaming transaction in respect of which the deposit was made. That being so, I agree with the other members of the court that in such a case the depositor is entitled to have his money back.

Appeal in part allowed.

Solicitor for the appellant, *H. H. Boorne.*

Solicitors for the respondent, *Atkinson & Dresser.*

High Court of Justice.

Chan. Div. }
Kekewich, J. } July 19, 20.

PERRINS v. BELLAMY. (a.)

Trustee—Breach of trust—Sale of leaseholds—No power of sale—Court's power to excuse—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

Where leaseholds were held upon trust for certain persons for life, and after the death of the survivor of them upon trust for their children, and the trustees of the settlement, which did not contain a power of sale, acting bonâ fide, *and, as they believed, in the best interests of the trust estate, sold the leaseholds, they were held to be entitled, under section* 3 *of the Judicial Trustees Act,* 1896, *to be relieved from personal liability on the ground that they had acted "honestly and reasonably, and ought fairly to be excused for the breach of trust."*

Section 3 *of the Judicial Trustees Act,* 1896, *discussed.*

Action.

By an indenture of settlement dated the 23rd of October, 1879, Elijah Barnett assigned to trustees (*inter alia*) certain leasehold houses situated at Edgbaston for the respective residues then unexpired (which ranged from 52 to 73 years) of the several terms of years under which the premises were then held upon trust to pay the income thereof to his wife Charlotte Barnett for her life, and after her death to his daughters, the defendant Eliza Barnett and the plaintiff Alice Mary Perrins, during their lives in equal shares, and after the decease of one of them to pay the income of her share to her children as therein directed until the decease of the survivor of them, and in case there should be no child of the daughter first dying then upon trust to pay the whole income to the survivor of them for her life, and after the decease of the survivor upon trust to stand possessed of the trust estate and the proceeds thereof for the children of his daughters as therein directed. The settlement conferred no power upon the trustees to sell the leasehold property.

Alice Mary Perrins was married to the plaintiff F. H. Perrins on the 9th of September, 1880, and there were two infant children of the marriage now living. The defendant Eliza Barnett was not married.

Elijah Barnett died on the 10th of February, 1888, and Charlotte Barnett on the 26th of February, 1895.

On the 10th of May, 1895, the trustees of the settlement offered for sale by public auction at Birmingham in eleven lots the whole of the leasehold premises comprised in the settlement. The purchasers of nine of the lots completed, but an objection was taken with regard to the remaining two lots that the trustees had no power of sale, and upon that objection being upheld by his lordship on a vendor and purchaser summons, the respective purchasers of those lots refused to complete and the lots remained unsold.

This was an action by Alice Mary Perrins and her two infant children by their father as next friend, as plaintiffs, against the trustees of the settlement and Eliza Barnett, as defendants.

By their statement of claim the plaintiffs alleged that the trustees had committed a breach of trust in selling the leasehold property when they had no power of sale; that the property was sold contrary to the expressed desire of the plaintiff Alice Mary Perrins; that the property was situate in a good position and let to good tenants at good rentals, and ought to have been retained in the interests of the trust estate; that the trustees had committed a breach of trust in not investing £3,700, part of the proceeds of sale, until the 16th of January, 1898, and in not investing £700, part of the same moneys, up to the present time, and in not paying the proper amount of income to the plaintiff Alice Mary Perrins; and that the trust estate had been reduced in value by the alleged breaches of trust, and the income of the plaintiff Alice Mary Perrins greatly reduced thereby. The plaintiffs claimed (1) a declaration that the defendant trustees had been guilty of a breach of trust in selling the leasehold premises; (2) an inquiry as to the loss accrued to the trust estate and to Alice Mary Perrins by reason of such breach; and (3) that the defendant trustees might be ordered to make good to the trust estate all such loss. The plaintiffs also asked for the removal of the trustees, the delivery of proper accounts, and the execution of the trusts of the settlement by the court so far as might be necessary. In their defence the defendants admitted that they had no express power of sale under the settlement, but alleged that they had an implied power. They denied that the property was let at good rentals, that it should have been retained in the interest of the trust estate, and that they sold contrary to the desire of the plaintiff Alice Mary Perrins. They alleged that the making up of the accounts and the investment of the proceeds of sale were delayed by the vendor and purchaser summons above mentioned, and that they had no balance thereof in their hands, such balance having been expended in the payment of estate duty payable on the death of Mrs. Barnett. They submitted that if they had committed a breach of trust in selling the property they had acted honestly and reasonably in making such sale, and ought fairly to be excused for such breach of trust (if any) and for omitting to obtain the direction of the court in the matter, and they claimed the benefit of section 3 of the Trustee Act, 1896.

[The further facts and the evidence material to the present report are sufficiently set out in the judgment.]

Bramwell Davis, Q.C., and *Tyrrell*, for the plaintiffs.—It is not denied that the sale of these leaseholds was a breach of trust, and that being so, we ought to be put in the same position in which we were before the sale. The trustees did not take such steps as were reasonable before they sold. They did not take the opinion of counsel, nor did they consult with the tenants for life; in fact they sold in direct opposition to Mrs. Perrins' wish. They have not acted "reasonably" within the meaning of the Act, and they ought not to be excused for the breach of trust either wholly or partially: *In re Kay, ante*, p. 74, [1897] 2 Ch. 518.

Warrington, Q.C., and *S. B. L. Druce*, for the defendant trustees, were not called upon.

Bardswell, for the defendant Eliza Barnett.

KEKEWICH, J.—In this case the main question is, to my mind, one of extreme difficulty, and it has been so treated when it has arisen in different circumstances before other judges. That difficulty is to find out the real meaning which the court ought to put on section 3 of the Judicial Trustees Act, 1896, and how that meaning ought to be applied to particular facts. The difficulty that is presented to my mind now, and that has presented itself to my mind for some time past, although the Act of course is not new to me, is that in a few words intended no doubt to

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

be perfectly clear and expressive, the Legislature has thought fit to interfere with well-established doctrines of the Court of Chancery and the Chancery Division, doctrines which are to be found not only in numerous authorities, but also in text-books ancient and modern, which are accepted as authorities and as expressing the view of the profession respecting the law relating to trustees and their *cestuis que trustent*. It is extremely difficult—in fact I do not hesitate to confess at once that it is beyond my powers—to say within the limits of a judgment, or at all, what is the full extent of the Act. The difficulty arises from the fact that you are dealing with a large body of law, and a few words are intended to introduce large alterations in that law. What are those alterations? and how are they to be applied? That is the difficulty.

Now, before I go to the details of this case I will just apply the Act to the skeleton of it. Here there is a breach of trust. It is distinctly a breach of trust, and Mr. Warrington is unable, in this court at any rate, to say that the trustees had power to sell the leaseholds, and it follows that if any ill consequences result from that breach of trust the trustees are responsible in respect of them. How that responsibility ought to be enforced, and what are the extent and limit of the remedy of the *cestuis que trustent* is another question. Broadly speaking, they are responsible for it, but the foundation of this statute is that the trustee is or may be personally liable for a breach of trust. I am accordingly bound to look at the rest of the section from the point of view that the breach of trust itself is not to render the trustee personally liable for that breach of trust. I leave out the intervening words which only make the Act retrospective, and then I see why generally the trustee is to be excused. He is not to be held liable if he has acted "honestly and reasonably, and ought fairly to be excused for the breach of trust." "Honestly" I leave out of consideration, for in this case, as in a large majority of the cases which come before the courts, the trustees have acted honestly; sometimes there is dishonesty and then one has really very little concern with a breach of trust, because the dishonesty puts it out of sight, although, of course, the dishonesty and the breach of trust are intimately connected. The Legislature has made it a condition precedent to being relieved from liability that the trustee should act honestly, but that is not the gist of the position. The gist is in the words "and reasonably, and ought fairly to be excused for the breach of trust." How much those later words add to "reasonably" I am at a loss to say, but I suppose there are or may be cases in which a trustee may act reasonably and yet ought not fairly to be excused for a breach of trust. Here these trustees, perhaps it may be said, even though they acted reasonably in selling the property, ought not fairly to be excused because Mrs. Perrins objected to the sale when it was brought to her notice.

I can conceive such an argument because the copulative words are added, and the trustees are not only to be held to have acted reasonably, but it must also be held that they ought to be fairly excused for the breach of trust. But I venture to think, nevertheless, that unless some case can be made against the trustees of a strong character, if they are within the meaning of the Act then they are entitled to be relieved and may fairly claim to be relieved, and it would not be incumbent on the court to consider whether they ought fairly to be excused for the breach of trust unless there was evidence to show that that provision did not apply. I will not say anything more about that, because in this case I do not think that there is any reason why the trustees ought not fairly to be excused for the breach of trust if they acted reasonably. Here the question, and the only question, really is whether they acted reasonably. I say "the only question" knowing that there is something else towards the end of the section; and the presence of that something else must not be passed over, although it is almost as great a puzzle as the words to which I have just referred. I allude to the words "and for omitting to obtain the directions of the court in the matter in which he committed such breach." I have not yet mastered the sense of that, and I do not understand how a trustee is to be excused for a breach of trust without being excused also for omitting to obtain the directions of the court, nor do I understand how he could be excused for omitting to obtain the direction of the court without also being excused for committing the breach of trust. I do not see how he can be excused in the one case and not in the other. The additional words, if I may venture to guess, must, I think, have been by amendment to the original section without full regard to the meaning of that section. I hope that is not an improper aspersion on the wisdom of the Legislature.

It strikes me that the words have crept in there without due regard to the antecedent language. But it never was, so far as I know, a reason for holding a trustee liable that he omitted to obtain the direction of the court. It may sometimes be a reason for guiding the court in a matter of costs, and a reason for guiding the court in saying whether the trustee has acted reasonably or not; and particularly in these days, when the decision of the court on an originating summons may be obtained expeditously and cheaply. But, if the trustee has acted reasonably, I cannot myself see why, having come to the conclusion that he has acted reasonably, one should go on to consider independently whether he has omitted to obtain the direction of the court or not. So much on the meaning of the Act.

I now return to the question whether these gentlemen have acted reasonably, remembering, and I think it is so important to remember that I will repeat it, that it is "acted reasonably" in a breach of trust. Now, what was the breach of trust here? Selling this property. A great deal has been made on behalf of the plaintiffs of the trustees selling it when they had no power of sale. That was a breach of trust. If they had sold it, having a power of sale, of course the plaintiffs could not have succeeded at all without making out that they had exercised that power dishonestly or unreasonably. It is possible, of course, to make trustees liable for exercising a power without proper discretion, exercising it, perhaps, against advice, or under circumstances which lead the court to the conclusion that they really were not doing their duty at all. But the Act seems to me, for the purpose of construing it, to place a sale of property such as this, with or without power on the same footing. You cannot approach it, you cannot apply the Act at all if there was a power of sale, because then there is no breach of trust. Therefore the Act seems to say—applying it to this case—that where trustees, having no power or trust for sale of leaseholds sell those leaseholds, but reasonably, and they ought fairly to be excused, then they may be relieved. Therefore the point to be considered is whether they sold reasonably. If they sold reasonably, then, notwithstanding that the sale was a breach of trust, they may be excused. Therefore I repeat the real question is, whether they sold reasonably, and it is to that that I propose to devote the rest of my judgment.

This property was settled as leasehold. It consisted of a number of houses held for fairly long

terms; some of them have been called short and some long, but they were fairly long terms, and it is quite possible according to my knowledge of what those competent to advise do advise on such subjects, that they would have realized quite as much a few years later as they did in 1895. But the terms were not so short, speaking only from my experience and from advice I have often heard, as to say that it became imperative to consider whether the houses should be sold or not. Some of the terms were short and some were long. The trustees' attention to the peculiar character of the property seems to have been called by the necessity of raising £600 for estate duty. If they had a power of sale I apprehend no reasonable man would say that they were wrong in raising that £600, possibly by mortgage, but raising it out of the leasehold property rather than by a sale of a first-class trustees' investment. Supposing that they had a power of sale, I cannot conceive that any question could be made or sustained against them for raising the money out of the leaseholds rather than out of the investments, so I pass that over and say no more about it. The payment of the duty is called to their attention, and they apparently determine, without much more consideration, to sell some of the shorter terms. But they inquired about the other property and they took advice. I have had before me to-day the gentleman by whom they were advised, about whose position and competency not a word has been said, therefore that is not in question. I have also his report. Now, for my present purpose I will assume that he is entirely wrong. I will assume that his view of this property was one which has not only been contradicted by facts up to the present time, but will be contradicted by facts in the future. That is by no means my conclusion on the facts I have heard, but I will nevertheless make that assumption. The trustees were entitled to be advised by a professional man. They would have acted to my mind unreasonably if they had not been advised by a competent man, and they are entitled to act on opinions so given. In my judgment they would act unreasonably, I do not say within the meaning of the Act, but they would act unreasonably if they did not act upon opinions so given, or at any rate take another opinion so as to correct the first. The advice they received was perfectly distinct. I have it before me in the report, and the evidence only went to show that the gentleman who conducted the personal investigation, with a knowledge of the neighbourhood, still stands by the opinion he then expressed. He says he finds the property very badly built, and in a very bad state of repair; the interior fittings of the houses require renewing in many instances. There are no bath-rooms, no hot water apparatus in the rooms; in only one instance is there a water-closet in the yard, the remainder of the closets being of the old-fashioned midden type which are being condemned by the corporation. To put these matters right and to bring the houses up to the standard of modern requirements would need a very considerable outlay. I leave entirely out of my consideration his conclusion that in his opinion the property is a very undesirable one to be held by trustees. He does say so, but that was a matter with which he was not directly concerned. It was not at all an improper remark for him to make in that connection, but it was for the trustees to consider, with the assistance of their legal adviser, whether, on the report on these houses, they ought or ought not to realize the property. It certainly strikes me that the trustees, having a power of sale, which they assumed they had—they did not doubt it—had no alternative; perhaps I ought not to go quite so far as that, for it was open to them to communicate with the ladies who were entitled to moieties for life, and to consult them as to whether it would be desirable to pay for all those repairs out of income, and establish a sinking fund to provide against what they might anticipate to be a large ultimate loss. That would have been reasonable enough, but I cannot say that the trustees were unreasonable in not doing that, if they supposed that they had a power of sale. Of course we all know that it would have been very much better if they had communicated with the ladies and not acted independently; but they thought they would act independently, and that was the essence of their breach of trust. Strange to say, I know from Mrs. Perrins that she only thought, and Mr. Perrins seems to have been of the same opinion, that the trustees could not sell without her consent. She never thought that they could not sell at all; and really she was right, because with the assistance of the Settled Land Act she, as tenant for life, and the trustees could have made a good title. A further appointment of the trustees would have been necessary under the Act which might have been carried through, and, indeed, that course was suggested subsequently. That was the position in which the trustees were. They had determined, and properly enough if they had the power, to sell some of the shorter leases for the purpose of raising the estate duty. Then they were confronted with this opinion, which told them, I think, as reasonable men either that they ought to sell the whole, or that they might possibly deal with the property in some other way. The only answer to that, so far as I know, and the only answer that has been attempted, is this: Mrs. Perrins was entitled —I say Mrs. Perrins, but Miss Barnett also—to have the income of this property during her life, in repair or out of repair, whether with bath-rooms and hot water or not. She was entitled to have such rent as could be got out of this property during her life; that is her view, and it is strictly the case. But the trustees had other duties to perform besides giving Mrs. Perrins what she was entitled to. They had to consider Mrs. Perrins' children, who will ultimately become entitled to this property (it being assumed that there will be no children of Miss Barnett), and that they will take the whole of it, at any rate in any event they will take half of it. The trustees were bound to consider these children, and I am a little astonished at the father coming forward as next friend and saying that it was not to the interest of his children that the property should be sold. I do not know Mrs. Perrins' age, but I will assume that she will live twenty, thirty, or more years; at the end of that time these leaseholds will be running out, even the longest of them will be a very short term. These children will then be perhaps married and started in life and wanting money; they will want to make a settlement, or to raise money on mortgage, or otherwise to provide for those that come after them. Where will that fund be? There will be nothing. In their interest I cannot for a moment doubt that the trustees have done the very best thing they possibly could. They have realized the property for as much as it was worth, and the result is that these children will be provided with a substantial sum in lieu of a wasting property which would be of very little use to them, and if they live the ordinary length of life would be all gone before themselves. As regards the children, I cannot see a shadow of damage, I cannot see how the action can be maintained at all, and having heard the evidence I have no doubt myself that had there been a reference to chambers it would have been decided that this was not an action for the benefit of the infants. There is no doubt, however, that it is sustainable by Mrs.

Perrins, but for the reasons I have given I think she fails to make out her case. I do not say what would have happened if it had not been for this Act of 1896. Probably I should have had to direct an inquiry, and make the trustees pay the costs up to and including the trial; but I am stopped, it seems to me, from going in to those matters by the conviction that although they have committed a breach of trust, yet they acted reasonably, and therefore they stand in the same position as if they had a power of sale and exercised it in such circumstances that there is nothing to be said against them. That being so, my conclusion is that on that, the main part of the case, Mrs. Perrins' action fails as well as that of the infants.

His lordship then considered the minor breaches of trust alleged against the trustees and decided that they ought not to be held liable in respect of them.

Solicitors, *Tyrrell & Son*, for *J. B. Clarke & Son*, Birmingham; *Gamlen & Burdett*, for *Cottrell & Son*, Birmingham.

Chan. Div. }
Wright, J. } April 28.

In re WAVERLEY TYPEWRITER.
D'ESTERRE *v.* WAVERLEY TYPEWRITER. (*a.*)

Company—Winding up—Debentures—Floating charge—Preferential payment—Retrospective—Preferential Payments in Bankruptcy Act, 1888 (51 & 52 *Vict. c.* 62)—*Preferential Payments in Bankruptcy Amendment Act*, 1897 (60 & 61 *Vict. c.* 19).

The Preferential Payments in Bankruptcy Act, 1897, *is not retrospective in its action, so that those persons who, under that Act, are given priority for their wages, &c., over the debenture-holders are not entitled to the benefit of the Act where a receiver was appointed by the debenture-holders before the date when the Act came into force.*

The Waverley Typewriter (Limited) had issued debentures creating a floating charge on all its capital. The company stopped business early in 1897, and on the 18th of May the plaintiff issued a writ on behalf of himself and the other debenture-holders to realize the debenture securites.

On the 19th of May a petition to wind up the company was presented. A receiver was appointed in the debenture-holders' action on the 21st of May, and on the 2nd of June a winding-up order was made.

On the 15th of July, 1897, the Preferential Payments in Bankruptcy Amendment Act, 1897, received the Royal Assent. Section 3 of that Act is as follows: "In case a receiver is appointed on behalf of the holders of any debentures or debenture stock of a company secured by a floating charge, or in case possession is taken by or on behalf of such debenture-holders of any property comprised in or subject to such charge, then and in each of such cases, if the company is not at the time in course of being wound up, the debts mentioned in section 1 of the said Preferential Payments in Bankruptcy Act, 1888, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of such debentures or debenture stock. And the periods of time mentioned in the said Act shall be reckoned from the date of the appointment of the receiver or possession being taken as aforesaid, as the case may be. And any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors."

The summons raised the question whether the Act was retrospective so as to give those persons mentioned in the Act priority over the debenture-holders.

C. T. Mitchell, for the plaintiff.—The Preferential Payments in Bankruptcy Act, 1897, does not specificially state that priority is given by it over debentures creating a floating charge where the receiver has been appointed or the winding up of the company has commenced before the Act came into operation. Section 10 of the Judicature Act, 1875, was held not to be retrospective: *In re Joseph Suche & Co.*, 24 W. R. 184, 1 Ch. D. 48. The Act of 1897 give priority to debts mentioned in section 1 of the Preferential Payments in Bankruptcy Act, 1888. Section 3 of the Act of 1888 only applies the Act to windings up "commenced after the commencement the Act," and the Act of 1897 is limited in the same way.

Percy F. Wheeler, for the official receiver and liquidator of the company.—The Act of 1897 is retrospective: *In re Anglo-French Co-operative Society, Ex parte Pelly*, 32 W. R. 748. In that case the Companies Act, 1883, was held to be retrospective. The Act of 1888, which repealed it, expressly stated that its effect was not retrospective.

Mitchell in reply.

WRIGHT, J.—This case is very much on the line, but on the whole I think the Act of 1897 is not retrospective. The reasons for my opinion are two. *Primâ facie* the Act is not retrospective, although the terms of section 2 are ambiguous. And, having regard to the terms of section 3, *primâ facie* that provision is prospective. The observations of Lord Selborne on *Main* v. *Stark*, L. R. 15 App. Cas. 384, support the contention that the Act is not retrospective, and the case of *In re Joseph Suche & Co.* is a strong one in support of the same view. In the case last mentioned Sir George Jessel went out of his way to decide as he did. He said in his judgment: "Since this question came last before me I have consulted several of the other judges," and, referring to section 10 of the Judicature Act, 1875, he said, "I prefer on this occasion to rest my decision on the more general grounds that the section was not intended to apply to any winding up which had been commenced before the Act came into operation. I so decide because it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule—namely, that where enactments merely affect procedure and do not extend to rights of action they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within that exception. I am of opinion that it is not. This is an alteration, not merely in procedure, but in the right to prove for a debt, which is not distinguishable in substance from a right of action before winding up, being simply a legal proceeding to recover a debt against a company in liquidation." In this case the Legislature has interfered with the rights of debenture-holders if they have not taken steps to realize their securities before the passing of the Act, but it has not gone so far as to interfere with their rights when they have already taken those steps. The Act of 1897 seems to form part of the Act of

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

1888, which in terms only applies where a winding up has commenced after the commencement of the Act. The case of *In re Anglo-French Co-operative Society*, 32 W. R. 748, 50 L. T. Rep. 754, turned on the particular language of a different statute. No such words occur in the Act of 1897, and in this case I must hold that the workmen are not entitled to the priority which they claim.

Solicitors for the plaintiff, *John H. Mote & Son.*

Solicitors for the official receiver, *Shaen, Roscoe, Massey, & Co.*

Prob. Div. & Adm. Div. Admiralty. } May 13.

"THE PACIFIC." (*a.*)

Ship—Salvage—Life salvage—Jurisdiction—Life salvage services "rendered to foreign vessel wholly or in part within British waters"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 544.

An English vessel fell in with a Norwegian vessel in the North Sea, more than three miles from the coasts of the United Kingdom, flying signals of distress, waterlogged and unmanageable, in want of immediate assistance for herself and her crew, and rendered life salvage services to the crew of the distressed vessel by taking them off their vessel and bringing them into an English port in safety.

Held, that the English court had jurisdiction under section 544 *of the Merchant Shipping Act,* 1894, *to make an award of life salvage remuneration to the owners, master, and crew of the salving vessel; such services having in fact been rendered in part within British waters.*

This was an action of salvage instituted in the Admiralty Division of the High Court in England, on behalf of the owners, master, and crew of the English steam trawler *Jersey* against the Norwegian barque *Pacific*, her cargo and freight, to recover life salvage remuneration for services rendered to the crew of *The Pacific* on the 27th and 28th of March last, when *The Jersey*, having fallen in with *The Pacific* flying signals of distress, waterlogged, and in want of immediate assistance for her and her crew, about ninety miles north-east of the Sperm, on the morning of the 27th of March, took on board her the crew of *The Pacific*, twelve in number, proceeded with them to Hull, and there landed them in safety.

The owners of *The Pacific* appeared to defend the suit, and pleaded that *The Pacific* was a Norwegian vessel, and the services of the plaintiffs were services in saving life only, and were rendered neither wholly nor in part in British waters, and that the English court had no jurisdiction to deal with the plaintiffs' claim or to award salvage to the plaintiffs for the said services, and that the action should be dismissed, with costs.

The action was now heard before the President (Sir Francis Jeune), assisted by two of the Elder Brethren of the Trinity House.

Butler Aspinall, for the plaintiffs.—In the somewhat similar case of the *Willem III.*, 20 W. R. 216, L. R. 3 A. & E. 487, the actual point to be decided here did not arise, as the persons whose lives were saved were brought into an English port not by the salving vessel but by another vessel, but it was admitted in argument that f the salving vessel had herself brought the lives saved to Spithead, her owners master and crew would have been entitled to salvage remuneration under the 9th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), for which is now substituted as the ruling enactment in this case section 544 of the Merchant Shipping Act, 1894, which is as follows: "Where services are rendered wholly or in part in British waters in saving life from any British or foreign vessel, or elsewhere in saving life from any British vessel, there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved a reasonable amount of salvage, to be determined in case of dispute in manner hereinafter provided."

He also referred to *The Johannes*, Lush 182, 9 W. R. Adm. 21, and *The Cairo*, 22 W. R. 742, L. R. 4 A. & E. 184.

Carver, Q.C., and *Stubbs*, for the defendants.—The services in this case were on the facts completed directly the crew of *The Pacific* had been taken on board *The Jersey*. They were then in safety, and the bringing them from the point where they were so rescued into the port of Hull was not a salvage service.

The following judgment was delivered by the President on the question of jurisdiction:

JEUNE, P.—I think the construction to be put upon this section of the Merchant Shipping Act, 1894, is sufficiently covered by authority to prevent my having serious difficulty or doubt about the matter. What I understand from the facts in this case is that there was *The Pacific*, a foreign derelict, outside British waters, from which were taken persons by the British vessel and brought within British waters, and landed on the English shores. That raises quite neatly the question whether the persons who so saved the seamen from the foreign vessel are entitled to salvage. It is clear they would not be entitled to salvage *juri gentium*, because before the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104) no one disputes that there could have been any life salvage in such a case. Then we have to see what the effect of the Act of 1854 was. The effect of that is well illustrated by the case of *The Johannes*. By section 458 of that Act salvage could be granted, amongst other cases, in the following case: "Whenever any ship or boat"—that is to say, including a foreign ship—"is stranded, or otherwise in distress, upon the shore of any sea or tidal water situated within the limits of the United Kingdom." Now, in the case before Dr. Lushington what happened was this: A Prussian vessel was wrecked seventy miles east of Yarmouth, and her crew were taken off her, other salvors afterwards bringing the ship into Grimsby. Life salvage was claimed by the persons who had taken these foreign sailors and brought them to Hull. Dr. Lushington decided that the claim under that section of the Act could not be maintained, because first of all the limits of the United Kingdom meant within three miles, and although the sailors had been brought within the limits of the United Kingdom, yet the words of the section were clear that the ship or boat must be stranded or otherwise in distress on the shore of any sea or tidal water situated within the limits of the United Kingdom. When the words of the section are looked at it is easy to understand the language of Dr. Lushington. He uses a phrase which might be taken to mean that the service of saving life was rendered outside the limits of the United Kingdom. By that, however, he does not mean that the whole of the services were rendered there, because all he meant to say and all that it was necessary to say was that the ship in distress was outside, not within, the limits of the United Kingdom. I have no doubt it was the hard-

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

ship pointed out by Dr. Lushington in that case which gave rise to the 9th section of the Admiralty Court Act, 1861, and in that statute the Legislature dealt with the matter and by section 9 provided that all the provisions of the Merchant Shipping Act of 1854 in regard to life salvage should apply in the case "of any foreign ship where the services have been rendered either wholly or in part in British waters." I cannot doubt that that provision meant to deal with the case which had arisen in the case of *The Johannes* where the services were rendered in part within British waters, although the ship itself was outside British waters when in distress. It must be a question of fact in every case whether the service was rendered wholly or in part in British waters. The test appears to me to be whether what was done by the salvors for saving was done wholly or in part in British waters. I can easily imagine cases where people might be salved from a vessel and then might be taken very considerable distances, perhaps for a long voyage, by the vessel which salved them, and then might come within British waters. It could not be said that that was a case of salvage services being performed in part in British waters, because it is evident that the salvage services finished long before the vessel came within British waters at all. It is clear that one must be guided by practical considerations in each case, and what you have to look at is whether the vessel in the course of effecting the salvage service was within British waters. Then it is argued that one ought not to give so extended a meaning to the section in the Act of 1861, or to section 544 in the later Act of 1894, which practically repeated the former section, because you ought not to construe an Act of Parliament to affect foreigners by your legislation, unless it is clear that the words of the section do so, because for obvious reasons it would be contrary to the comity of nations for one nation to presume to legislate for the subjects of another. You must always consider what the meaning of the words are, and, apart from other considerations, where an Act of Parliament has said in terms that the services are to be performed wholly or in part within British waters, it must, I think, be understood to mean what it says, and so understood, it does not appear to me to conflict in any way with such comity as nations extend to one another in this matter, because if foreign sailors are saved from a foreign vessel and brought to an English port, in the course of saving their lives, it would seem that the English Legislature has a perfect right to say that the owners or the ship may be made liable for services rendered in part, at any rate, to foreign sailors within the limits of English jurisdiction.

That being to my mind the clear view to be taken of section 544 of the Act of 1894, I do not think it is to be regarded as cut down by section 545 of the same Act, because, although the exact words of section 544 are not followed, I think the reason for that amending of the sections has been very clearly put by Mr. Aspinall—namely, that the two sections come from different statutes, now consolidated. In those circumstances I do not feel any difficulty in saying that in such a case as this the salvage service is one for which a reward can be claimed, and I think the further decision in the case of *The Willem III.*, and to some extent the case of *The Cairo*, bear in the same direction. I am not concerned to consider whether the decision in the case of *The Willem III.* was a correct decision or not. I assume that it was. I assume that it was quite correct to say that although the services were to be considered as a whole, still that they were not to be considered as services in the whole of which each salvor participated; and although, therefore, the whole of the services are to be considered as a whole for some purposes, they were not to be considered as a whole in the sense of saying that *The Flora*, which took part in the operation outside British waters, was entitled to life salvage, although *The Scorpion*, which performed a portion of the services in British waters, was so entitled. It is not necessary for me to consider that. It appears to me quite clearly that if *The Flora* had carried the persons within British jurisdiction it would have been decided that she would have been entitled to a salvage award. That is precisely the condition raised in the present case. I do not think it necessary to refer further to the case of *The Cairo*. Under these circumstances I think the plaintiffs have a right to claim as life salvors.

Solicitors for plaintiffs, *Pritchard & Sons*.

Solicitors for defendants, *Stokes & Stokes*.

Prob. Div. & Adm. Div. Admiralty } January 24.

"THE RUBY" (No. 2).

REG. *v.* CITY OF LONDON COURT JUDGE AND PARRATT. (*a*.)

County court—Ship—Wages—Ship's husband—Salary—The County Courts Admiralty Jurisdiction Act, 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 10.

A county court having admiralty jurisdiction has no jurisdiction under the County Court Admiralty Jurisdiction Act, 1868, *over a claim by a ship's husband for his salary or other remuneration due to him in that capacity.*

Motion.

This was an application on behalf of J. W. Matthews, mortgagee of the steamship *Ruby*, for a writ of prohibition prohibiting the judge of the City of London Court, and W. Philips, the plaintiff in an action *in rem* instituted in the City of London Court under the 3rd section of the County Courts Admiralty Jurisdiction Act, 1868, against *The Ruby* for the recovery of £42, from further proceeding in such action.

Laing for the applicant.

The plaintiff seeks, in the action he has brought in the City of London Court, to recover £42 remuneration due to him as a superintendent engineer and ship's husband of *The Ruby* under the name of "wages." But the amount so sought to be recovered is not "wages," and neither a county court having admiralty jurisdiction, nor the Admiralty Division can have jurisdiction over the action. The plaintiff is not a seaman and the remuneration in question was not earned on board *The Ruby*. The plaintiff only performed the duties usually performed by a ship's husband, and although it may be admitted that he went voyages in *The Ruby* on two or three occasions, he only went for the purpose of better performing his duties in attending to the passengers and collecting money due to the owners of *The Ruby* abroad. A party entitled to bring an action of wages must be a mariner.

L. Batten, on behalf of the plaintiff in the action sought to be prohibited, showed cause against the issue of the writ of prohibition.—It is a question of fact for the judge trying a case of wages to determine whether the claim set up in the action is

(*a*.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

properly a claim for wages, and in this case the judge of the City of London Court has determined that the claim is a claim for wages. This finding the court ought not to interfere with: *Brown* v. *Cocking*, 16 W. R 933, L. R. 3 Q. B. 672. The plaintiff is a seaman within the wide definition of that word in use in actions of wages (see The Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 742), and the remuneration he seeks to recover in the action can properly be described as wages. A surgeon and a woman who acted as shipkeeper have been held entitled to bring actions *in rem* for their wages: *The Jane and Matilda*, 1 Hagg. Adm. 187; *The Lord Hobart*, 2 Dods. 100, and the right to proceed *in rem* for wages extends to services rendered on shore equally as to services rendered on board a ship; the question being whether the services so rendered were, as is contended to be the case here, maritime services. *Reg.* v. *The Judge of the City of London Court and Owners of the Ss. Michigan*, 38 W. R. 638, 25 Q. B. D. 339.

Sir F. JEUNE, P.—This claim is on the face of it a claim in an action *in rem* for wages as ship's husband, and the learned judge in the court below appears to have held that as a matter of law the plaintiff had a maritime lien, and he therefore gave judgment for the amount of the claim. But was there anything to support this view? I think not. According to the particulars filed the claim is in terms for wages as a ship's husband, and that I think raises the question which I think can be decided on prohibition whether a ship's husband in the well-known and ordinary meaning of the expression, can so claim. But if we look at what was proved in the action the result is the same. From the evidence it is clear that the plaintiff's duties were the duties of a ship's husband, and that he made some voyages, not many, on the ship; but it does not follow that there was anything necessarily done on the ship, though it may be that the plaintiff incidently performed some of his duties on board the ship.

The question then arises, Does the plaintiff bring himself within the 10th section of the Admiralty Court Act, 1861? By such 10th section the claim over which jurisdiction is given must be a claim "by a seaman of any ship for wages earned by him on board the ship." I agree that the word "seaman" may be extended to any person who is employed in the practical employment or management of a ship; but the gist of the matter is that the employment must be to do the work of the ship, and I think you may go a step further and say you must look at the nature of the employment and see whether it is such work as is required to be done on board ship. I say that because in the case of *The Chieftain*, 11 W. R. 538, Br. & L. 104, Dr. Lushington, in dealing with the case of a captain who was employed a great deal on shore, looked at the nature of his duties, and held that he was entitled to a maritime lien for his wages. But having regard to the character of the duties of the plaintiff in this case, I do not think that they are duties of the nature of those of a seaman even in the most extended sense which can be given to the term. Under these circumstances the correct view seems to to me to be that a ship's husband acting as such and employed as such is not a person who comes within the 10th section of the Admiralty Court Act, 1861, and consequently that his claim is not a claim within the 3rd section of the County Courts Admiralty Jurisdiction Act, 1868. I do not think that the case of *Reg.* v. *The Judge of the City of London Court and the Owners of The Ss. Michigan* is at all contrary to this view, for there the plaintiff who claimed wages had been mate of *The Michigan*, and was still employed on her.

Under these circumstances I am of opinion that there was no jurisdiction for the City of London Court to entertain the claim, and that the prohibition must go.

Solicitor for applicant, *Williams*.

Solicitor for plaintiff, *Harris*.

[THE END.]

THE

WEEKLY REPORTER DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

ALSO OF SOME

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE IN IRELAND;

FROM THE 25TH OF OCTOBER, 1897, TO THE 12TH OF AUGUST, 1898.

VOL. XLVI.

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1898.

A DIGEST

OF ALL THE

CASES DECIDED IN ENGLAND,

TOGETHER WITH SOME DECIDED IN IRELAND,

FROM

THE 25TH OF OCTOBER, 1897, TO THE 12TH OF AUGUST, 1898,

AS REPORTED IN

VOL. XLVI. OF THE WEEKLY REPORTER, 1897-98;

AND IN

CERTAIN OTHER LEGAL REPORTS DURING THE SAME PERIOD,

TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH.D., the Chancery Division; Q.B.D., the Queen's Bench Division; BKCY., the Queen's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved; C.A. (Ir.), the Court of Appeal in Ireland; M.R. (Ir.), the Master of the Rolls in Ireland; V.C. (Ir.), the Vice-Chancellor of Ireland; Q.B.D. (Ir.), the Queen's Bench Division, Ireland; P.D. & AD.D. (Ir.), the Probate and Matrimonial Division, Ireland.

*** *This Digest will contain at the end thereof a Tabular Index of the Names of all Cases Reported up to the end of August,* 1898, *as well in this Volume* (46) *of the* WEEKLY REPORTER *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports will be found in the Tabular Index to the Names of Cases.*

ACCOUNT:—

Action for—Contract—Payment in currency of foreign country—Rate of exchange—Damages.—As a general rule the courts of this country have no jurisdiction to order payment of money except in the currency of this country. Whatever sum is ordered to be paid, whether for principal, interest, or damages, must be expressed in English money.

By a contract dated the 6th of October, 1891, P. agreed to pay (*inter alia*) to M. one cent. in Mexican currency per cubic metre of certain excavation works mentioned in the contract, to be payable as and when received by P. from the Mexican local authority. P. also agreed to make a monthly statement of the total number of cubic metres of excavation done during each month, when the amount payable under the contract would be ascertainable. M. died in June, 1894, down to which time all sums found due were punctually paid, but no legal personal representative to his estate was appointed until May, 1896. The excavation works were finished and paid for on the 31st of August, 1896.

In an action for an account brought in England by M.'s legal personal representative against P.,

judgment was given declaring that the plaintiff was entitled to an account of what was due to him by P. under the contract with M.; but the judgment contained no declaration or inquiry as to damages. Upon taking the account it was, on the 13th of November, 1897, found that a balance of 19·366 Mexican dollars was due by P. to the plaintiff. Upon a motion by the plaintiff to determine questions as to the currency, in which the account should be calculated and the balance paid,

Held, by the Court of Appeal (affirming Kekewich, J.) (*dissentiente* Vaughan Williams, L.J.), that having regard to the form of the judgment at the trial of the action, the balance found due must be turned into English money, as on the 13th of November, 1897, when the amount due was first ascertained. An action for an account is in equity an action for the balance found due on taking the account, and not a series of actions for particular items in the account.—MANNERS *v.* PEARSON, *C.A.*, 498.

ADMINISTRATION:—

1. *Assets—Insolvent estate—Crown debt—Legacy duty—Priority.*—A debt due by a bankrupt to the Crown for legacy duty is entitled to priority over the general creditors of the bankrupt; and such priority can be asserted in the bankruptcy proceedings notwithstanding the vesting of the bankrupt's estate in his assignees.—GALVIN, RE, *C.A.* (*Ir.*).

2. *Costs—Creditor's action—No assets.*—In a creditor's action for administration of the personal estate of a testator it turned out, pending the administration action, by reason of the decision of another court, that the testator had no assets.

Held, that the rule in *Bluett* v. *Jessop*, Jac. 240, nevertheless applied, and that the plaintiff in the administration action should pay the costs of the executor.—HIBERNIAN BANK *v.* LAUDER, *V.C.* (*Ir.*)

3. *Intestacy—Co-parceners—"Purchaser," tracing title from—Real estate—Inheritance, law of—Descent—Heir-at-law—Issue—Ancestor, standing in place of—Inheritance Act*, 1883 (3 & 4 *Will.* 4, *c.* 106), *ss.* 1, 2—*Lunacy—Real estate of lunatic—Sale—Purchase-money—Conversion—Lunacy Regulation Act*, 1853 (16 & 17 *Vict. c.* 70), *ss.* 124, 135.—The doctrine of *Cooper* v. *France*, 19 L. J. Ch. 313—that on the death intestate of a co-parcener a co-heiress of the purchaser of land, her son, notwithstanding section 2 of the Inheritance Act, 1833, stands in her place quoad her share—applies equally in favour of her more remote lineal descendants. Accordingly, on the death intestate of a son of such a co-parcener,

Held, that the entire share descended on the nephew of such son (the nephew being a grandson of the co-parcener), and that no part thereof descended to the descendants of a sister of the co-parcener.

The purchase-money of a lunatic's descended moiety of land sold in 1863 under section 124 of the Lunacy Regulation Act, 1853,

Held, under section 135, transmissible, upon his death intestate, in precisely the same manner as the descended moiety if the same had not been sold.—RE MATSON, JAMES *v.* DICKINSON, *Ch.D. Kekewich, J.*

4. *Practice—Priorities—Rates—Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *s.* 1, *sub-sections* 1 (a), 6; *s.* 3.—The priority conferred by section 1, sub-section 1, of the Preferential Payments in Bankruptcy Act, 1888, applies in the administration of the insolvent estate of a person who has died since the 31st of December, 1888, the date of the commencement of that Act; but does not apply in cases of death prior to that date.—HEYWOOD *v.* HEYWOOD, *Ch.D. Stirling, J.*, 72.

5. *Testamentary expenses—Costs of unsuccessfully opposing probate—Order as to payment of costs by the Probate judge—Testator's personal estate insufficient.*—The plaintiff took an action in the Probate Division against the executors, contesting the validity of the testator's will. That action was dismissed, but the judge of the Probate Division ordered the costs of both parties to the action to be paid out of the testator's estate. The personal estate being insufficient, the executors took out an administration summons to ascertain whether the plaintiff's costs of the probate action were payable out of the testator's real estate, which had been devised subject to the payment of testamentary expenses.

Held, that the costs in question were not testamentary expenses.—PRINCE, RE, GODWIN *v.* PRINCE, *Ch.D. Stirling, J.*

See also Bankruptcy, 1, 5, 8; Partnership, 2; Solicitor, 6; Trustee, 1; Will, 6.

ADMIRALTY:—

1. *County court—Jurisdiction—Ship—Sale of ship by bailiff of county court in action* in rem—*Admiralty title—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 12, 23—*County Court Rules*, 1892, *ord.* 39B, *rr.* 40-42 (105-107)—*County Court Rules*, 1889, *Form* 331.—The purchaser of a ship sold by the high bailiff of a county court under the decree of a county court having admiralty jurisdiction made in an action *in rem*, takes the ship free from all antecedent liens, mortgages, and liabilities.—"RUBY," THE, *P.D. & Ad.D.*, 164.

2. *County court—Practice—Mode of trial—Meaning of term "actions" in consolidating and amending Act—County Courts Admiralty Jurisdiction Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 2—*Maritime cause—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 101.—The proper mode of trial in the case of a maritime cause over which a county court having admiralty jurisdiction has jurisdiction under the 2nd section of County Courts Admiralty Jurisdiction Act, 1869, is either by the judge alone or by the judge assisted by mercantile assessors.

The parties in such a suit are not entitled to a jury: section 101 of the County Courts Act, 1888, by which it is provided that, in all "actions" where the amount claimed shall exceed five pounds, it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action, unless the action is of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice, not being by the context applicable to admiralty or maritime causes tried in a county court having admiralty jurisdiction.—"THEODORA," THE, *P.D. & Ad.D.*, 157.

3. *County court—Ship—Wages—Ship's husband—Salary—The County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 10.—A county court having admiralty jurisdiction has no jurisdiction under the County Courts Admiralty Jurisdiction Act, 1868, over a claim by a ship's husband for his salary or other remuneration due to him in that capacity.—"RUBY," THE (No. 2), *P.D. & Ad.D.*, 687.

ADULTERATION:—

Food—"Skimmed" milk—"Separated" milk—Disclosure of injurious alteration—Sale of Food and

Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 9.—Section 9 of the Sale of Food and Drugs Act, 1875, enacts that "No person shall, with intent that the same may be sold in its altered state, without notice abstract from any article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration under a penalty in each case not exceeding twenty pounds."

Held, that the question whether or not the alteration has been sufficiently disclosed is a question of fact.

Milk from which 97 per cent. of the fat had been abstracted was sold as skimmed milk. The magistrate held, on the evidence, that this was not a sufficient disclosure under section 9.

Held, that there was no appeal from his decision. *Jones* v. *Davies*, 69 L. T. Rep. 492, and *Platt* v. *Tyler*, 58 J. P. 91, commented on and explained. —PETCHEY v. TAYLOR, *Q.B.D.*

ADVANCEMENT.—See Will, 3.

AGENT.—See Company, 12; Deed, 2; Principal and Agent, 1-4; Vendor and Purchaser, 5, 12.

ANIMAL:—

1. *Dog—Injury done to cattle or sheep—Liability of owner of dog—Dogs Act*, 1865 (28 & 29 *Vict. c.* 60), *s.* 1.—A dog chanced to worry and kill a sheep which was trespassing on the land of the owner of the dog.

Held, that, the words of section 1 of the Dogs Act, 1865, being absolute, the owner of the dog was liable in damages.

Semble (*per* Collins, J.), there might be cases, however, where some qualifying proviso ought to be read into the section.—GRANGE *v.* SILCOCK, *Q.B.D.*, 221.

2. *Holding sale of swine—Taking round swine in cart and offering for sale—Diseases of Animals Act*, 1894 (57 & 58 *Vict. c.* 57), *s.* 22, *sub-section* 19—*Markets and Fairs* (*Swine Fever*) *Order*, 1896.—By an order of the Board of Agriculture, dated the 11th of December, 1896, made in pursuance of section 22, sub-section 19, of the Diseases of Animals Act, 1894, "no market, fair, sale, or exhibition of swine shall be held in a district to which this order applies except as expressly authorised by this order," and "a sale of swine (not being in a swine fever infected area) may be held with the licence of the local authority."

The respondent was in charge of a horse and float passing along a highway containing pigs, two of which had been previously ordered, and, whilst so travelling, asked other people if they wanted to buy pigs, and subsequently sold them all to various people. This was not a swine fever infected area, and there had been no licence obtained from the local authority. The magistrates held that there had been no contravention of the order of 1896, and dismissed the information.

Held, that the magistrates were right, for, although there was a selling, there was no holding a sale.—MCLEAN *v.* MONK, *Q.B.D.*

3. *Regulation of cowsheds — Contagious Diseases* (*Animals*) *Act*, 1878 (41 & 42 *Vict. c.* 74), *s.* 34—*Dairies, Cowsheds, and Milkshops Order of* 1885, *articles* 7, 8, 13—*Regulations of local authority—Ventilation — Air-space.* — A local authority has power under section 34 of the Contagious Diseases (Animals) Act, 1878, and article 13 of the Dairies, Cowsheds, and Milkshops Order of 1885, to make regulations prescribing the amount of air-space to be provided for each animal kept in a cowshed, the term "ventilation" in that article including "air-space."—BAKER *v.* WILLIAMS, *Q.B.D.*, 64

ANNUITY:—

Deed—Charge upon corpus *or income.*—By marriage settlement the husband conveyed real estate to trustees upon trust to permit him to receive the rents and profits for life, and after his death, to permit his wife to receive £300 a year "out of the rents, issues, and profits thereof for and during her life, without impeachment of waste, and for her jointure, . . . and immediately after her decease" in trust for the settlor, his heirs and assigns. The settlor covenanted that any lands taken in exchange for the settled lands should, during the life of the wife, produce the clear yearly income of £300.

Held, that the annuity was a charge upon the *corpus* of the settled estate.—WEST'S ESTATE, RE, *C.A.* (*Ir.*).

See also Inland Revenue, 5, 17, 18.

APPOINTMENT:—

1. *Power—Exercise by will—Foreign unattested will—Invalid execution—Wills Act*, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *ss.* 9, 10, 27—*Wills Act*, 1861 (*Lord Kingsdown's Act*) (24 & 25 *Vict. c.* 114), s. 1. —A foreign unattested will or testamentary instrument, though valid according to the law of the place where the testator was domiciled when the same was made, and admissible to probate in this country under section 1 of the Wills Act, 1861, will not operate as a valid exercise of a testamentary power of appointment, since it does not fulfil the requirements of sections 9 and 10 of the Wills Act, 1837.

D'Huart v. *Harkness*, 13 W. R. 513, 34 Beav. 324, distinguished.

In re Kirwan's Trusts, 32 W. R. 581, 25 Ch. D. 373, followed.—HUMMEL *v.* HUMMEL, *Ch.D.* *Kekewich, J.*, 507.

2. *Power—Period of ascertaining class—Gift over on marriage or death of surviving unmarried daughter—Remoteness.*—In 1835 a husband and wife, in exercise of a power of appointment conferred upon them by their marriage settlement, appointed that a certain fund should be held by the trustees upon trust (in the events which happened) to pay thereout the sum of £1,500 to each of their three daughters, F., L., and S., who should thereafter marry; and upon further trust, so long as they or any or either of them should be from time to time living and unmarried, to pay the income of the fund to such of them as should from time to time living and unmarried, if more than one in equal shares; and in case one or two only of them should marry, then upon trust, after the decease or, as the case might require, the marriage of such one of them as should be last living and unmarried, to pay the fund unto the four other children of the marriage, and such one or more of them the said F., L., and S., as should marry as aforesaid, in equal shares.

Held (1) that the final gift over was void for remoteness; (2) that the appointment of the £1,500 to each of the three unmarried daughters was also void for remoteness; and (3) that the appointment of the income of the fund to the three unmarried daughters was a valid appointment of an equal undivided third share of such income to each of such daughters so long as she was living and unmarried, but that the gift over of such one-third share on her marriage was void for remoteness.

Wainwright v. *Miller*, 45 W. R. 652, [1897] 2 Ch.

255, approved.—GAGE, RE, HILL v. GAGE, *Ch.D. Kekewich, J.*, 569.

3. *Power—Real estate—Power of sale—Appointment to trustees upon trust for sale—Legal estate—Proper persons to conduct sale.*—A testator gave his daughter a power of appointment over certain real estate in favour of her children. The daughter by will appointed the property to trustees upon trust for sale and to stand possessed of the proceeds upon trust for the objects of the power.

Held, that the appointment was good; that in the circumstances, the legal estate was vested in the trustees of the daughter's will; and they were the proper persons to carry out the sale.

Kenworthy v. *Bate*, 6 Ves. 793, and *Coxe* v. *Foster*, 1 Joh. & Hem. 30, 9 W. R. Ch. Dig. 55, followed.—PAGET, RE, MELLOR v. MELLOR, *Ch.D. Kekewich, J.*, 328.

4. *Power of—Rule against double portions—Appointment by mother—Person* in loco parentis.—A lady, under a special power for the purpose in her father's will, appointed by will £10,000 equally among her three children. Subsequently by deeds-poll she appointed sums equal to one-third to one daughter.

Held, *per* Stirling, J., that the burden of proof lay on those who asserted that the mother intended to put herself *in loco parentis* to her daughter, and that, there being no proof that she did so intend, the rule against double portions did not apply, and the daughter was entitled to share in the unappointed residue equally with the other children.

But held, by the Court of Appeal, on further evidence, and without considering the point of law raised in the court below, that on the facts the appointments by deeds-poll were intended to be in satisfaction of the daughter's share in the £10,000, and that she was not entitled to share in the unappointed residue equally with the other children.

Decision of Stirling, J. (*ante*, p. 138, [1897] 2 Ch. 574), reversed on the facts.—ASHTON, RE, INGRAM v. PAPILLON, *C.A.*, 231.

See also Will, 23.

APPORTIONMENT.—See Practice, 19A; Will, 4, 5.

ARBITRATION:—

1. *Arbitrators—Misconduct—Refusal to state case for opinion of court, or to adjourn that court may be applied to to order a case—Application for case made reasonably and* bonâ fide—*Remitting matter to arbitrator for reconsideration after award made—Arbitration Act*, 1889 (52 & 23 *Vict. c.* 49), *ss.* 10, 11, 19.—Where one of the parties to an arbitration, acting *bonâ fide* and on reasonable grounds, requests the arbitrator to state a special case raising a material question of law, or to delay his award until the party can apply to the court for an order directing a special case, the arbitrator, if he refuses and at once makes his award, is *primâ facie* guilty of a breach of duty amounting to misconduct within the meaning of section 11 of the Arbitration Act, 1889. In such circumstances the court is justified, under that section, in setting aside the award, or, under section 10, in remitting it for reconsideration, and may order the arbitrator to state a special case.—PALMER'S AND HOSKEN'S ARBITRATION, RE, *C.A.*, 49.

1A. *Costs—Award—Practice—No mention as to costs—Arbitration Act*, 1889, *ss.* 14, 15 (2)—*R. S. C., ord.* 36, *rr.* 55b, 55c—*Ord.* 65, *r.* 1.—Where an action was referred to arbitration, and the order of reference and also the award were silent as to costs,

Held, that the costs of the action, reference, and award followed the event, because under section 15, sub-section 2, of the Arbitration Act, 1889, the award is equivalent to the verdict of a jury.—CARR v. DOUGHERTY, *Q.B.D.*

2. *Partnership—Dissolution—Application to stay proceedings—Time—"Step in the proceedings"—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.—The mere filing of affidavits by the defendant in answer to a motion for a receiver in an action for dissolution of partnership, is not a "step in the proceedings" within section 4 of the Arbitration Act, 1889, the taking of which will preclude the defendant from moving to refer the case to arbitration under a clause in the partnership articles.—ZALINOFF v. HAMMOND, *Ch.D. Stirling, J.*

See also Lands Clauses Acts, 2; Partnership, 1; Railway, 8.

ARMY:—

Volunteer—"Persons subject to military law"—"Being trained or exercised with" regular forces—Breaking up of camp—Subsequent detention—"Military custody"—Army Act, 1881 (44 & 45 *Vict. c.* 58), *ss.* 43, 45, 158, 176, *sub-section* 8 (a).—The plaintiff, a member of a volunteer corps, was, with other members of the corps, in military training with a portion of the regular forces at a camp under a War Office order, which provided for the formation of a volunteer brigade at the camp from the 1st to the 8th of August. Upon the morning of the 8th of August, while the corps was still in camp, the plaintiff was, by order of the adjutant, placed under arrest on a charge of larceny in the camp, and taken to the railway station, where a special military train was waiting to convey the corps to their home destination, and he was then given into the custody of the defendants, three members of the volunteer corps, who, acting under orders, upon the arrival of the train at the home destination, took the plaintiff to the police-station and handed him over to the police. The defendants were then formally dismissed. The plaintiff was subsequently tried at quarter sessions and acquitted. In an action against the defendants for assault and false imprisonment,

Held, that the training or exercise of the volunteer corps with the regular forces, within section 176, sub-section 8 (*a*), of the Army Act, 1881, did not cease, as regards the plaintiff and the three defendants, until they were dismissed after the plaintiff had been handed over to the police, and that until that time they were subject to military law; and that, therefore, the defendants were not liable to the action.

Held, also, that the defendants could justify taking and keeping the plaintiff in military custody under section 158 of the Army Act, 1881, as that section applied to an offence alleged to have been committed by a person subject to military law.

Held, further, that, under section 43 of the Army Act, 1881, the plaintiff's only mode of redress was by complaint to his superior officer as therein provided, and that no action would lie.

Decision of the Queen's Bench Division (*ante*, p. 249) reversed.—MARKS v. FROGLEY, *C.A.*, 548.

ASSIGNMENT:—

1. *Debt—Mortgage—Absolute assignment with proviso for redemption—Implication of power to redeem—Assignment of part of an entire debt—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.—A mortgage of debts due to the mortgagor, made in the ordinary form with a proviso for redemption

and reassignment upon repayment to the mortgagor, is "an absolute assignment (not purporting to be by way of charge only)" within section 25, sub-section 6, of the Judicature Act, 1873.

Tancred v. *Delagoa Bay and East Africa Railway*, 23 Q. B. D. 239, approved.

Where there is an absolute assignment of a debt, but by way of security, a right to a reassignment on redemption will be implied, and section 25, sub-section 6, of the Judicature Act, 1873, is applicable to such an assignment.

Quære, whether an assignment of part of an entire debt is within the enactment.

Judgment of Lord Coleridge, C.J., in *Brice* v. *Bannister*, 3 Q. B. D. 569, questioned.

A firm of builders delivered to the plaintiffs a document in the following terms: "*Re* Building Contract, South Lambeth-road.—In consideration of money advanced from time to time we hereby charge the sum of £1,080, which will become due to us from John Robertson on the completion of the above buildings, as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you." The plaintiffs gave notice to the John Robertson named in the document, and brought this action against him to recover the amount.

Held, that the document was not "an absolute assignment (not purporting to be by way of charge only)" within section 25, sub-section 6, of the Judicature Act, 1873, and that the plaintiffs could not recover in the action.—DURHAM *v.* ROBERTSON, *C.A.*

2. *Debt—Notice of assignment—Retention by creditor of negotiable instrument given for the debt—Effect of.*—Where a debtor has given a negotiable instrument in payment of his debt a notice given to the debtor that the debt has been assigned can be disregarded by the debtor.—BENCE *v.* SHEARMAN, *C.A.*

BANKER:—

Banking account of third party—Inspection before trial—Bankers' Books Evidence Act, 1879 (42 *Vict. c.* 11), *ss.* 3-7.—Section 7 of the Bankers' Books Evidence Act, 1879, was not intended to confer power on the court to order that a party to legal proceedings should have liberty to inspect and take copies of entries in a banker's books of the accounts of persons who are not parties to the action.—POLLOCK *v.* GARLE, *C.A.*, 66.

BANKRUPTCY:—

1. *Administration—Execution—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 46, 125—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11 (2).—A judgment creditor levied execution upon goods of a judgment debtor. The sheriff seized and sold the goods, retaining the proceeds for fourteen days as required by section 11 (2) of the Bankruptcy Act, 1890. Within the fourteen days the sheriff had notice of a petition in bankruptcy against the debtor, and therefore continued to hold the money after the fourteen days had expired. Soon after that date the debtor died, and the petition of which the sheriff had had notice was dismissed; but a petition was presented by a different creditor for administration under section 125 of the Bankruptcy Act, 1883, upon which an administration order was made.

The trustee in the administration and the execution creditor both claimed the money in the hands of the sheriff.

Held, that the execution creditor was entitled to the money, because it had become his property prior to the making of the administration order, and at that date no longer formed part of the debtor's property.—WATKINS *v.* BARNARD, *Bkcy.*, 156.

2. *After-acquired property—Assignment—Equitable* chose in action—Bona fides—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54—*Colonial law.*—The principle that where a bankrupt deals *bonâ fide* and for value with his property acquired subsequently to his bankruptcy, but before his discharge, the transaction is valid against the creditors under the bankruptcy, applies to a case where the property dealt with is an equitable interest in a trust fund; and the assignee for value may demand payment of the trust fund from the trustees.

It makes no difference that the bankrupt had not informed his trustee in bankruptcy of his having acquired the equitable interest, and that the trustee was ignorant of the fact until after the assignment, and that the assignee for value was aware of the ignorance of the trustee, as the conduct of the bankrupt towards his trustee in bankruptcy is immaterial to the question of *bona fides*.

Cohen v. *Mitchell*, 38 W. R. 551, 25 Q. B. D. 262, explained.

Ex parte Ford, 24 W. R. 590, 1 Ch. D. 521, and *Ex parte Clarke*, [1894] 2 Q. B. 393, distinguished.—HUNT *v.* FRIPP, *Ch.D. Byrne, J.*, 125.

3. *Bill of sale—Reputed ownership—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44 (*iii.*)—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 15.—Goods in the possession of a bankrupt in his trade or business at the commencement of the bankruptcy under such circumstances that he is the reputed owner thereof, though covered by a bill of sale, pass to the trustee in the bankruptcy, and not to the grantee of the bill of sale.—GINGER, RE, LONDON AND UNIVERSAL BANK, EX PARTE, *Bkcy.*, 144.

4. *Costs of stranger to bankruptcy—Taxation—Power of Board of Trade to review—Bankruptcy Rules*, 1886 *and* 1890, *r.* 124—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 73, *sub-section* 3.—Where the respondent to a motion by a trustee in bankruptcy has had his costs taxed by the registrar in a county court the Board of Trade has no power to insist on the review of such taxation by the taxing-master of the High Court under rule 124. That rule only applies to the costs of persons employed in the bankruptcy, not to the costs of strangers litigating with the trustee.—HUNT, RE, BOARD OF TRADE, EX PARTE, *Bkcy.*, 384.

5. *Execution—Administration of estate of deceased debtor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 125.—An order for the administration of the estate of a deceased debtor under section 125 of the Bankruptcy Act, 1883, is not equivalent to a receiving order for the purposes of section 45 of that Act, so as to disentitle an execution creditor of the deceased debtor to retain the benefit of his execution against the trustee of the debtor's estate in cases in which he has not completed the execution before the date of the administration order.—HASLUCK *v.* CLARK, *Bkcy.*

6. *Execution—Garnishee—Judgment debt.*—A garnishee order can be made on foot of a judgment obtained in England and subsequently extended to Ireland under the Judgments Extension Act, 1868.—JOHNSTONE *v.* BUCKNALL, *Q.B.D.* (*Ir.*).

7. *Fraudulent preference—Onus of proof—Bank-*

ruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.—Where a trustee in bankruptcy impeaches a payment made by the bankrupt, as a fraudulent preference, the onus of proof of intention to prefer lies upon the trustee throughout the case, and it is not for the respondent to prove absence of intention to prefer after the trustee has proved that the bankrupt knew that he was insolvent at the time when he made the payment impeached.

Dictum of Vaughan Williams, J., in *In re Eaton, Ex parte Viney*, [1897] 2 Q. B. 16, 45 W. R. Dig. 12, dissented from.—LAURIE, RE, GREEN, EX PARTE, *Bkcy.*, 491.

8. *Insolvent estate—Debt due to executor—Retainer in specie—Administration order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-sections* 1-9.—Where an executor is a creditor of the testator for a larger amount than the whole value of the estate, he is entitled to retain the whole estate (with the possible exception of outstanding book debts), without realizing it, in satisfaction of his claim.—GILBERT, RE, GILBERT, EX PARTE, *Bkcy.*, 351.

9. *Judgment debt—Equitable assignment of debt—Right of judgment creditor to issue bankruptcy notice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1.—A creditor who has obtained a final judgment against a debtor may issue a bankruptcy notice founded upon the judgment under section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, notwithstanding that he has made an equitable assignment of the judgment debt.

Ex parte Dearle, In re Hastings, 33 W. R. 440, 14 Q. B. D. 184, followed.—PALMER, RE, BRIMS, EX PARTE, *C.A.*, 342.

10. *Judgment debt—Scotch judgment registered in England—Jurisdiction to issue bankruptcy notice in England—Judgments Extension Act*, 1868 (31 & 32 *Vict. c.* 54), *s.* 3—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g).—A decreet of the Court of Session in Scotland registered in England under the Judgments Extension Act, 1868, cannot be made the foundation of a bankruptcy notice under the Bankruptcy Act, 1883, s. 4, sub-section 1 (*g*).

In re Watson, Ex parte Johnston, 41 W. R. 34, [1893] 1 Q. B. 21, followed.—BANKRUPTCY NOTICE, A, RE, *C.A.*, 325.

11. *Judgment debtor—Foreign subject—Application for committal—Receiving order—Jurisdiction of court—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 6, 103, *sub-section* 5.—In the case of an application under section 5 of the Debtors Act, 1869, for the committal of a foreign subject domiciled abroad, and who, within a year before the application, has not ordinarily resided in England or had a dwelling-house or place of business therein, the court has jurisdiction, under section 103, sub-section 5 (*d*), of the Bankruptcy Act, 1883, if it think fit, to decline to commit, and in lieu thereof, with the consent of the judgment creditor, to make a receiving order against the debtor.—CLARK, RE, CLARK, EX PARTE, *C.A.*, 102.

12. *Lease—Assignment—Covenant to indemnify assignor—Bankruptcy of first assignee—Right to sue executors of deceased second assignee—Bankruptcy Act*, 1886 (46 & 47 *Vict. c.* 52), *ss.* 20, 44, 50 (5), 56, 57, 168.—The lease of a house to A. contained a covenant that A. would pay rent and insure and perform other usual obligations. By deed A. subsequently assigned the lease to B., and B. subsequently assigned to C. Each assignment contained covenants by the assignees to perform the covenants contained in the original lease, and to indemnify the assignors. In June, 1895, C. died. On the 12th of June, 1897, B. was adjudicated a bankrupt, and D. was appointed his trustee. A. was called upon to pay, and did pay, the arrears of rent under the lease, and tendered a proof against B.'s estate for the amount actually paid and the estimated amount of his future liability under the lease. A compromise was then effected between A. and the trustee by a deed, whereby the trustee sold to A. the full benefit of the covenant on the part of C. in consideration of the sum of £5, and of his executing a release whereby A.'s proof against the estate of B. was withdrawn, and all claims and demands under or in respect of the covenants by B. with A. were released and discharged. Under this deed A. carried in a claim against C.'s estate for payment out of his assets of what A. had paid for rent and insurance and for future indemnity against liability against the covenants in the original lease.

Held, that the right of the trustee in bankruptcy to sue C. was property within the meaning of section 168 of the Bankruptcy Act, 1883, and was assignable to A., and that the damages in an action by the trustee against C.'s executors would not be confined to the dividend payable to A. in respect of his proof against B.'s estate; and, (2) on the construction of the release, that, having regard to the terms of the deed and the release of B.'s estate, A. acquired a right to sue C.'s executors.—PERKINS, RE, POYSER *v.* BEYFUS, *C.A.*, 595.

13. *Maintenance order—Arrears—Debt provable in bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-sections* 1, 2, 3, 8.—Arrears payable under a maintenance order, and due at the date of a receiving order, are not debts provable in the bankruptcy.

Linton v. *Linton*, 33 W. R. 714, 15 Q. B. D. 239, followed.—KERR *v.* KERR, *Q.B.D.*, 46.

14. *Order of adjudication—Middlesex Registry—Deed or conveyance—Priorities—Middlesex Registry Act* (7 *Anne c.* 20)—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 54 (4), 121.—An order under section 121 of the Bankruptcy Act, 1883, whereby a person is adjudicated a bankrupt is not a deed or conveyance within the meaning of the Middlesex Registry Act, so as to require, or be capable of, registration thereunder.

Decision of Kekewich, J. (*ante*, p. 457), reversed.—CALCOTT AND ELVIN'S CONTRACT, RE, *C.A.*, 673.

15. *Order and disposition—Debts growing due to bankrupt in the course of his trade—Unaccepted bills drawn in respect thereof—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44, *sub-section* 2 (*iii.*).—Merchants in England sold goods to customers in Spain, giving them six months' credit, the customers undertaking to accept three months' bills for the price at the expiration of three months from the date of the invoices. The English merchants, in order to put themselves in funds, drew bills upon their Spanish customers at six months from the date of the invoices for the price of the goods, and handed these bills to their bankers in London, together with copies of the invoices and duplicate bills of lading. These bills were not presented for acceptance. Upon receipt of these documents the bankers handed their acceptances to the English merchants at three months for a sum less than the invoice price, which the merchants

got discounted. Before the Spanish customers had paid for the goods, or had accepted bills for the price thereof, the English merchants became bankrupt.

Held, that the debts owing by the Spanish customers to the bankrupts for the goods supplied were debts due or growing due to the bankrupts in the course of their trade and business, and were in the order or disposition of the bankrupts at the commencement of the bankruptcy with the consent of the bankers within the meaning of section 44, sub-section 2 (iii.), of the Bankruptcy Act, 1883.—GOETZ, RE, *C.A.*, 469.

16. *Personal earnings—Charge on fund—Personal promise to pay—Assignment not perfected by notice—Intervention of trustee—Stop-order—Title of trustee.*—T. an undischarged bankrupt, who had prior to his bankruptcy been a wine merchant, while not a professional public-house broker, had since his bankruptcy habitually endeavoured to earn money by introducing buyers to vendors of public-houses, introduced to R. a purchaser for R.'s public-house, and on the 20th of April, 1897, obtained a judgment against R. for £258 commission. On the 6th of May, 1897, the trustee in the bankruptcy gave notice to T. and R. claiming the money for the estate, and on the 7th of May obtained a stop-order. The trustee was subsequently informed of two claims by C. and V. against this fund. C.'s claim was based on a letter by T. promising C. one-half the commission earned by T. on the sale by T. of public-houses introduced by C. to T. V.'s claim arose out of a written assignment by T. of his claim against R. executed two days prior to the trial of T.'s action against R. Neither C. nor V. had given notice of assignment to R., but R. in the course of the action became informed of C.'s claim.

Held, (1) that commission so earned was in the nature of earnings from a trade or business, and not in the nature of mere personal labour or personal skill, and passed to the trustee. (2) That C.'s claim was not a charge or assignment on the particular fund, but a mere personal contract to pay money in certain events. (3) That V. not having perfected his assignment by notice, the trustee by obtaining a stop-order had perfected his title.—MERCER *v.* VAN COLINA, *Bkcy.*

17. *Practice—Application to set aside bankruptcy notice—Adjournment—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g)—*Bankruptcy Rules,* 1886 *and* 1890, *rr.* 138 (2), 139, *Form* 8.—No adjournment of an application to set aside a bankruptcy notice can be granted if the debtor does not, in his affidavit in support of the application, rely on the statutory grounds for setting aside a bankruptcy notice—viz., "that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."—COLE, RE, ATTENBOROUGH, EX PARTE, *Bkcy.*, 352.

18. *Practice—Evidence on appeal—Judge's note—Right to use shorthand-writer's transcript to supplement vital omissions—Order LVIII., r.* 11.—On the hearing of an appeal, the judge's note may by special order be supplemented on vital points by a transcript of a shorthand-writer's note, but the whole of the shorthand-writer's note ought not to be referred to.—SPRANGE, RE, *Bkcy.*

19. *Proof—Amendment—Secured creditor—Omission to value security owing to inadvertence—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *Schedule I., r.* 10; *Schedule II., rr.* 11, 12, 13.—Rule 10 of Schedule I. of the Bankruptcy Act, 1883, provides that "For the purpose of voting a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the court on application is satisfied that the omission to value the security has arisen from inadvertence."

A secured creditor who, owing to false information, omits to value his security, does not omit to value such security from inadvertence within the meaning of the above rule.

A secured creditor who states in his proof the particulars of his security, and states that he considers it is worthless, does not (Collins, L.J., dissenting) omit to value such security from inadvertence within the meaning of the above rule.

Judgment of Wright, J. (*ante*, p. 207), affirmed.—PIERS, RE, PIERS, EX PARTE, *C.A.*, 475.

20. *Proof—Bill of exchange—Secured creditor—Consolidation of debts and securities.*—In bankruptcy it would *primâ facie* be right for a creditor who had several debts due to him from a bankrupt to prove for the lump sum without distinguishing the debts. But if there were different rights over with respect to some of the debts as against third parties, or different securities given by the bankrupt for the different debts, it would be the duty of the trustee to require the person proving to specify the particular debts, or the security for each debt.

In re Smith and Logan, Ex parte Fletcher and Brandon, 43 W. R. 412, 2 Manson Bank., Rep. 70, explained.

The holder of four dishonoured bills of exchange sent in a proof in the liquidation of the estate of a firm which had endorsed each bill, for the aggregate amount of the four bills with noting expenses. The trustee in the liquidation had different rights of indemnity in respect of the four bills. In respect of two of those bills the holder had received more than 20s. in the £ upon his proofs against the various parties to the said bills, but the total amount received by him was considerably less than the aggregate amount claimed in respect of the four bills.

Held, that he could not be allowed to retain the surplus beyond the amount due on either of the two overpaid bills and attribute it to payment of the debts on the other bills.—JAMES *v.* LONDON AND COUNTY BANKING CO., MORRIS, RE, *Ch. D. Romer, J.*, 627.

21. *Proof—Debt contracted after notice of act of bankruptcy—Liability of bankrupt—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 9, *sub-section* 1; *s.* 37, *sub-sections* 2, 3.—A debt contracted after notice of an available act of bankruptcy, and before the receiving order is made, is a "debt provable in bankruptcy" within the meaning of section 37, sub-section 3, of the Bankruptcy Act, 1883, though the creditor is prevented by section 37, sub-section 2, from proving the debt; and therefore the creditor cannot, by reason of section 9, sub-section 1, sue the debtor in respect thereof.—BUCKWELL *v.* NORMAN, *C.A.*, 339.

22. *Proof—Verbal agreement to lend money—Receipt by lender of a share of profits of business—Bankruptcy of borrower—Postponement of lender's proof—Partnership Act,* 1890 (53 & 54 *Vict. c.* 39), *s.* 2, *sub-section* (3); *s.* 3.—A verbal agreement to lend money on the terms that the lender shall

receive a share of the profits of a business to be carried on by the borrower is within the provisions of section 3 of the Partnership Act, 1890; and therefore, in such a case, if the borrower is adjudged a bankrupt the lender is not entitled to recover anything in respect of his loan until the claims of the other creditors of the borrower have been satisfied.—FORT, RE, SCHOFIELD, EX PARTE, *C.A.*, 147.

23. *Property of bankrupt—Money paid into court by defendant with denial of liability—Bankruptcy of defendant—Secured creditor—R. S. C.*, 1883, *ord.* 22, *r.* 6—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45.—Where the defendant in an action pays money into court with a denial of liability, and becomes bankrupt before the action can be tried, the plaintiff has a claim as a secured creditor upon the money paid into court to the extent to which the trustee in bankruptcy admits the claim in the action.—GORDON, RE, NAVALCHAND, EX PARTE, *Bkcy.*, 31.

24. *Protected transaction—Execution—Sheriff to hold goods for fourteen days—Notice of bankruptcy petition—Hours for service—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-section* 2—*Bankruptcy Rules*, 1886, *r.* 90.—By section 11, sub-section 2, of the Bankruptcy Act, 1890, the sheriff is to retain the proceeds of an execution for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made thereon, he is to pay the money to the official receiver. By rule 90 of the Bankruptcy Rules, 1886, service of notice is to be effected before six in the afternoon, except on Saturday, when it is to be effected before two in the afternoon; and service effected after those hours shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day, or, in the case of Saturday, on the following Monday.

Notice of a bankruptcy petition, and a receiving order made thereon against the debtor, was served upon the sheriff, who was holding the proceeds of an execution, after the hour named in rule 90, on the fourteenth day.

Held, that the notice was served in time, as rule 90 did not apply to such a notice, but only to service of notices of procedure in the bankruptcy; and, further, that, even if the rule did apply, it did not invalidate the service upon that day, but merely postponed the date for computing the time within which the next step in the proceedings was to be taken.—LOLE *v.* BETTERIDGE, *C.A.*, 161.

25. *Protected transaction—Statement of accounts—Payment to an accountant for preparation with a knowledge of an act of bankruptcy—Title of trustee.*—Where an accountant, who had prepared a statement of accounts and sent to the creditors a notice which amounted to an act of bankruptcy, had received payment for his services,

Held, that the transaction was not protected within the exception of *In re Sinclair, Ex parte Payne*, 15 Q. B. D. 616, and that the money so paid was recoverable by the trustee in the bankruptcy.—WHITE, RE, WARD, EX PARTE, *Q.B.D.*

26. *Receiving order — Application to rescind — Arrangement with creditors—Jurisdiction and discretion of registrar—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 104—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-section* 6.—A debtor presented a petition in bankruptcy against himself and obtained a receiving order. Subsequently to this he entered into an arrangement with all his creditors, under which they received a composition of 10s. in the pound, and released the debtor from their respective debts and withdrew their proofs. The debtor then applied to the registrar to rescind the receiving order. The registrar rescinded the order, though the debtor had undergone no public examination.

Held, by A. L. Smith and Collins, L.JJ. (Rigby, L.J., dissenting), that the registrar had jurisdiction to rescind the receiving order, and that, under the circumstances of the case, he had exercised his discretion properly.

This course should, however, only be adopted with great caution and under special circumstances, when there has been no misconduct on the part of the debtor, and it is for the benefit of the creditors that the receiving order should be rescinded.—IZOD, RE, OFFICIAL RECEIVER, EX PARTE, *C.A.*, 304.

27. *Settlement—Marriage consideration—Settlement in favour of purchaser.*—By section 52 of the Bankruptcy (Ireland) Act, 1872, the following are excepted from the settlements avoided by the section: (*a*) settlements made before and in consideration of marriage; or (*b*) made in favour of a purchaser or incumbrancer in good faith and for valuable consideration.

Held, that exception (*a*) is confined to settlements made on the marriage of the settlor; and that exception (*b*) is confined to transactions for valuable consideration in money passing between the parties.

Ex parte Hillman, In re Pumfrey, 10 Ch. D. 622, approved.—DOWNES, RE, *Q.B.D.* (*Ir.*).

28. *Set-off — Mutual dealings — Bankruptcy Act*, 1883, *ss.* 37, 38, 125.—Where there have been mutual dealings between a creditor and a debtor, the creditor is entitled as against the trustee to set off under section 125 of the Bankruptcy Act, 1883, against his indebtedness a debt due to him from the bankrupt, although it has only ripened into a debt after the bankrupt's death.—WATKINS *v.* LINDSAY, *Bkcy.*

See also Administration, 1, 4; Bill of Sale, 2; Company, 24, 35; County Court, 5; Married Woman, 1, 2; Solicitor, 1.

BASTARDY:—

Summons—Simultaneous applications to three magistrates—One summons dismissed—Fresh summons—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 3.—On the 21st of October, 1896, the complainant applied to three magistrates separately for summonses against C. in respect of a bastard child born on the 9th of September, 1896. On the 28th of July 1897, one of the magistrates issued a summons, which was heard on the 3rd of November, 1897, and dismissed, on the ground that there was not sufficient corroboration of the complainant's evidence. On the 17th of November 1897, another of the three magistrates issued a summons, which recited that it was based on the application to this magistrate on the 21st of October, 1896. On this summons a bastardy order was made.

Held, that the three applications of the 21st of October, 1896, must be treated as one application only, and that that application was exhausted by the issue and dismissal of the summons of the 28th of July, 1897; and that consequently the summons of the 17th of November, 1897, was not based upon an application made within twelve months of the birth of the child, and must be quashed.—REG. *v.* ROBINSON, *Q.B.D.*, 462.

BETTING.—See Gaming, 1-3.

BILL of EXCHANGE:—

1. *Action on consideration—Bill outstanding—Dishonour.*—Where a buyer of goods has given to the seller a bill of exchange for the price, and the seller has indorsed the bill over to a third party, an action for the price of the goods will not lie while the bill is outstanding, although it has been dishonoured, nor can the plaintiff succeed on the ground that he has got in the bill after action brought, but before trial.—DAVIS *v.* REILLY, *Q.B.D.*, 96.

2. *Indorsement—Bill not complete and regular—Indorsement by way of security—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 55, 56.—It was agreed between the plaintiffs and A., who owed them money, that they should draw a bill on him, and that the defendant, who was A.'s father, should indorse it to guarantee payment. They accordingly drew a bill on A. to their own order and, without indorsing it, gave it to A., who returned it to them accepted by himself, and indorsed by the defendant. They then indorsed it, and it was not paid at maturity.

In an action against the defendant,

Held, that he was not liable as indorser under section 55 of the Bills of Exchange Act, 1882, nor as having incurred the liabilities of indorser under section 56, since at the time he put his name on the bill it was not complete and regular on the face of it, as it lacked the plaintiffs' indorsement; nor was he liable on a contract of suretyship, since the provisions of the Statute of Frauds were not satisfied.

The principles laid down in *Steele* v. *McKinlay*, 5 App. Cas. 754, are not affected by the provisions of the Bills of Exchange Act, 1882.—JENKINS *v.* COOMBER, *Q.B.D.*

3. *Maker of promissory note—Signature of maker obtained by fraudulent misrepresentation—Right of payee to recover against maker—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 29.—Where one of two joint makers of a promissory note, without any want of due care on his part, and without any intention of signing a negotiable instrument, has been induced to sign the note by the fraudulent misrepresentation made by the other joint maker that the document was a deed relating to private matters, the payee of the note, who takes the same in good faith and for value, cannot recover on the note against the joint maker who has been so induced to sign the note.

Semble, in such circumstances even a holder of the note in due course could not recover against such joint maker.

Foster v. *Mackinnon*, 17 W. R. 1105, L. R. 4 C. P. 704, followed.—LEWIS *v.* CLAY, *Q.B.D.*, 319.

4. *Notice of dishonour—Reasonable time—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 49, *sub-section* 12.—In an action on a bill of exchange it appeared that the holders handed the bill to their bankers, the Cardiff branch of the G. Bank, who sent it to their agents, the L. and W. Bank, to present for payment. The bill having been dishonoured, the L. and W. Bank sent notice of dishonour on the following day to the G. Bank, but addressed it by mistake to the Cirencester branch. On the next morning, having discovered their mistake, they telegraphed notice of dishonour to the Cardiff branch.

Held, by the Court of Appeal (Collins, L.J., dissenting), that, so far as regarded the giving of notice by the L. and W. Bank to their principals, the requirements of section 49, sub-section 12, of the Bills of Exchange Act, 1882, had been complied with.—FIELDING *v.* CORRY, *C.A.*, 97.

See also Bankruptcy, 20; Sale of Goods, 1.

BILL of SALE:—

1. *Consideration—Payment off of a prior bill of sale with money advanced—Provision for repayment of principal and interest by monthly instalments of a specified amount—Right of grantee to interest as if the date for repayment had been inserted—Misdescription of grantor which is not misleading.*—Where the money consideration as set forth in a bill of sale has been actually paid to the grantor it is not necessary to refer to the payment off of a prior bill of sale out of the proceeds.

Where the principal and interest advanced on a bill of sale is to be repaid by regular instalments of a specified amount, the holder is in the same position as if the date of repayment which can be gathered by calculation had been inserted in the bill of sale, and can only be redeemed by payment of interest to that date.

Semble, a misdescription of a grantor, which is not calculated to mislead, does not avoid a bill of sale.—DAVIES, RE, EQUITABLE INVESTMENT CO., EX PARTE, *Q.B.D.*

2. *Execution creditor—Sale by sheriff by order of court—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11—*R. S. C., ord.* 57, *r.* 12.—The jurisdiction conferred on the court by ord. 57, r. 12, ought not to be exercised against a mortgagee, unless there is a reasonable ground for assuming that the sale will produce more than sufficient to answer the just claims of the mortgagee, so as to leave a surplus available for the execution creditor.

Semble, the effect of section 11 of the Bankruptcy Act, 1890, upon the execution and the proceedings thereon, on request made by the official receiver for delivery of the goods, would be to preclude any proceedings being taken by the execution creditor under ord. 57, r. 12.—STERN *v.* TEGNER, *C.A.*, 82.

3. *Goods seized to protect security—Relief against seizure—Order as to giving up bill of sale—Jurisdiction—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.—The grantee of a bill of sale seized the goods upon default in payment of one of the instalments of interest. The warrant authorizing the bailiff to seize directed him to take and hold possession for the amount of interest in arrear. Upon a summons by the grantor for relief under section 7 of the Bills of Sale Act, 1882, the judge at chambers ordered that the grantee should give up the bill of sale upon the grantor paying the principal sum with the interest then in arrear.

Held, that, as the grantee had seized merely for the purpose of protecting his security, and not for the purpose of realizing it, the judge had no jurisdiction to order him to give up the bill of sale.

Ex parte Wickens, ante, p. 385, [1898] 1 Q. B. 543, distinguished.—ELLIS, EX PARTE, *C.A.*, 531.

4. *Seizure of goods—Entering into possession for purpose of realizing security—Non-production of last receipt for rent—Reasonable excuse—Relief against seizure—Jurisdiction to order bill of sale to be given up—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7, *sub-section* 4.—Where the grantee of a bill of sale seizes the goods for the purpose of realizing his security, and the grantor makes an application under section 7 of the Bills of Sale Act, 1882, the judge has jurisdiction to order the bill of sale to be given up on payment of the principal sum and the interest then due.

Where the grantor of a bill of sale did not upon

demand produce to the grantee a receipt for a quarter's rent which became due only a short time before, and of which the landlord had not yet required payment,

Held (approving *Ex parte Cotton*, 32 W. R. 58, 11 Q. B. D. 301), that the grantor had not without reasonable excuse failed to produce the last receipt for rent within the meaning of section 7, sub-section 4, of the Bills of Sale Act, 1882.

Per Collins, L.J.—A grantee is not entitled under sub-section 4 to demand that the grantor shall send him his last receipt for rent by post.—WICKENS, EX PARTE, *C.A.*, 385.

5. *Validity—Address of grantees—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.—In a bill of sale the grantees were described as "The Staffordshire Financial Company, Limited," without any other description or any address being given.

Held, that the bill of sale was void, under section 9 of the Bills of Sale Act, 1882, as not in accordance with the form in the schedule to that Act.—ALTREE *v.* ALTREE, *Q.B.D.*

6. *Validity—Filing of copy and affidavit—Date of execution—Omission from copy—Insertion in original and in affidavit—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-section* 2.—A bill of sale is not void because the copy of the bill of sale required to be filed by section 10, sub-section 2, of the Bills of Sale Act, 1878, leaves the date of the execution of the bill of sale in blank, if the date is truly stated in the original bill of sale, and in the affidavit filed under the same section.—THOMAS *v.* ROBERTS, *Q.B.D.*

See also Bankruptcy, 3.

BUILDING SOCIETY:—

1. *Fully paid-up shares—Loss written off by reducing shares—Resolution of special meeting—* Ultra vires—*Building Societies Act*, 1836 (6 & 7 *Will.* 4, *c.* 32), *s.* 1—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 7, 13, 16, 18—*Building Societies Act*, 1894 (57 & 58 *Vict. c.* 47), *ss.* 1 (f), 25 (2).—Section 18 of the Building Societies Act, 1874, confers upon "any society under this Act certified previously to the passing of this Act," a general power of altering its rules as to all matters affecting merely the rights of the members *inter se*.

A society certified after 1856, but before 1874, has, therefore, power to alter its rules so as to provide for losses incurred by reducing the shares; and it makes no difference whether this is done by amending the existing rules or by substituting a new set of rules.

Decision of Stirling, J., 45 W. R. 700, reversed.—STROHMENGER *v.* FINSBURY BOROUGH BUILDING SOCIETY, *C.A.*, 69.

2. *Unincorporated — Winding-up — Scheme of arrangement — Surplus assets — Priorities — Widows and children of deceased members—Building Societies Act*, 1836 (6 & 7 *Will.* 4, *c.* 32).—Rule 22 of a building society provided that "if more than one member shall give notice to withdraw at one time they shall be paid in rotation, according to the priority of notice; provided always that the widows and children of deceased members shall always have the precedence."

The rules also provided (clause 25) that, in case of a member dying, his shares and interest should belong to his executors or administrators, or other the person or persons thereinafter mentioned; that, when on the death of any member without leaving a will a sum of money not exceeding £50 should become payable, such sum should, in default of letters of administration being taken out to the deceased member, be paid to any person nominated by the deceased in writing (such person being husband, wife, father, mother, child, brother or sister, nephew or niece, of such member), and, in case there should be no such nomination, or the person so nominated should have died before the deceased member, or in case the member should have revoked such nomination, then such sum should be paid to the person who should appear to be entitled under the Statutes of Distributions to receive the same, without taking out letters of administration.

Held, on the winding up of the society, that the true construction of the rules was that, whenever there was a competition between persons who had given notice to withdraw their shares and the widows and children of deceased members whom the society was bound to recognize under clause 25, then the widows and children should always have precedence.

Held, therefore, that, under the scheme of arrangement, such widows and children were entitled to be paid in priority to the other shareholders of the society, such widows and children ranking *inter se* according to the dates of the deaths of the deceased members through whom they claimed.—WEST LONDON BUILDING SOCIETY, RE, *C.A.*

See also Inland Revenue, 1.

BURIAL:—

New burial-ground—Addition to an old burial-ground—Approval of Secretary of State—Burial Act, 1852 (15 & 16 *Vict. c.* 85), *ss.* 25, 26, 28—*Burial Act*, 1853 (16 & 17 *Vict. c.* 134), *ss.* 1, 6.—Under the Burial Act, 1852, a burial board can buy land or appropriate parish land, or accept a gift of land, for the purpose of a burial-ground without the preliminary sanction of a Secretary of State.

The restriction contained in section 6 of the Burial Act, 1853, as to the opening of any new burial-ground without the consent of a Secretary of State applies only to the "provision and user" of such burial-ground, and not to its acquisition by a burial board.

Consequently it is *intra vires* of a burial board, or their statutory successors, to acquire ground adjacent to their existing burial-ground as an addition to it without obtaining the approval of a Secretary of State.

So held by the Court of Appeal, reversing the decision of Byrne, J.—WARD *v.* PORTSMOUTH (MAYOR), *C.A.*, 610.

See also Ecclesiastical Law, 3; Local Government, 37; *Mandamus*.

BYE-LAW.—See Local Government, 3, 5, 6, 7, 29.

CANADA, LAW of:—

1. *Ontario — British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 92, *sub-section* 1, 4, 14—*Powers of provincial legislature—Revised Statutes of Ontario*, 1877, *c.* 139—*Provincial bar—Power to issue patents of precedence.*

Held, that, according to the true construction of the British North America Act, 1867, *s.* 92, sub-sections 1, 4, 14, Revised Statutes of Ontario, 1877, c. 139, which empowers the Lieutenant-Governor of the province to confer precedence by patents upon such members of the bar of the province as he may think fit to select, is *intra vires* of the provincial legislature.—ATTORNEY-GENERAL FOR CANADA *v.* ATTORNEY-GENERAL FOR ONTARIO, *P.C.*

2. *Ontario—Company—Statutory duties of a corporation—Breach—Cause of action.*—Where by an

Act extending the powers of the respondent company certain duties and obligations were imposed on it for the benefit of its customers with a view to the reduction of the price of gas contingent on the amount of surplus net profit, but no pecuniary penalty was imposed for default and no right of action given to persons aggrieved, provision however being made for its accounts being audited by direction of the mayor of the corporation with whose assent the company was originally established,

Held, that no individual customer had a right of action against the company for non-compliance with the provisions of the Act. Such a right only arises where given by the Act, and especially so where the Act as in this case is in the nature of a private legislative bargain, and not one of public and general policy.—JOHNSTON TYPE FOUNDRY Co. *v.* TORONTO GAS CONSUMERS Co., *P.C.*

3. *Ontario—Powers of provincial legislature—Appointment of Queen's Counsel—Powers of Lieutenant-Governor of province—Prerogative of Crown.*—An Act of a provincial legislature empowering the Lieutenant-Governor to appoint by letters patent Queen's Counsel within the province, is within the limit of their legislative authority, and such appointments by the Lieutenant-Governor do not constitute an encroachment upon the prerogative of the Crown.—ATTORNEY-GENERAL FOR CANADA *v.* ONTARIO ATTORNEY-GENERAL (No. 2), *P.C.*

4. *Quebec—Underground wires—Power to lay wires underground for purpose of supplying electricity and gas—Right to excavate streets—Quebec Act* (55 & 56 *Vict. c.* 77), *s.* 5—*Construction.*—Section 5 of the respondent company's incorporating Act (55 & 56 Vict. c. 77) empowered it on certain conditions (which have been complied with) to lay its wires underground as the same may be necessary, and in so many streets, squares, highways, lanes, and public places as may be deemed necessary for the purpose of supplying electricity and gas.

Held, that the power to open streets, that is, to break up their surface and excavate them, is plainly involved in this provision, and that an injunction obtained by the respondents to restrain the municipality from interfering therewith was properly granted.—MONTREAL (CITY OF) *v.* STANDARD LIGHT AND POWER Co., *P.C.*

CAPE of GOOD HOPE, LAW of:—

Contract — Construction — Water, supply of — Monopoly—Mining purposes.—Where the respondents had agreed for a specified period to "obtain and purchase all the water required by them for their mining purposes" from the appellants and from no other person, with a proviso excepting any water obtained by them from their own mines,

Held, (1) that the proviso was not limited to such of the mines as the respondents possessed at the date of the agreement; and (2) that the respondents could not, by obtaining a supply of water gratis elsewhere, thereby deprive the appellants of their monopoly of supply.—KIMBERLEY WATERWORKS Co. *v.* DE BEERS CONSOLIDATED MINES, *P.C.*

CERTIORARI.—See Justices, 5-8.

CEYLON, LAW of:—

Registration—Priority—Mortgage bonds—Unregistered ante-nuptial settlement—Ceylon Land Registration Ordinance VIII. of 1863, *s.* 39.

Held, that under section 39 of the Ceylon Land Registration Ordinance VIII, of 1863, an unregistered deed of ante-nuptial settlement executed by a wife is postponed to subsequently registered mortgage bonds relating to the settled estates and jointly executed by both husband and wife, *bonâ fide* and for valuable consideration.—GAUDER *v.* DASSENAIKE, *P.C.*

CHARITY:—

1. *Churchwardens—Income of charity estates—Banking account—Anticipation of rents—Charge on charitable property—Charitable Trusts Admendment Act,* 1855 (18 & 19 *Vict. c.* 124), *s.* 29—Estates held on old parochial trusts, the origin of which was unknown, were in 1865 vested in trustees by a deed of appointment of new trustees upon trust to permit and suffer the churchwardens of St. B., in the City of London, to receive and take the rents as the same should from time to time grow due and be payable as formerly had been used, and for such charitable uses, intents, and purposes as the same had been usually employed by the parishioners of of the said parish, whether in or about the repairs of the church, the relief of the poor of the parish, or any other of the public affairs of the parish. The churchwardens kept an account with a bank headed as the account of the churchwardens, not mentioning their names, and for many years this account had been kept as a continuous account, an adverse balance at the end of one year being paid out of rents of subsequent years. From 1885 to 1888 the then churchwardens, there being a temporary diminution of income, obtained from the bank, without the sanction of the Charity Commissioners, advances amounting to £3,000, which were carried to the credit of the churchwardens in the account. In 1891 a scheme by the Charity Commissioners under the City of London Parochial Charities Act, 1883 (46 & 47 Vict. c. 36), came into effect, by which the estates were vested in the Official Trustee of Charity Lands, and the administration of the rents in the Trustees of the London Parochial Charities. The bank then sued the individual churchwardens in whose time the advances had been made for the advances; and the churchwardens brought an action against the Official Trustee of Charity Lands and the Trustees of the London Parochial Charities to be indemnified out of the rents against the claims of the bank.

Held, by Romer, J., that on the construction of the deed appointing new trustees, the churchwardens for the time being could only receive the rents as they became due and apply them, and had no power to anticipate the income so as to have a claim on the future income, and that their claim therefore failed:

Held, by the Court of Appeal, that whether this was a correct view or not the churchwardens' claim was defeated by the Charitable Trusts Amendment Act, 1855, s. 29, which prohibits any sale, mortgage, or charge of a charity estate without the approval of the Charity Commissioners.—FELL *v.* OFFICIAL TRUSTEE OF CHARITY LANDS, *C.A.*

2. *Ecclesiastical charity—Local Government Act,* 1894 (56 & 57 *Vict. c.* 73), *ss.* 14, 70, 75.—A testatrix charged certain lands with the payment of £3 a year, to be paid on the feast day of St. Thomas the Apostle to the churchwardens of A., to be laid out by them in the purchase of flannel petticoats, stockings, or gowns to be given to six old and poor widows of the said parish whom they should judge to be the properest objects to receive the same, with preference to those who, not being disabled by infirmity or sickness, were most constant in their attendance on the public services of the church.

Held, that this was not an ecclesiastical charity within the meaning of section 75 of the Local Government Act, 1894, and that new trustees might be appointed under section 14 of that Act by the parish council, in the place of the churchwardens.—ROSS CHARITY, RE, *Ch.D. North, J.*, 27.

3. "*Ecclesiastical charity*"—*Member of Church of England as such—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 70, 75.—The founder of a charity required that the objects of it should be selected from persons who should have (1) regularly attended Divine service at the parish church for a fixed period; (2) been partakers of the Holy Communion; (3) lived a godly, righteous, and sober life, to the glory of God's holy Name; and that the trustees should be members of the Church of England.

Held that this was a charity for the members of the Church of England as such; and was therefore an ecclesiastical charity within the meaning of section 75 of the Local Government Act, 1894.—PERRY ALMSHOUSES, RE, *Ch.D. Stirling, J.*, 360.

4. *Mortgage of property of—Jurisdiction of Charity Commissioners—"Cathedral, collegiate, chapter, or other schools" — Words "ejusdem generis" — Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 62.—By section 62 of the Charitable Trusts Act, 1853, it is enacted that that Act shall not extend to certain kinds of charitable institutions therein specifically mentioned, but the said section concludes with a proviso that "the said exemption shall not extend to cathedral, collegiate, chapter, or other schools."

Held, that such proviso ought to be so construed as to apply only to schools *ejusdem generis* with cathedral, collegiate, and chapter schools.—STOCKPORT RAGGED SCHOOLS, RE, *Ch.D. Stirling, J.*, 455.

5. *Mortgage—Real estate held in trust for charity—Sanction of court—Practice—Service of petition—Romilly's Act* (52 *Geo.* 3, *c.* 101).—The court may sanction a scheme providing (*inter alia*) for the mortgage of real estate belonging to a charity.

It is unnecessary to serve the Attorney-General with a petition under Romilly's Act for the sanction by the court of a scheme providing for the sale of real estate belonging to a charity and the purchase of new premises with the proceeds of sale, and additional moneys to be raised by mortgage of the trust property; but the trustees of the charity other than the petitioning trustees should be made respondents to the petition.—STOCKPORT RAGGED SCHOOLS (No. 2), RE, *Ch.D. Stirling, J.*

See also Vendor and Purchaser, 11; Will, 6, 7.

COAL.—See Weights and Measures.

COMPANY:—

1. *Articles of association—Winding up—Right of contributory to petition for—Limitations imposed by articles—Validity—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79, 82.—It is not competent for a limited company to curtail by its articles of association the statutory right of any of its members to present a winding-up petition to the court.—PEVERIL GOLD MINES, RE, *C.A.*, 198.

2. *Debentures—Charge on all "property"—Uncalled capital.*—In a charge created by debentures issued by a limited company on all present and future property of the company, the word "property" does not include uncalled capital of the company.—RUSSIAN SPRATT'S PATENT, RE, JOHNSON *v.* RUSSIAN SPRATT'S PATENT, *C.A.*, 514.

3. *Debentures—Equitable security—Option to call for debenture.*—An option to call at any time for a specified amount of debentures in satisfaction of a promissory note may be exercised at any time while the issue is unexhausted. The holder of such a security is in equity a debenture-holder.

In re Queensland Land and Coal Co., Davis v. *Martin*, 42 W. R. 600, [1894] 3 Ch. 181, followed.—PEGGE *v.* NEATH TRAMWAYS CO., *Ch.D. North, J.*, 243.

4. *Debentures—No profits—Debenture interest paid out of capital—No obligation to recoup capital out of profits of subsequent year before paying dividend.*—The principal mine of a mining company fell in, rendering further working impossible without a previous expenditure of large sums of money in re-opening it. To obtain the necessary funds for this purpose the capital of the company was increased by the issue of shares and debentures, and ultimately the mine was re-opened and working recommenced. From the date of the issue of the debentures to the date of the re-opening of the mine the company made no profits and the interest on the debentures was paid out of capital. When the working recommenced profits were made and the debenture interest and all outgoings were paid out of income. The directors then proposed to pay a dividend out of the profits for the year, and to carry over the remainder to a sinking fund which they opened with the object of recouping the amount paid out of capital for interest on the debentures. Upon a motion for an injunction to restrain them from paying a dividend out of profits until the amount paid out of capital for debenture interest in previous years had been repaid,

Held, that the company were not bound to apply profits in replacing the amount paid out of capital for debenture interest in previous years before declaring a dividend.—BOSANQUET *v.* ST. JOHN D'EL REY MINING CO., *Ch.D. North, J.*,

5. *Debentures—Payment by instalments—Specific performance of agreement—Agreement to lend money—Damages.*—Specific performance of a contract to lend money will not be granted, and this is equally so where the agreement on the one side is to lend money for a term of years, and on the other to give the lender certain specified security for his loan.

Decision of the Court of Appeal (45 W. R. 467, [1897] 1 Q. B. 692) affirmed.—SOUTH AFRICAN TERRITORIES *v.* WALLINGTON, *H.L.*, 545.

6. *Debenture—Power to appoint receiver—Fiduciary power—Jurisdiction of court.*—Each of a series of debentures issued by a company and ranking *pari passu*, contained a condition that in a certain event a named debenture-holder should have power to appoint a receiver. The event having happened, that debenture-holder, who was a large shareholder in the company, appointed a receiver, not for the protection of the debenture-holders, but in the interest of the company and its shareholders.

Held, that the power was a fiduciary one, and must be exercised in the interest of the debenture-holders as such, and that the court had jurisdiction to interfere for their protection by appointing another receiver. Receiver appointed accordingly.—MASKELYNE BRITISH TYPEWRITER, RE, STUART *v.* MASKELYNE BRITISH TYPEWRITER, *C.A.*, 294.

7. *Debentures — Priority between equitable mortgagees — Notice — Negligence of first mortgagee in custody of deeds.*—A company had created by way of equitable mortgage certain debentures, which

were secured by a floating charge on all the property of the company. There was a condition that the company should not be at liberty to create any charge upon its freehold or leasehold property in priority to the debentures. The title-deeds of such property were left in the possession of the company, and were, subsequently to the issue of the debentures, deposited with the company's bank to secure an overdraft. The bank had then no notice of the existence of the charge created by the debentures. In the liquidation of the company the bank claimed to have a prior charge, and to retain the title-deeds until their debt was paid.

Held, that though, as between equitable incumbrancers, the general rule is that, where other equities are equal, the first in time has priority, that in the present case, having regard to the possession of the title-deeds and other circumstances, the bank had the better equity, and were entitled to priority for their charge.—CASTELL & BROWN, RE, UNION BANK OF LONDON, EX PARTE, *Ch.D. Romer, J.*, 248.

8. *Debentures—Redemption—"Redeemable" sinking fund—Prospectus.*—Debentures issued by a company provided that the company should carry to the credit of a sinking fund in each half-year the sum of £2,500 which should be applied in redeeming at a specified premium, on the 1st of January and the 1st of July in each year, so many of the debentures issued as the sum from time to time standing to the credit of the sinking fund should suffice to pay off, the particular debentures to be redeemed on each occasion being determined by half-yearly drawings. The prospectus which the company had previously issued, inviting subscriptions for the debentures, stated that they were to be "redeemable within seventeen years by half-yearly drawings on the 1st of January and the 1st July in each year by the application of a sinking fund of £5,000 per annum."

Held, that, even if the prospectus could be looked at in order to ascertain the contract between the company and the debenture-holders, the word "redeemable" meant only that the debentures were to be liable to redemption during the seventeen years, but that there was no obligation upon the company that they should all be redeemed within that period.

Semble, however, that the debentures contained the whole contract between the company and the debenture-holders, and that the prospectus could not be looked at for the purpose of interpreting the contract.—CHICAGO GRANARIES CO., RE, MORRISON *v.* SAME, *Ch.D. North, J.*

9. *Debenture-holders—Floating security—Execution creditor—Sheriff—Priority.*—A trading company issued first mortgage debentures payable on the 31st of December, 1898. They were secured by a floating charge upon all the property of the company. Indorsed on the debentures was the provision that they should become payable "if an order is made, or an effective resolution is passed, for winding up the company"; also, "whenever the trustee of the within-mentioned trust deed shall have entered upon the mortgaged premises comprised in the trust deed, or appointed a receiver or receivers under the provisions therein contained." A further condition was that no part of the property subject to the security should be dealt with except in the ordinary course of business of the company.

The debenture-holders were entitled to the benefits and subject to the conditions of the said trust deed, which vested in a trustee for the benefit of the debenture-holders the leasehold property and the uncalled capital of the company, and gave to such trustee the right to call upon the company to vest in him all the property of the company, but the company was left free—until the trustee or the debenture-holders took action on the happening of any of certain events contemplated by the deed, one of which was "If any execution, sequestration, extent, or other process of any court or authority is sued out against the property of the company for any sum whatsoever," or until the happening of any of the events contemplated by the terms of the debentures—to carry on the business and deal, but only in the ordinary course of business, with the assets of the company.

The plaintiffs obtained judgment against the company for a sum of money, and a writ of *fi. fa.* was issued, under which the sheriff seized certain goods in the possession of the company which were charged by the debentures. The claimant then, for himself and the other debenture-holders, claimed the goods as theirs under the debenture securities. The sheriff thereupon interpleaded. The due date of the debentures had not then arrived, nor had any winding-up resolution been passed. No receiver had been appointed, nor had the trustee put in force his powers under the trust deed.

Held, that the rights of the debenture-holders prevailed against those of the execution creditor. The seizure under the execution on the judgment was not a dealing by the company in the ordinary course of business within the condition indorsed on the debentures. The security had become enforceable by reason of the fact that an execution had been sued out against the company. The goods seized were charged with the payment of the amount of the debentures, which exceeded the value of the goods, and the judgment debtor had therefore no interest in the property seized available to satisfy the judgment debt.—DAVEY *v.* WILLIAMSON, *Q.B.D.*, 571.

10. *Directors—Breach of trust*—Ultra vires—*Parties to sue—Laches—Statute of Limitations—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8—*Manchester, Sheffield, and Lincoln (Various Powers) Act*, 1891 (54 & 55 *Vict. c. cxiv.*), *ss.* 45, 47.—In July, 1890, the plaintiffs contracted with the Railways and General Co. (Limited) for the sale of certain stock in the Wrexham, Mold, and Connah's Quay Railway. The real purchaser, however, was the Manchester, Sheffield, and Lincoln Railway, and the money was paid by that company in two sums, the larger on the 5th of August, and the smaller on the 10th of October, 1890. These payments were then *ultra vires*. But by their Act of 1891 they were authorized to subscribe towards the undertaking of the Wrexham Co., and to hold shares therein, and a resolution authorizing the Manchester Co. to so subscribe was agreed to the day after the Act passed. The books of the Manchester Co. did not accurately represent the facts. The writ was issued on the 6th of August, 1896, claiming against three of the directors repayment to the company of these sums.

Held, (1) that the purchase was not a subscription within the meaning of the Act of 1891, and was therefore *ultra vires*.

(2) That, as to the larger sum, the writ not having been issued within six years and no fraud being alleged, the Statute of Limitations afforded a good defence.

(3) That, as to the smaller sum, the evidence showed that the plaintiffs had purchased shares to enable them to bring the action, and that they

were aware of the purchase by the Manchester Co. before October, 1890, and that, under the circumstances, therefore, the action ought to have been brought by the company and not by the plaintiffs.—WHITWAM *v.* WATKIN, *Ch.D. Stirling, J.*

11. *Directors — Qualification — Casual vacancy— Calls on shares—Invalidity.*—A clause in the articles of association of the A. Co. provided that any acts done at any meeting of the directors should, notwithstanding that it should be afterwards discovered that there was some defect in the appointment of such directors, or that they were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

N., who had been duly appointed a director of the A. Co., transferred all his shares, and for a few days was without a director's qualification. After re-acquiring his qualification he, without being formally re-elected, acted as a director, and, in conjunction with his co-directors, made a call on the shares.

Held (reversing Ridley, J.), that the acts done by N. in his capacity of a director were validated by the clause in the articles of association (as above set out).

Further, the clause operates not only as between the company and its members, but also as between the company and third parties.

Howbeach Coal Co. v. *Teague*, 8 W. R. 264, 5 H. & N. 151, explained.—DAWSON *v.* AFRICAN TRADING CO., *C.A.*, 132.

12. *Mortgage—Receiver — Principal and agent— Liability for goods ordered.*—By an indenture of second mortgage all the land and property, and all the business and undertaking of a limited company were conveyed to the appellant as trustee for the second debenture-holders. By this deed it was provided that the trustee might appoint a receiver of the mortgaged premises, who should have power to enter into possession and carry on the business, and that the person so appointed should be the agent of the company, who alone should be liable for his acts and defaults. The trustee appointed K. receiver, the instrument appointing him containing certain regulations as to payment of money received into the appellant's bank, and that cheques drawn by him should be countersigned by the appellant's solicitor, who was also chairman of the company. Immediately after his appointment the receiver entered into possession and carried on the business, and goods were ordered by him signed in the company's name, with the addition "K., Receiver." Soon after the appointment of the receiver, an order was made for the compulsory winding up of the company, and a liquidator was appointed, who, however, did not displace the receiver. K. continued to carry on the business, and, in the course of doing so, ordered goods from the respondents in the abovementioned form.

Held, in an action brought by the respondents against the trustee for the price of the goods supplied to the receiver's order, that the receiver was agent for the mortgagors (the company), and that the trustee was under no liability.

Decision of the Court of Appeal ([1896] 1 Q. B. 669) reversed.—GOSLING *v.* GASKELL, *H.L.*, 208.

13. *Reduction of capital—Capital lost or unrepresented by available assets—Arrears of dividends on preference shares—Inequality of reduction—Conversion of preference into ordinary shares.*—An incorporated society whose articles of association did not give power to modify rights, or to subdivide shares, or to reduce capital, having issued both preference and ordinary shares of £5 each, finding that, owing partly to the defalcations and mismanagement of a former manager and partly to depreciation of property, its capital had been lost or was unrepresented by available assets to the extent of a large amount, and also that the arrears of dividends on the preference shares amounted to a considerable sum, added to its articles of association articles for the above-mentioned purposes, and then prepared a scheme which was approved by a majority of each class of shareholders, under which some ordinary shares which had been transferred to the society were cancelled, the preference shares were reduced to £2 shares and then divided into £1 shares, the ordinary shares were reduced to shares of 10s. each and then consolidated into £1 shares, the arrears of dividends on the preference shares were cancelled, and the preference shares were made to rank *pari passu* with and to have only the rights and privileges of ordinary shares.

The society then petitioned the court to confirm the reduction of its capital and to approve minutes for registration. The petition was unopposed.

The court confirmed the reduction and approved the minutes.—NATIONAL DWELLINGS SOCIETY, RE, *Ch.D. North, J.*

14. *Register—Inspection—Right to take extracts— Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 32.—The right of inspection under section 32 of the Companies Act, 1862, includes the right of taking copies of the register.—BOORD *v.* AFRICAN CONSOLIDATED LAND CO., *Ch.D. North, J.*, 150.

15. *Sale of undertaking—Bonus to directors—* Ultra vires—*Notice of purpose of extraordinary meeting—Sufficiency of notice—Companies Clauses Act*, 1845 (8 *Vict.* c. 16), *ss.* 71, 85, 86.—The directors of the C. Co. entered into a provisional agreement for the sale of their undertaking and assets to the T. Co. One of the terms of the agreement was that a lump sum should be paid to the directors and secretary of the C. Co. as compensation for loss of office. The agreement was conditional upon its adoption by the shareholders of the C. Co. in general meeting. The notice convening the meeting stated that the purpose of the meeting was to consider and, if advisable, approve the terms of the agreement.

Held, (1) that the agreement was not *ultra vires* on account of the compensation to be paid to the directors and secretary; but (2) that the notice convening the meeting did not sufficiently disclose the nature of the business to be considered at the meeting, and did not, therefore, comply with the provisions of section 71 of the Companies Clauses Act, 1845.

Southall v. *British Mutual Life Assurance Society*, 19 W. R. 865, L. R. 6 Ch. App. 614, discussed.

Hutton v. *West Cork Railway Co.*, 31 W. R. 827, 23 Ch. D. 654, distinguished.—KAYE *v.* CROYDON TRAMWAYS CO., *C.A.*, 405.

16. *Shares—Contract—Conditional application for shares—Repudiation—Opposing winding up petition— Void contract.*—A conditional applicant for shares in a company before allotment, to whom shares are allotted, may repudiate his shares if the conditions specified in his application are not fulfilled, as there is no *consensus ad idem*, and therefore there is no contract between the company and the applicant.

This right of repudiation is not taken away by his appearance on a petition to wind up the com-

pany as a contributory opposing such a petition.—BRINSMEAD & Co., RE, TOMLIN'S CASE, *Ch.D. Wright, J.*, 171.

17. *Shares — Contract — Fully paid-up shares — Registration of subsidiary contract only— Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—The contract to be registered under section 25 of the Companies Act, 1867, prior to the issue of shares as fully paid must, in order to comply with that section, set forth all the material terms of such contract.

Therefore, where a subsidiary agreement only was filed, which recited merely that by another specified agreement, "for the considerations therein mentioned," it was agreed that certain shares should be allotted as fully paid up,

Held, that such registration was insufficient to protect the allottees.—KARASKHOMA SYNDICATE, RE, *C.A.*, 37.

18. *Shares — Contract — Fully paid-up shares — Statement of consideration—Particularity—Rectification of register—Order—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—The contract to be registered under section 25 of the Companies Act, 1867, prior to the issue of shares as fully paid, must, in order to comply with that section, describe with some degree of particularity the consideration given for the shares. A mere recital in the filed contract to the effect that, by a previous unfiled agreement, it was agreed to allot the shares in consideration of the sale to the company of "the businesses and property mentioned in the first part of the schedule" to the previous agreement and "the leasehold hereditaments, short particulars of which are set out in the second part" of the same schedule, does not describe the consideration with sufficient particularity.

Form of order for rectification of register.—MAYNARDS, RE, *Ch.D. Kekewich, J.*, 346.

19. *Shares—Contract—Option of taking shares—Voluntary liquidation—Damages for breach of contract.*—The fact that a company has given to any person the option of taking its unissued shares at a future date at an agreed price does not fetter the company in any way in the conduct of its business in the interval, and it may exercise all the powers conferred upon it by the memorandum of articles of association, and either dispose of its business to another company or agree to a voluntary liquidation.

After liquidation proceedings have commenced a person holding an option of taking shares is entitled, if he chooses to exercise his option, to have shares issued to him and to be put on the list of contributories, and if the liquidators refuse to do so, the measure of his damages is his share in the existing assets of the company after deducting the price he had agreed to pay for the shares.—HIRSCH *v.* BURNS, *H.L.*

20. *Trade-name—Similarity—Name of new company incorporating name of existing company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 20.—In 1888 the M. Co. and the N. Co. were carrying on business as separate limited companies, and continued to do so until 1897. In the latter year the N. Co. sold its business to R., who converted it into a company under the registered title of the N. and M. Co. The M. Co. having brought an action against the N. and M. Co. claiming an injunction,

Held, that the N. and M. Co. must be restrained from using a name which included the name of the M. Co., and so nearly resembled the same as to be calculated to deceive the public, or induce the belief that the business carried on by the defendant company was the same as the business carried on by the M. Co., or in any way connected therewith.

The registration of the name of a limited company which includes the name of a town or place gives no monopoly to that company of the particular name so as to prevent its use by any other limited company, provided such use is not calculated to deceive the public.—MANCHESTER BREWERY CO. *v.* NORTH CHESHIRE AND MANCHESTER BREWERY CO., *C.A.*, 515.

21. *Winding up—Arrears of interest—Statutory powers—Specialty debt—Statute of Limitations* (21 *Jac.* 1, *c.* 16)—*Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 3—*Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *ss.* 22, 23.—Section 27 of the Companies Clauses Act, 1863, provides for the recovery of interest in arrear by action or suit against the company. The issue of warrants for arrears of interest does not operate as a satisfaction of the claims for interest. The cause of action is therefore in respect of a specialty debt, and is not within the Statute of Limitations, but of the Real Property Limitation Act, 1833, and the period of limitation is therefore twenty years and not six.—CORNWALL MINERALS RAILWAY CO., RE, *Ch.D. Vaughan Williams, J.*, 5.

22. *Winding up—Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104)—*Colonial creditor—Pleading—Foreign court.*—Although the Companies Arrangement Act, 1870, extends to all creditors when their rights are in question in the courts of the United Kingdom, that Act does not extend to the Colonies; and therefore the proceedings in our courts cannot be pleaded in Victoria as a defence to an action by a Victorian creditor.

Gibbs v. *Société des Métaux*, 25 Q. B. D. 399, 39 W. R. Dig. 57, approved.—NEW ZEALAND LOAN AGENCY *v.* MORRISON, *P.C.*, 239.

23. *Winding up—Contributory—Removal of name —Fraud—Mistake as to identity of company.*—Where a person is fraudulently induced to take shares in a company by reason of the misrepresentation that it is another company of very similar name, there is no contract at all, and he is entitled to have his name removed from the list of contributories in the winding up, though he has taken no steps to repudiate his shares before the company was wound up.

Cundy v. *Lindsay*, 26 W. R. 406, 3 App. Cas. 459, followed. — INTERNATIONAL SOCIETY OF AUCTIONEERS, RE, BAILLIE'S CASE, *Ch.D. Wright, J.*, 187.

23A. *Winding up—County court—Jurisdiction—Statement of affairs—Refusal of director to submit statement—Companies (Winding up) Act*, 1890, *s.* 7. —Where a company is wound up in a county court, and the official receiver has required a director of the company to submit a statement of affairs of the company under section 7 of the Companies (Winding up) Act, 1890, if the director refuses, the county court judge has jurisdiction, notwithstanding sub-section 5 of section 7, to make an order directing the director to submit the statement.—NEW PAR CONSOLS, RE (No. 2), *Q.B.D.*

24. *Winding up—Debentures—Floating charge—Preferential payment — Retrospective — Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62)—*Preferential Payments in Bankruptcy Amendment Act*, 1897 (60 & 61 *Vict. c.* 19).—The Preferential Payments in Bankruptcy Act, 1897, is not retrospective in its action, so that those persons

who, under the Act, are given priority for their wages, &c., over the debenture-holders are not entitled to the benefit of the Act where a receiver was appointed by the debenture-holders before the date when the Act came into force.—WAVERLEY TYPEWRITER, RE, D'ESTERRE *v.* WAVERLEY TYPEWRITER, *Ch.D. Wright, J.*, 685.

25. *Winding up—Defunct company—Petition—Advertisement—Companies Act*, 1880, *s.* 7—*Companies Winding-up Rules*, 1890, *r.* 35.—Where the Registrar of Joint-Stock Companies has struck the name of a defunct company off the register under section 7 of the Companies Act, 1880, the proper remedy of a creditor is to petition for a winding-up order. In such a case, special directions as to service of the petition must be obtained, as neither rule 35 of the Companies Winding-up Rules, 1890, nor the provisions as to service in the Act of 1880, apply.—ANGLO-AMERICAN EXPLORATION CO., RE, *Ch.D. Vaughan Williams, J.*

26. *Winding up — Directors' fees — Creditors — Articles of association—Fixed remuneration—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 38 (7).—Where articles of association fix the fees of directors at a specific sum they are entitled to prove in the winding up with other creditors for such fees as were due at the date of the liquidation; for the fees being fixed by the articles, they were impliedly part of the contract between the company and the directors when they accepted their office. The directors therefore stand in the position of ordinary creditors, and not of members of the company, in regard to those fees; and section 38, sub-section 7, of the Companies Act, 1862, does not apply.

Ex parte Cannon, In re Leicester Club Racecourse Co., 34 W. R. 14, 30 Ch. D. 629, distinguished.

In re Dale and Plant, 38 W. R. 409, 43 Ch. D. 255, followed. — NEW BRITISH IRON CO., RE, BECKWITH, EX PARTE, *Ch.D. Wright, J.*, 376.

27. *Winding up—Distribution of surplus assets—Articles of association—Repayment—Unequal contribution — Equalization.* — If the articles of association of a company provide that, in the event of winding up, if the surplus assets (after payment of all debts and liabilities) shall be insufficient to repay the whole of its paid-up capital, such surplus assets shall be distributed so that, as nearly as can be, the losses shall be borne by members in proportion to the capital paid, or which ought to have been paid, at the commencement of the winding up other than amounts paid in advance of calls, and if at the commencement of the winding up some of the shares are fully and some partly paid up, the amounts paid up on the shares must be equalized by a call, actual or in account, on such partly-paid shareholders, and when the amounts paid by all the shareholders is thus made equal, the surplus assets are to be distributed equally.—ANGLO-AUSTALIAN CORPORATION OF WEST AUSTRALIA, RE, *Ch.D. Wright, J.*, 413.

28. *Winding up—Distribution of surplus capital—Fully paid and partly paid shares—Nominal amount of shares—Equalization—Unlimited liability.*—In the case of a company not constituted under the Companies Acts, reference must be made to the deed or instrument under which it is constituted as to the distribution of surplus assets in the winding up. If the deed or instrument contains any provision with regard to the surplus, effect must be given to it; but a provision governing dividends ought not of itself to govern a distribution of surplus. If the capital of the company is limited by shares of an equal or commensurable amount, the same consequences ought to follow as if it were so limited under the Companies Acts.

Thus, where a company was constituted under a deed of settlement in 1835, and one of the clauses of that deed provided that upon a winding up, the residue, after payment of debts, &c., "was to be divided among the several proprietors for the time being in proportion to their respective shares," and part of the shareholders had paid for their shares in full, and others in part only: on the winding up of the company after payment of all debts and return of the paid-up capital, the surplus should be distributed in proportion to the nominal amount of the shares without regard to the manner in which dividends were payable or had been paid.

Somes v. *Currie*, 1 K. & J. 605, 3 W. R. Dig. 76, and *Sheppard* v. *Scinde, Punjaub, and Delhi Railway Co.*, 36 W. R. 1, distinguished.—DRIFFIELD GAS CO., RE, *Ch.D. Wright, J.*, 411.

29. *Winding up—Memorandum of association—Ancillary clauses — Substratum gone — "Just and equitable"—Companies Act*, 1862, (25 & 26 *Vict. c.* 89), *s.* 79, *sub-section* 5.—A company formed to carry on a temporary business as its main object, but whose memorandum of association also stated other object clauses, not as defining a succession of objects different to the main object, but as referring to matters incidental to it, should be wound up and its surplus assets distributed among the shareholders by its directors, when the temporary business which was its main object has been accomplished, for it would be *ultra vires* to carry on any other business mentioned in the ancillary clauses.

Where, however, the directors propose to carry on such ancillary business instead of winding up the company, the court, on a shareholder's petition, will make a compulsory order.

Ex parte Fox, 18 W. R. 1083, L. R. 6 Ch. App. 176, distinguished.—AMALGAMATED SYNDICATE, RE, *Ch.D. Vaughan Williams, J.*, 75.

30. *Winding up — Misfeasance — Promoters — Directors—Secret profit—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—In January, 1893, a syndicate of thirty-three members, of whom four were the founders and trustees as well as members, was formed to purchase the property known as "Olympia," then belonging to a company in liquidation, with a view to the resale thereof, either to a company to be registered under the Companies Acts, or to some other purchaser. Each member signed a form of agreement which, after reciting the object of the syndicate, provided that each subscriber was to subscribe a certain amount, paying a deposit on signing the agreement, and that the trustees were to do their best to purchase "Olympia" on behalf of the syndicate, and to resell it at such reasonable advance in price as would cover the charges and expenses and yield a bonus for division amongst the subscribers. The trustees also had power to purchase as an *interim* investment, any first mortgage bonds of the company in liquidation; and the syndicate accordingly purchased certain debentures for £100,000, and a second mortgage for £10,000, on the property, at very low prices. In February, 1893, "Olympia" was sold by auction by the chief clerk in the debenture-holders' action against the company in liquidation, to one of the trustees of the syndicate, acting for the others, for the sum of £140,000, which was sufficient, after paying the expenses of the liquidation, to pay in

respect of the debentures and mortgage a sum giving a profit of over £20,000. By an agreement of March, 1893, entered into between the trustees of the syndicate and a trustee for an intended company (registered on the same day as Olympia (Limited)), the property was sold to the company for £180,000. One of the objects of Olympia (Limited), as stated in its memorandum of association, was to adopt and carry into effect the agreement of March, 1893, which was afterwards adopted by the company; and in a prospectus issued to the public, inviting subscriptions for shares and debentures, the fact was disclosed that the directors were also the vendors. The price paid by them for the property, and the price to be paid by the company was also disclosed, and the date and names of the parties to the agreement of March, 1893, were stated; but the profit made out of the debentures and mortgage was not stated. A summons was taken out by the official receiver and liquidator asking for a declaration that the four syndicate trustees were guilty of misfeasance or breach of trust in that they, being promoters and directors of the company, had secretly obtained and retained for their own use out of the purchase-money paid by the company for Olympia the sum of £6,341 (being the share of the four syndicate trustees in the profit of £20,000 made out of the debentures and mortgage); and that they might be ordered to pay that sum with interest.

Held, that the four syndicate trustees owed a duty to the company to inform the company of the profits which the four syndicate trustees had made at the expense of the company; that the fact that the company which had thus been kept in the dark as to these profits could not now rescind was no bar to relief; and that the four syndicate trustees were jointly and severally liable to replace the sum of £6,341.—OLYMPIA, RE, *C.A.*

31. *Winding up—Mortgage of uncalled capital—Debenture-holders—Unsecured creditors—Priority—Companies Act*, 1879 (42 & 43 *Vict. c.* 76), *s.* 5.—The M. Co. had power under its memorandum and articles of association to borrow money and issue debentures charged on (*inter alia*) its uncalled capital. Before this power was exercised the company, by special resolution, declared that a portion of the uncalled capital should "not be capable of being called up except in the event of and for the purpose of the company being wound up in accordance with the provisions of the Companies Act, 1879." The directors afterwards created and issued debentures charged on the company's undertaking and property, "including its uncalled capital for the time being." The company having gone into liquidation, and a winding-up order having been made, the liquidator called on the contributories for payment of that portion of the capital (the reserve capital) to be called up only in the event of a winding up.

The assets of the company, including the reserve capital, not being sufficient to pay the costs of the winding up and the creditors of the company, the debenture-holders claimed to have a valid first charge on the reserve capital, and to be entitled to be paid in priority to the other creditors and to the costs of the winding up.

Held, that the company had no power to create any charge on that portion of its capital which could only be called up in the event of and for the purpose of the company being wound up.

In re Pyle Works, 38 W. R. 674, 44 Ch. D. 534, distinguished.

Decision of Wright, J., *ante*, p. 199, affirmed.—MAYFAIR PROPERTY CO., RE, BARTLETT *v.* MAYFAIR PROPERTY CO., *C.A.*, 465.

32. *Winding up—Practice—Statutory affidavit—Supplemental affidavits—Notice of filing—Companies (Winding up) Rules*, 1890, *r.* 36—*Rules of March*, 1893.—It is not necessary to give notice of the filing of the statutory affidavit in support of a winding-up petition, but such notice should be given in respect of the filing of additional or supplemental affidavits to avoid unnecessary adjournments being made in order to answer such affidavits.

In re New Weighing Machine Co. (Limited), 101 L. T. 8, [1896] W. N. 48, explained.—BRITISH CYCLE MANUFACTURING CO., RE, *Ch.D. Wright, J.*

33. *Winding up—Promoter—Liability to account or make compensation—"Moneys or property of the company"—Money had and received to the use of the company—Companies (Winding up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—Where it was sought to make a promoter of a company account to the company, under section 10 of the Companies (Winding up) Act, 1890, for promotion money received by him from the vendor,

Held, on the facts (reversing the decision of Wright. J., *ante*, p. 314), that the defendant was under no obligation to account to the company.

Semble, money had and received to the use of the company, but not its property till received by the promoter, is included in the term "moneys or property of the company" in section 10 of the Winding up Act, 1890.—SALE HOTEL CO., RE, HESKETH'S CASE, *C.A.*, 617.

34. *Winding up—Scheme sanctioned by the court—Surplus assets—Management expenses—"Undistributed assets"—Joint-Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2—*Companies (Winding up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 15 (3).—Where a scheme of arrangement, which had been sanctioned by the court, under section 2 of the Joint-Stock Companies Arrangement Act, 1870, provided that the liquidator should employ any surplus he had from calls, after paying a dividend on the debentures, in payments necessary or expedient for keeping up the company's property, &c., such surplus should be retained in the hands of the liquidator for the purposes named in the scheme; and the Board of Trade is not entitled to demand that he should pay such surplus into the Companies Liquidation Account under section 15 of the Companies (Winding up) Act, 1890, for the special legislation provided by the scheme is not to be overridden by the general legislation of that section, this surplus not being "undistributed assets" within the meaning of the section.—LAND MORTGAGE BANK OF FLORIDA, RE, *Ch.D. Wright, J.*, 333.

35. *Winding up—Set off—Insolvent company holding shares—Set off of debt against calls—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 16, 38, 101—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.—The G. Co. (Limited) held shares in the A. Co. (Limited), and before either company went into liquidation calls were made on the shares, and the A. Co. became indebted to the G. Co. for money lent.

The A. Co. was ordered to be wound up by the court, and the G. Co., being insolvent, passed an extraordinary resolution for voluntary winding up.

Held, that section 10 of the Judicature Act, 1875, did not enable the liquidator of the G. Co. to set

off the debt against the calls.—AURIFEROUS PROPERTIES, RE, *Ch.D. Wright, J.*

36. *Winding up—Voluntary liquidation—Register of shareholders—Application to inspect—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 32.—Section 32 of the Companies Act, 1862, which gives a right to inspect the register of shareholders of a company, is no longer applicable where the company is being wound up, whether the winding up be compulsory, or under supervision, or merely voluntary.—KENT COALFIELDS SYNDICATE, RE, *C.A.*, 453.

See also County Court, 6; Inland Revenue, 13; Landlord and Tenant, 13; Practice, 7; Trade-name, 3.

COMPENSATION.—See Corporation, 5; Landlord and Tenant, 2, 16; Lands Clauses Act, 1, 2.

CONSPIRACY:—

Legal injury—Combination to induce a person not to employ another—Conspiracy to do an act not amounting to an actionable wrong—Employer and workmen.—A conspiracy to do certain acts (not being criminally punishable) gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff, for which he would have had a right of action.

Kearney v. *Lloyd*, [1890] 26 L. R. Ir. 268, approved and followed.—HUTTLEY *v.* SIMMONS, *Q.B.D.*

See also Criminal Law, 5; Trade Union.

CONTRACT:—

1. *Building—Contract abandoned by builder—Completion by building owner—Right to sue on a quantum meruit—Evidence from which new contract may be inferred.*—A builder who contracts to erect certain buildings for a lump sum, and who, after performing part of the contract, abandons it, thus necessitating the completion of the buildings by the building owner, cannot sue the latter on a *quantum meruit* for the work done unless there is some evidence from which the inference can be drawn that there was a fresh contract to pay on that basis.

Munro v. *Butt*, 8 E. & Bl. 738, 7 W. R. C. L. Dig. 19, followed.—SUMPTER *v.* HEDGES, *C.A.*, 454.

2. *Building agreement—Default of builder—Re-entry of landowner—Damages.*—A builder having made default under a building agreement, the landowner exercised the right reserved to him in such a case by the agreement to re-enter and take possession of the land and premises, with all the buildings, plant, and materials thereon.

Held, that an action would lie at the suit of the landowner against the builder to recover damages for the builder's breach of the agreement.—MARSHALL *v.* MACKINTOSH, *Q.B.D.*, 580.

3. *Employment—Breach of—Music-hall artiste—"Perform every evening"—Sunday—"Not perform at any club"—"Perform," meaning of.*—The plaintiff K., a music-hall artiste, entered into contracts with each of the three defendant companies by which she agreed to perform for ten weeks certain, commencing at a certain date, every evening at the time notified by the management, in "her usual entertainment as mimic" in two of the contracts, "as singer and mimic" in the other, at a salary of £8 per week in respect of each hall, subject to the following conditions (*inter alia*)—viz., "that the said artiste shall not perform before nor during this engagement at any theatre, music-hall, club, concert, or place of entertainment within one mile of the said music-halls respectively." At the end of the contract was this clause: "In the event of the above-named artiste not observing these conditions in every respect, the company shall have the option of cancelling this agreement." During the fulfilment of the engagement she went to a smoking concert at a certain club one Sunday evening within a mile of these music-halls by invitation. Nobody except members and their guests were admitted to this club, and no admission money was paid. At this concert she sang a song and danced for a few minutes. The following night she performed at the halls, but at one of them the manager asked if she had sung at the club, and she replied she had done so. He told her it was against the rules, and that she must not do it again. The following night a letter was handed her cancelling the three engagements, and signed by the manager of the halls. These actions were then brought by the plaintiff to recover damages for wrongful dismissal and for breach of contract.

Held, that the word "engagement" did not include Sundays, that day in such contracts being a *dies non*. That the performance was not within the meaning of the word "perform" as contemplated by the parties, for the plaintiff did not use her powers of mimicry. That, although singing was included in one contract, singing before a private audience such as the present case was not a performance.—KELLY *v.* LONDON PAVILION, *Q.B.D.*

4. *Evidence — Admissibility — Parol evidence.*—Parol evidence cannot be said to be improperly admitted as contradicting or varying a written agreement, when it relates to the circumstances under which the plaintiff's name was appended to a document which was no part of the agreement, but which was placed before him for signature by the defendant after the agreement was concluded.—AUSTRALASIA (BANK) *v.* PALMER, *P.C.*

5. *Licence—Revocation—Breach of contract by licensor—Licensee's right of action—Posting advertisements on hoarding.*—Plaintiff and defendant agreed orally that defendant should let his wall to plaintiff, for bill-posting, at £2 10s. a year, plaintiff to erect a hoarding, on which the bills were to be posted. Plaintiff erected the hoarding, posted bills and made several payments. Defendant gave notice to plaintiff that the hoarding must be removed, and nearly a month later defendant took it down.

In an action to recover damages for breach of contract,

Held, that, although the permission to post bills was a licence, and therefore, not being by deed, was revocable, the action was maintainable for breach of contract, and therefore plaintiff was wrongly nonsuited.

Wood v. *Leadbitter*, [1845] 13 M. & W. 838, distinguished.—KERRISON *v.* SMITH, *Q.B.D.*

6. *Master and servant—Wine merchants' traveller—Negative stipulation against doing other business—Injunction.*—The defendant, under the articles of agreement regulating his employment as traveller for the plaintiffs, a firm of wine merchants, had bound himself to devote the whole of his attention and time during the usual business hours to the business of the plaintiffs, and not directly or indirectly to employ himself in any other business or transact any business with any other person than the plaintiffs for a period of ten years. There was no provision enabling the defendant to determine his employment, but he assumed to do so by writing a letter giving notice of his intention to leave, and entered the service of

a rival firm. The plaintiffs moved for an injunction to restrain him from thus engaging himself in any other business than that of the plaintiffs' under his contract with them.

Held, that the negative stipulations in the contract were unreasonable, and ought not to be enforced.—EHRMANN *v.* BARTHOLOMEW, *Ch.D. Romer, J.*, 509.

7. *Restraint of trade—Covenant—"Neighbourhood"—Injuncton.*—By an agreement dated the 18th of September, 1893, the defendant sold his retail milk business and goodwill to the defendant Stride, and covenanted "not to employ any one or retail milk on his own account in the neighbourhood of Southampton or Norham." On a breach of this covenant the county court judge granted an injunction in the terms of the covenant. The defendant appealed on the grounds that the covenant was wider than was necessary to protect the plaintiff, and therefore void, and that the injunction was bad, not being sufficiently definite in showing exactly where the defendant could not trade.

Held, that the covenant was not too wide to protect the plaintiff, and that the injunction following the terms of the covenant was not too indefinite as the parties must know its meaning, and that the word "neighbourhood" meant immediate neighbourhood.—STRIDE *v.* MARTIN, *Q.B.D.*

8. *Sale by private treaty—Tender—"Highest net tender."*—The liquidator of the H. Co. (in liquidation) offered for sale certain royalties on coal measures, and undertook to accept the "highest net tender" he received. The S. Co., by their agents, offered such a sum as would "exceed by £200 the amount offered by the other intending purchaser."

Held, that such an offer did not amount to a tender at all, and was therefore not binding on the liquidator.—SOUTH HETTON COAL CO. *v.* HASWELL, *C.A.*, 355.

See also Account; Company, 16-20, 23; Gaming, 4-6; Infant, 1, 2; Insurance, 14; Master and Servant, 2; Vendor and Purchaser, 5, 6, 10, 12.

CONVEYANCING ACTS.—See Inland Revenue, 21; Landlord and Tenant, 3, 9; Married Woman, 6; Mortgage, 2, 5; Vendor and Purchaser, 2, 8.

COPYHOLD:—

Tenant for life and remainderman—Custom of the manor—Leases for lives—No right of renewal—Arbitrary fines on renewal.—A tenant for life of a manor is entitled to use and enjoy his life estate according to the custom of the manor, and although he is seised of a limited interest only, yet as lord of the manor he may grant such estate as is authorized by the custom of the manor, notwithstanding that the interest so granted may continue longer than his own. Accordingly, where it is the custom of the manor for the lord to grant the copyhold lands of the manor on leases for lives, for the fines on renewal to be arbitrary, and for the tenants to have no right of renewal, a tenant for life unimpeachable for waste who is lord of the manor can grant valid leases for lives to the tenants, and is entitled as against the remaindermen to the whole of the moneys received by him in respect of the fines on renewal paid to him by the tenants during the continuance of his life estate.—MEDOWS, RE, NORIE *v.* BENNETT, *Ch.D. Kekewich, J.*, 297.

COPYRIGHT:—

1. *Catalogue—List of articles for sale—Injunction.*—A chemist and druggist carrying on business in a provincial town prepared and registered a catalogue of articles, medicines, and drugs sold by him, arranged under various headings and sub-headings, which contained under the heading "Drugs and Chemicals, including Veterinary Medicines and Photographic Chemicals," an alphabetical list, fifteen pages long, of such articles with their prices, and under the heading "Patent Medicines and Proprietary Preparations. Any preparation not in stock will be procured with as little delay as possible," an alphabetical list, twelve pages long, of such remedies with their prices. A limited company carrying on several businesses in the same town added a drug and dispensing department, and inserted in their catalogue copies of the abovementioned headings and lists from the chemist's catalogue, omitting two preparations only. They also copied from his catalogue several other entries. The copying was admitted.

On a motion for an injunction to restrain the company from infringing the chemist's copyright in his catalogue it was contended that mere dry lists of articles for sale with their prices could not be the subjects of copyright.

Held, that the lists were subjects of copyright, and an injunction was granted accordingly.—COLLIS *v.* CATER, *Ch.D. North, J.*

2. *Infringement—Action on the case—Action of detinue—Action of trover—Injunction—Delivery up and damages—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 15, 23.—In addition to the remedy of a special action on the case under section 15 of the Copyright Act, 1842, the registered proprietor of a copyright can also sue the offender in an action of detinue or an action of trover under section 23 of that Act, and he may join all these remedies in one action, which may be brought in the Chancery Division.—MUDDOCK *v.* BLACKWOOD, *Ch.D. Kekewich, J.*, 166.

CORONER:—

Public hospital—Honorary medical officer of—Post-mortem examination and attendance at inquest by order of coroner—Right of medical officer to recover fees—Coroners Act, 1887 (50 & 51 *Vict. c.* 71), *s.* 22.—A hospital chiefly intended for children, was founded to meet the requirements of a large population in a particular district and was free for the admission of poor patients from that district. It had a committee of management, governors—who were the subscribers—medical men, committees, and all the apparatus of an ordinary hospital. The plaintiff was honorary medical officer of the hospital, receiving no remuneration for his services, and as such medical officer he attended a patient who died in the hospital, and by order of the coroner he made a *post-mortem* examination of the deceased and attended at the inquest to give evidence. In an action by the plaintiff to recover his fees from the coroner,

Held, that the hospital was a "public hospital," and that the plaintiff, though he received no remuneration for his services, was the medical officer "whose duty it was to attend the deceased person as a medical officer of the institution," within the proviso in section 22 of the Coroners Act, 1887, and that he was therefore not entitled to recover his fees from the coroner under that section.—HORNER *v.* LEWIS, *Q.B.D.*

CORPORATION:—

1. *Forfeited recognizance—Fines and Amercements—Construction of charter to corporation.*—By a charter of Henry IV. the Crown granted to the

corporation of Nottingham "all fines for trespasses and other offences whatsoever, and also fines for licence to agree, and all amercements, ransoms and forfeited issues, forfeitures year day waste and estrepement."

By a charter of Henry VI. the Crown granted to the corporation "all issues fines and amercements from whatsoever pledges and mainpernors" of persons dwelling in the borough.

Held, that under neither of these charters did a forfeited recognizance to appear to answer a charge of felony or misdemeanour pass to the corporation. —NOTTINGHAM CORPORATION, RE, *Q.B.D.*

2. *Municipal corporation—Application of borough fund—Costs of chief constable in opposing renewal of licence—Borough Funds Act*, 1872 (35 & 36 *Vict. c.* 91), *s.* 2—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 140-143, 191; *Schedule V., Part II., clause* 5 (d).—The borough fund cannot be applied by a municipal corporation in paying the costs incurred by the chief constable as a litigant party in opposing at licensing or quarter sessions the renewal of publicans' licences. — ATTORNEY-GENERAL *v.* TYNEMOUTH (MAYOR), *C.A.*, 518.

3. *Municipal corporation—Borough Funds Act*, 1872 (35 & 36 *Vict. c.* 91)—*Bill in Parliament opposed—Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41).—A municipal corporation is not entitled to oppose a Bill promoted by a gas company in Parliament without first complying with the requirements of section 4 of the Municipal Corporations (Borough Funds) Act, 1872, when the Bill leaves untouched the power of the corporation to have fixed by arbitration under section 24 of the Gasworks Clauses Act, 1871, the price of the gas used by the corporation.

Attorney-General v. *Mayor of Brecon*, 10 Ch. D. 204, 27 W. R. Dig. 137, discussed.—ATTORNEY-GENERAL *v.* SWANSEA (MAYOR), *Ch.D. North, J.*, 534.

4. *Municipal corporation—Borough having population under* 10,000—*Separate court of quarter sessions —Liability for costs—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 169—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 38.—In the case of boroughs having a separate court of quarter sessions and containing a population of less than 10,000 the Local Government Act, 1888, has not transferred the obligation of paying the salaries of the recorders and clerks of the peace of such courts of quarter sessions from the borough to the county council.

Ex parte County Council of Kent and Council of Sandwich, [1891] 1 Q. B. 389, not followed.—THETFORD CORPORATION *v.* NORFOLK COUNTY COUNCIL, *Q.B.D.*

5. *Municipal corporation—Street vested in corporation—Compensation—Sydney Corporation Act*, 1879 (43 *Vict. No.* 3)—51 *Vict. No.* 37.—Under the Sydney Corporation Act, 1879, all public ways in the city of Sydney were vested in the council. A local Act (51 Vict. No. 37) enabled the Secretary for Public Works to form a tramway. In the course of construction it became necessary to take a small portion of a street in the city of Sydney, and the municipal authority claimed compensation under the Act, which entitles the owner of property taken to compensation.

Held, that the vesting of a street or public way vested [illegible]perty in the municipal authority beyo[illegible]ce of the street and such portion [illegible]y necessarily incidental to the [illegible]anagement of the street, and did not vest the soil or land in them as owners; and, consequently, that the surface of the street was not subject-matter for compensation.—SYDNEY (MUNICIPAL COUNCIL) *v.* YOUNG, *P.C.*, 561.

6. *Newspaper — Libel — Action against editor — Liability of proprietors—Indemnity*—Ultra vires.—The editor of a journal owned by and published for the benefit of the members of a nursing association (incorporated by Royal Charter) inserted in the journal, on the express instructions of the executive committee of the proprietors, paragraphs which were alleged to be libels on one of the members of the association. An action for libel having been brought by the member against the editor alone, the executive committee resolved to defend such action and to indemnify the editor against costs and damages.

Held (reversing the decision of North, J.), that such a defence of the action was not a misapplication of the funds of the association; and a motion for an *interim* injunction by one of the members of the association to restrain such application of the funds was accordingly dismissed.—BREAY *v.* ROYAL BRITISH NURSES' ASSOCIATION, *C.A.*, 86.

See also Election Law, 1, 2.

COUNTY COURT:—

1. *Appeal—Action where the debt or damage claimed does not exceed* £20—*Injunction—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.—In an action for trespass brought in a county court, where the damage claimed did not exceed £20, the plaintiff recovered 6d. damages and was granted an injunction restraining the defendant from continuing the trespass.

Held, that an appeal lay from the injunction.—BRUNE *v.* JAMES, *Q.B.D.*, 257.

2. *Appeal—Point not raised at trial — County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120, *and following sections.*—Under the provisions of section 120 and the following sections of the County Courts Act, 1888, the omission of the judge to direct the jury as to the law is a point of law, which must be raised and submitted to the judge at the trial in order to entitle the party complaining thereof to appeal.—CLIFFORD *v.* THAMES IRONWORKS CO., *Q.B.D.*, 222.

3. *Costs—Action founded on tort—Bailment—Agistment—Injury to animal—Negligence—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.—The plaintiff delivered a horse to the defendants to be agisted in consideration of a daily payment, and the defendants negligently turned the horse into a field in which there was a barbed wire fence covered with long grass, whereby the horse was injured. In an action to recover damages for the injuries to the horse, the jury found a verdict for the plaintiff for £30.

Held, as the negligence relied upon was a breach of the common law duty arising out of the bailment, that the action was founded on tort within the meaning of section 116 of the County Courts Act, 1888, and the plaintiff was entitled to costs upon the High Court scale.—TURNER *v.* STALLIBRASS, *C.A.*, 81.

4. *Costs—Remitted action — Judgment in High Court for part of claim—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.—In an action brought in the High Court an order was made under order 14 that the plaintiff be at liberty to sign judgment for £27, part of the amount claimed, with costs, that the defendant be at liberty to defend as to a sum of £2 18s. 5d., the residue of the amount claimed, and that the action be tried in the county

court under section 65 of the County Courts Act, 1888.

At the trial in the county court the plaintiff recovered £2 0s. 6d., with costs.

Held, that the plaintiff was only entitled to taxation of his costs on the lower scale in use in county courts where the sum recovered exceeds £2 but does not exceed £10—not on the higher scale, where the sum recovered exceeds £20 but does not exceed £50.—BAILEY *v.* WATSON, *Q.B.D.*

5. *Costs — Security for costs—Jurisdiction — Remitted action—Bankruptcy of plaintiff—Joinder of trustee—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 94.—Where an action of contract, brought in the High Court, is ordered to be tried in a county court, under section 65 of the County Courts Act, 1888, and before the plaintiff has lodged the original writ and the order with the registrar of the county court, he becomes bankrupt, and a trustee is appointed, and an order is made joining the trustee as plaintiff in the action, the judge of the county court has no jurisdiction to order the trustee to give security for the costs of the action under section 94.—HEMMING *v.* DAVIES, *Q.B.D.*

6. *Jurisdiction — Company — Winding up—Committal order—Prohibition—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1 (6).—A writ of prohibition does not lie in respect of a committal order made by a county court judge in the course of proceedings to wind up a company.—NEW PAR CONSOLS, RE, *C.A.*, 369.

7. *Practice—Action by solicitor on bill of costs—No signed bill—Statutory defence—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*County Court Rules*, 1889, *ord.* 10, *rr.* 10, 18.—The defence to an action brought by a solicitor to recover a bill of costs, that the solicitor had not delivered a signed bill of costs one month before action brought, as required by section 37 of the Solicitors Act, 1843, is a statutory defence within the meaning of ord. 10, rr. 10 and 18, of the County Court Rules, 1889; and when the action is brought in a county court notice of such defence ought to be given in pursuance of those rules.—LEWIS *v.* BURRELL, *Q.B.D.*

8. *Practice—Pleading—Statute of Frauds—Sale of Goods Act*, 1893, *s.* 4—*County Court Rules*, 1889-95, *ord.* 10, *r.* 18 (a).—If the defendant in an action on a contract for the sale of goods of the value of £10 intends to raise the defence of the Statute of Frauds he must give notice of that intention under ord. 10, r. 18 (*a*), of the County Court Rules.—BRUTTON *v.* BRANSON, *Q.B.D.*

9. *Practice—Stamp on document—Appeal—Application of High Court rule—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 164—*R. S. C.*, 1883, *ord.* 39, *r.* 8.—The ruling of a county court judge at the trial of an action, that a document offered in evidence is properly stamped, is not subject to appeal in the High Court.—MANDER *v.* RIDGWAY, *Q.B.D.*, 366.

See also Admiralty, 1-3; Company, 23A; Debtors Act; Practice, 5, 11.

RIMINAL LAW:—

1. *Cruelty to children—Proof of age of child—Prevention of Cruelty to Children Act*, 1894 (57 & 58 *Vict. c.* 41).—On the trial of an indictment for unlawfully and wilfully neglecting children under the age of sixteen, contrary to the Prevention of Cruelty to Children Act, 1894, the children were not produced before the court, and the only evidence as to their ages was that of two persons who said that they had seen the children and stated what they believed were their respective ages, all of them being under sixteen, and that of the mistress of a school who said that the elder children attended a public elementary school, and she believed they were within the statutory age limit.

Held, that there was evidence proper to be left to the jury that the children were under sixteen.—REG. *v.* COX, *C.C.R.*

2. *Evidence—Admissibility—Confession — Inducement to confess—Duty of prosecuting counsel and solicitor—Bail—Justices.*—A confession made in consequence of an inducement held out by a person in authority is not admissible evidence. A statement made by an accused person after he has been told that it will be better for him to speak the truth, cannot be admitted as evidence against him.

Semble, it is the duty of prosecuting counsel and solicitors having the charge of prosecutions to satisfy themselves before putting in evidence a confession, that it was not made under such circumstances as to be inadmissible.

Semble, bail is not to be withheld unless it is otherwise impossible to ensure the prisoner's attendance at the trial.—REG. *v.* ROSE, *Q.B.D.*

3. *Evidence—Admissibility of—Statement made by accused in answer to question by constable—Admissibility of question and answer—Voluntary statement.*—A statement made by an accused person in answer to a question put by a constable is admissible in evidence against the accused as a voluntary statement, provided that such statement has not been brought about by any inducement or threat.

The defendant was charged with cruelty to his horse by causing the same to be worked while in an unfit state, and in support of the charge the inspector proposed to give evidence of a question put by him to the defendant, asking him if it were true that his carman told the police that he (the defendant) had sent the horse out knowing it was lame, and the defendant's answer thereto. The justices having refused to admit the evidence on the ground that the statement, being in answer to a question put by an inspector, was not a voluntary statement, and was inadmissible.

Held, that the defendant's statement in answer to the question, not having been brought about by any inducement of advantage or by any threat, was a voluntary statement, and ought to have been admitted.—ROGERS *v.* HAWKEN, *Q.B.D.*

4. *False pretences—Obtaining credit by fraud—Obtaining food at a restaurant without having money to pay—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 13.—The prisoner was convicted on an indictment containing two counts, the first charging him with obtaining food and wine by means of a false pretence that he was then able to pay, and possessed sufficient money to pay, for what he ordered; the second charging him, under section 13 of the Debtors Act, 1869, with obtaining credit by means of fraud. It was proved that the prisoner entered a restaurant and ordered food and wine, which he consumed, and that he had no money or other means of paying for the articles so ordered and consumed by him. No statement was made by him and no inquiry was made of him at the time of his ordering the articles as to his ability to pay for them.

Held, that the count for obtaining the articles by false pretences could not be supported, but that he was rightly convicted of obtaining credit by fraud.—REG. *v.* JONES, *C.C.R.*, 191.

5. *Intimidation — Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *ss.* 7, 16—*Seamen—Seafaring men not actually employed on board ship.*—Persons who follow the sea as a calling, but are not "seamen" within the meaning of the Merchant Shipping Acts, are not within the exemption in favour of "seamen" contained in section 16 of the Conspiracy and Property Protection Act, 1875, and may properly be convicted of an offence under section 7 of that Act.—REG. *v.* LYNCH, *C.C.R.*, 205.

6. *Larceny by bailee*—Habeas corpus—*Extradition—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 3.—On an application for a writ of *habeas corpus*, the evidence showed that a loan was raised on a bond by a person authorized so to raise the loan, and that there was a fraudulent appropriation by him of the money so raised.

Held, that (following the decision of *Reg.* v. *De Banks*, 50 L. T. Rep. 427) that amounted to evidence of larceny by a bailee under section 3 of the Larceny Act, 1861, and the rule was accordingly discharged.—REG. *v.* GOVERNOR OF HOLLOWAY, GEORGE, EX PARTE, *Q.B.D.*

7. *Malicious damage to property — Assertion of supposed right — Unnecessary violence — Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 51.—On an indictment under the Malicious Damage Act, 1861, for malicious damage to property, it was proved that the defendants wilfully damaged the property in question, in exercise of a supposed right to remove the property from the land on which it stood, and that in so doing they interfered with the property more than was necessary for the assertion of the right.

Held, that they were guilty of malicious damage.—REG. *v.* CLEMENS, *C.C.R.*, 416.

8. *Malicious damage to property—Diluting milk—Fraudulent motive—Absence of malice—Malicious Injuries to Property Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 52.—K., the servant of a milk salesman, was employed by the latter to carry milk round and deliver it to customers. He fraudulently added water to it with the intent of adding to the bulk and putting money into his own pocket by selling and not accounting for the surplus; he, however, had no malice towards, or intention to injure, the owner of the milk.

Held, that he had wilfully committed damage to property within the meaning of section 52 of the Malicious Injuries to Property Act, 1861 (24 & 25 Vict. c. 97).

It is not necessary in committing the damage within the meaning of that section that there should be malice towards or intention to damage the owner of the property. It is sufficient if the act be done wilfully, and with the knowledge that it will cause damage.

Hall v. *Richardson*, 54 J. P. 345, overruled.—ROPER *v.* KNOTT, *Q.B.D.*, 636.

9. *Malicious damage to property—Trespass on grass field—Actual damage—Malicious Injuries to Property Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 52.—The appellant, a trespasser, walked across a grass field of the respondent's. The grass was long, and the damage done by the appellant was of the value of sixpence.

Held, that he was liable to be summarily convicted under section 52 of the Malicious Injuries to Property Act, 1861, which makes it an offence to "wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever . . . for which no punishment is hereinbefore provided."—GAYFORD *v.* CHOULER, *Q.B.D.*

10. *Master and servant—Sale of goods—False trade description—Criminal liability of master for acts of servant—Absence of* mens rea—*Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *ss.* 1, 2, 5.—A salesman and an assistant employed by the appellant in his business of a provision dealer sold as a Scotch ham (stating it on the invoice to be such) a ham which was in fact an American ham. The sale was effected in the absence and without the knowledge of the appellant, who had directed the persons employed in his business not to sell hams under any specific name of place or origin.

Held, that the appellant was properly convicted of selling goods to which a false trade description was applied.—COPPEN *v.* MOORE (No. 2), *Q.B.D.*, 620.

11. *Misdemeanour—Committal for rape — Indictment for misdemeanour—Commencement of prosecution for misdemeanour—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 5.—A prisoner was committed by a magistrate for trial on a charge of rape alleged to have been committed on a day less than three months before the date of the committal. At the assizes, more than three months after the commission of the alleged offence, an indictment was sent up to and found by the grand jury for a misdemeanour only, under section 5, sub-section 1, of the Criminal Law Amendment Act, 1885. The prisoner was convicted.

Held, that the prosecution before the magistrate for rape was also a prosecution for the misdemeanour, and that the prisoner was not entitled to be acquitted by reason of the proviso contained in section 5, that "no prosecution shall be commenced for an offence under sub-section 1 of this section more than three months after the commission of the offence.—REG. *v.* WEST, *C.C.R.*, 316.

See also Justices, 1.

CROWN:—

Prerogative of—Action against Lords of Admiralty—Trespass—Right of subject to maintain—Action, form of—Amendment.—The head of a Government department is not liable for the neglect or torts of any subordinate official, unless it can be shown that the act complained of was substantially the act of the head himself, in which case he would be liable as an individual, despite of his being an officer of State.

The court holding that the above action, which was for trespasses to land, was against the defendants, the Lords Commissioners of the Admiralty and the Director-General of Naval Works, in their official capacity and not as individuals, and the plaintiffs having asked leave to amend, if necessary, by also suing the defendants individually, and by adding as parties the persons by whose hands the alleged trespasses had been actually committed,

Held, that leave to amend ought not to be given, for what the plaintiffs were seeking to do was to change one action into another of a substantially different character; and that the action must be dismissed.—RALEIGH *v.* GOSCHEN, *Ch.D. Romer, J.*, 90.

See also Canada, Law of, 3.

DAMAGES.—See Account; Company, 5, 19; Contract, 2; County Court, 2; Gaming, 6; Landlord and Tenant, 3; Lands Clauses Acts, 1; Sale of Goods, 2; Ship, 20.

DEBTORS ACT, 1869:—

Practice—Judgment in High Court—Order in county court for payment of judgment debt by instalments—Subsequent proceedings to levy execution—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.—The effect of section 5 of the Debtors Act, 1869, is that, if a plaintiff, who has obtained judgment in an action in the High Court, goes to the county court, and accepts an order there for payment of the judgment debt by instalments, he thereby consents to have the judgment of the High Court modified to the extent of that order, and he is not entitled to afterwards issue execution upon the judgment in the High Court, without at any rate getting the order made by the county court discharged.

Jones v. *Jenner* (25 L. J. 319, Ex.) approved and followed.

Dictum of Cave, J., in *Re Ives, Ex parte Addington* (16 Q. B. D. 665, at pp. 670, 671), dissented from. —MONTGOMERY *v.* DE BULNES, *C.A.*

See also Bankruptcy, 11; Criminal Law, 4; Solicitor, 1.

DEED:—

1. *Construction—Estate clause—Recitals—Mortgage omitted—Estoppel—Priority.*—General words, whether descriptive of parcels or in the estate clause, are susceptible of being controlled or modified by other parts of the instrument, and by the scope of the deed read as a whole, and for this purpose negative words are not requisite.

By a settlement made on the marriage of M. T. it was recited that certain lands were, subject to two mortgages in fee to A., limited to C. in fee, subject to a limitation over in favour of T. for life, in the event of C. having no issue (which happened), and C. and T. "according to their respective estates and interests" conveyed the fee simple "and all the estate, right, title, claim, and demand of the said C. and T. respectively in or to arise out of the same premises" to trustees to hold (subject to the two mortgages to A.) to the use of C., T., and M. T. for successive life estates, with remainder to secure a jointure to the wife of M. T., with remainders over.

At the date of the settlement T. was absolutely entitled to a mortgage whereby C. out of the fee created a term of five hundred years to secure £2,000 and interest, but no reference was made to this in the settlement. T. afterwards voluntarily transferred this mortgage to M. T., who charged it in favour of the plaintiffs, who had no notice of the settlement. C. and T. having died, an action was brought by the plaintiffs for a declaration that the £2,000 and interest was a charge on the land subject only to the two mortgages to A.

Held, that, on the true construction of the settlement, the mortgage did not pass, as the estate clause was controlled by the scope of the instrument; and that it had priority over the interests of all persons under the settlement.

Held also, that no estoppel as to the mortgage was created by the settlement on account of any representations made by T. in the recitals, or by any standing by on his part.—WILLIAMS *v.* PINCKNEY, *C.A.*

2. *Escrow—Delivery to stranger, whether necessary to make deed an escrow—Misappropriation of consideration money by person who is agent of both parties—Money never received by grantor—Failure of consideration.*—A deed, though delivered to a person who is one of the grantees, may, if such was the intention of the parties, be an escrow in his hands, and evidence is admissible to show upon what terms it was delivered.

A mortgage deed, duly executed and delivered to the mortgagee's solicitor, cannot be impeached in equity on the ground that such solicitor, who acted also in the capacity of banker as well as solicitor for the mortgagor and had authority to receive the mortgage money, becomes bankrupt without paying it to the mortgagor.

Wall v. *Cockerell*, 11 W. R. 442, 9 Jur. N. S. 447, and *Coupe* v. *Collyer*, 62 L. T. Rep. 927, 38 W. R. Dig. 133, distinguished.—LONDON FREEHOLD, &c., PROPERTY CO. *v.* SUFFIELD (BARON), *C.A.*, 102.

See also Annuity; Bankruptcy, 14.

DENTIST:—

Registration—Pupil—Declaration—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *ss.* 6, 7, 37.—A person who, at the date of the passing of the Dentists Act, 1878, was articled as a pupil to a dental practitioner, and whose articles expired in October, 1878, held not to be entitled to be registered under section 37 of the Act, unless he complied with section 7 by sending to the registrar before the 1st of August, 1879, the information and declaration therein mentioned.

Judgment of Hawkins and Wright, JJ. (45 W. R. 526), affirmed.—REG. *v.* GENERAL MEDICAL COUNCIL, *C.A.*, 2.

DESIGN:—

Registration—Applicable for pattern—Coffin-plates—Drawing furnished to comptroller—"New or original"—Novel combination of old designs—Marking goods—Statutory requirements—"All proper steps"—Motion to expunge—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 51, 60—*Designs Rules*, 1890, *rr.* 8, 9.—It is not necessary for a person who registers a design under Part III. of the Patents, Designs, and Trade-Marks Act, 1883, to describe on his application by means of cross sections or otherwise how the article, for the pattern of which the design is applicable, is to be carried out in manufacture, and it is immaterial whether or not the design can be so carried out in more ways than one.

Although the word "ornament," which is used in section 60 of the Act of 1883, is not used in rule 9 of the Designs Rules, 1890, "pattern" in that rule must for the purposes of that rule be taken to include it.—ROLLASON'S DESIGN, RE, *C.A.*

DIVORCE:—

1. *Adultery of husband coupled with desertion—Offer by husband to resume cohabitation.*—A husband, shortly after deserting his wife, had requested her to resume cohabitation, which request the wife disregarded as not made *bonâ fide*, and had on the few isolated occasions, on which they met casually, disregarded her or made insulting gestures, but not otherwise communicated with her for nine years.

Held, that the facts constituted such a sufficient desertion as coupled with adultery to give the wife a right to a divorce.—MARTIN *v.* MARTIN, *P.D. & Ad.D.*

2. *Conduct conducing to adultery.*—Where a wife has committed several acts of adultery with a co-respondent, and the husband has been guilty of conduct conducing to some of these acts, the husband will not lose his right to a divorce if the first of these acts occurred prior to any such conduct.—MILLARD *v.* MILLARD, *P.D. & Ad.D.*

3. *Costs—Husband's right to costs against the co-respondent.*—The question of condemning the co-respondent in costs is entirely in the discretion of the court.

If a co-respondent who has misconducted himself with a woman in ignorance of the fact that she was a married woman continues to live in adultery with her after being informed of that fact, he will not necessarily be condemned in costs. —ROBINSON *v.* ROBINSON (No. 2), *P.D. & Ad.D.*

4. *Costs—Wife's costs—Husband dead just before trial—Order against executors—Taxation.*—Where a husband, respondent in divorce proceedings, died on the eve of the trial, an order for the wife's costs, limited to the amount lodged in court, was afterwards made against the husband's executors, to whom leave was given to attend the taxation.—CUNNINGHAM *v.* CUNNINGHAM, *P.D. & Ad.D.*

5. *Costs—Wife's costs—Husband's liability to pay costs where no real defence.*—The costs of a wife who is respondent will not be allowed as against the husband where facts have come to the knowledge of her solicitors or their London agent which ought to convince them of her guilt.

Such costs may, however, be ordered to be taxed against the co-respondent by the husband, and if recovered to be paid to the wife's solicitors.—TOWNSON *v.* TOWNSON, *P.D. & Ad.D.*

6. *Desertion—Intention at time of leaving—Criminal proceedings pending.*—A husband left his wife in 1895 after divorce proceedings in which he had appeared as co-respondent (the jury disagreeing). At the last interview, he left her under the impression that this was the cause of his departure, and that he would return in a few months. He was in financial embarrassment, his firm immediately became bankrupt, and ultimately the official receiver applied for a warrant against him. He had carried on an intrigue with an actress in 1893 and 1894 unknown to his wife. He sent one letter to his wife begging for money, but with no address; but otherwise he did not communicate with or see her.

The court held that, at the time he left his wife, he intended to desert her, and, adultery being proved, granted a decree *nisi* for dissolution of marriage.—WYNNE *v.* WYNNE, *P.D. & Ad.D.*, 560.

7. *Divorce bill—Definitive decree of divorce—Action for criminal conversation—Standing Orders, Nos.* 175, 177—*Domiciled Irishman—Jurisdiction of the English Court—Evidence taken in India.*—Great caution ought to be observed in allowing a petition for divorce to proceed in the English Divorce Court where there is ground for supposing that the parties are domiciled out of the jurisdiction.

It is not necessary for the first reading of an Irish divorce bill that a definitive sentence of divorce *a mensâ et thoro* should have been pronounced in the Irish courts.

Where in the proceedings upon an Irish divorce bill it appears that no action for criminal conversation has been brought against a co-respondent who was not domiciled and could not be served in Ireland, the House of Lords may allow the bill for divorce to be received.

Where there is no means of enforcing the warrant of the House of Lords to take evidence in parts of India the evidence as taken and used in a previous suit in the English Divorce Court may be allowed to be used *quantum valeat.*—SINCLAIR'S DIVORCE BILL, RE, *H.L.*

8. *Divorce bill—Infant—Custody.*—In an Irish divorce bill, although no separate action has been instituted in Ireland to obtain the custody of infant children after a decree for separation *à mensâ et thoro* has been pronounced, the House of Lords will sanction a clause giving the custody of the children to the innocent party.

Mrs. Addison's case, [1801] Macq. Prac. H. L. p. 598, followed.—HART'S DIVORCE BILL, RE, *H.L.*

9. *Evidence — Statements to third persons.* — A witness called to prove a husband's cruelty may be asked whether the wife made a complaint about the husband on a certain occasion.—BERRY *v.* BERRY, *P.D. & Ad.D.*

10. *Judicial separation — Cruelty — Habitual drunkenness—Charges of præ-marital misconduct—Admissibility of evidence.*—If a woman marry a drunkard, with full knowledge that he is a drunkard, she is not on that account to be held to take, without redress, the risk of anything that may happen to her as a result of his continued drunken habits.

In a case where a wife charges her husband with cruelty, and complains (*inter alia*) that he has made against her in the presence of other persons charges of præ-marital misconduct, which he stated to her he had discovered some time after the marriage, although documents may be admitted as tending to prove the *bona fides* of the husband in making the charges, yet, neither oral evidence nor documents are admissible in proof of the facts alleged by the husband against the wife, unless he himself be called to state upon oath that he believed and acted upon the reports which reached him as to his wife's former conduct.—WALKER *v.* WALKER, *P.D. & Ad.D.*

11. *Judicial separation—Cruelty—"Legal cruelty" —Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *s.* 22, *and* 1884 (47 & 48 *Vict. c.* 68).—A false charge of having committed an unnatural criminal offence brought by a wife against her husband, although published to the world and persisted in after she did not believe in its truth, is not sufficient evidence of legal cruelty to entitle the husband to a judicial separation.

So held, by the majority of the House of Lords (Lords Herschell, Watson, Macnaghten, Shand, and Davey; Lord Halsbury, L.C., Lords Hobhouse, Ashbourne, and Morris dissenting).

The effect of the Matrimonial Causes Act, 1884, discussed.—RUSSELL *v.* RUSSELL, *H.L.*

12. *Judicial separation—Domicil—Residence within jurisdiction at commencement of suit—Divorce Act,* 1857 (20 & 21 *Vict. c.* 85), *s.* 22—In a proceeding for a divorce *a mensâ et thoro* on the ground of cruelty, where the parties resided within the jurisdiction at the commencement of the suit, the Ecclesiastical Court would have granted relief irrespective of their domicil, and it would have made no difference that the cruelty was committed outside the jurisdiction, when the apprehension of further acts of cruelty remained.

Held, that the Divorce Division had under section 22 of the Divorce Act, 1857, the same jurisdiction as the Ecclesiastical Court to entertain the suit.—ARMYTAGE *v.* ARMYTAGE, *P.D. & Ad.D.*

13. *Judicial separation—Practice—Counter-claim for restitution of conjugal rights—Cross-petition*—36 & 37 *Vict. c.* 66, *s.* 24, *sub-section* 3.—A wife petitioned for a judicial separation on the ground of the respondent's cruelty. The respondent, in his answer, denied the cruelty, and claimed a decree for restitution of conjugal rights.

Held, that the respondent's proper course would have been to file a cross-petition, and that the relief prayed for could not be granted on a mere counter-claim in the answer not verified by affidavit.—WINGFIELD *v.* WINGFIELD, *P.D. & Ad.D.*

14. *Nullity—Provision for wife*—20 & 21 *Vict. c.* 85, *s.* 35.—Where a petition is brought for a declaration that a marriage ceremony is null and void on the ground that the respondent had a husband living at the time of the ceremony, the court cannot ordinarily make it a term of granting a decree that the petitioner shall make provision for the respondent.

Wilkins v. *Wilkins*, 74 L. T. Rep. 62, [1896] P. 108, explained.

A petitioner is entitled *ex debito justitiæ* to a declaration of nullity of marriage when the respondent's husband was alive at the time of the second marriage, and the court has no discretion as to withholding relief.—BATEMAN *v.* BATEMAN, *P.D. & Ad.D.*

15. *Permanent maintenance—Basis of calculation.*—On an application for permanent maintenance by a wife who had obtained a decree *nisi* on the ground of the husband's cruelty and adultery, the registrar, treating the husband's property as producing 4 per cent. per annum, recommended that an annual sum should be secured to the wife on the husband's property, such sum amounting to one-third of the income thereof at 4 per cent.

The court varied the report by ordering that this sum should be secured on a third only of the husband's property, and that, as to the difference between this sum and the sum produced by such third invested in trust securities, the wife must be content with the husband's personal covenant.—SHORTHOUSE *v.* SHORTHOUSE, *P.D. & Ad.D.*

16. *Permanent maintenance—Clause* "dum sola" *without* "et casta."—An order for permanent maintenance may be made containing a clause "*dum sola vixerit*" without the addition of "*et casta.*"—SMITH *v.* SMITH, *P.D. & Ad.D.*

17. *Permanent maintenance—Husband's property—Adequate jointure*—"Dum sola et casta" *clause.*—A wife obtained a divorce on the ground of the adultery and cruelty of her husband. The husband's income had been £19,000 per annum, and the wife, who had brought nothing into settlement, was entitled under the marriage settlement to £1,400 a year.

The court, on the petition of the wife for permanent maintenance, considering that £3,000 a year would have been an adequate jointure for the widow of a man in the husband's position, granted her £1,600 a year in addition to her present allowance, such additional income being payable "*dum sola et casta vixerit.*"—KETTLEWELL *v.* KETTLEWELL, *P.D. & Ad.D.*

18. *Permanent maintenance—Order on husband to secure annual sum for wife—Power of wife to release or alienate—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32.—Where a decree for dissolution of marriage has been made and the husband has been ordered, under section 32 of the Matrimonial Causes Act, 1857, to secure an annual sum to the wife, she can release or alienate it.

A decree for dissolution of marriage having been made on a wife's petition an order was made directing her husband to secure to her on certain property the sum of £90 per annum, payable monthly, as permanent maintenance, and directing him to execute an assignment of the property to secure that sum.

By agreement between the parties the deed was not executed, and after several payments had been made under the order the wife by deed released her husband from further payments in consideration of a gross sum then paid to her.

Held, that, although monthly payments were directed, the order was made under section 32 of the Matrimonial Causes Act, 1857, and that the wife had power to release the husband.

Held also, that, although the deed of assignment had not been executed as directed, the court had no jurisdiction to direct the order to be perfected now by the execution of the deed.—MACLURCAN *v.* MACLURCAN, *C.A.*

19. *Practice—Application for rehearing, whether to be made to Divisional Court or to Court of Appeal—Trial without a jury—Divorce Rules*, 1865, *r.* 62—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 1.—An application for leave to serve notice of motion for a rehearing of a petition for divorce must, if the petition was heard by a judge without a jury, be made to a Divisional Court of the Probate, Divorce, and Admiralty Division, and not to the Court of Appeal.—SMITH *v.* SMITH, *C.A.*, 24.

20. *Practice—Costs—Pauper—Queen's Proctor.*—A pauper petitioner who is unsuccessful upon the intervention of the Queen's Proctor is liable to be condemned in the full costs of the intervention.—WHITE *v.* WHITE, *P.D. & Ad.D.*

21. *Practice—Leave to proceed without co-respondent—Discretion of judge—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 28.—The mere belief of a petitioner, founded on the evidence then before him, that a person accused of being the adulterer is not guilty, is not in itself sufficient to excuse him from making that person a co-respondent; if, however, the court is satisfied that no evidence can be obtained against the accused person, it may exercise its discretion under section 28 of the Matrimonial Causes Act, 1857, and allow the petitioner to proceed without joining him as co-respondent.

Jones v. *Jones*, [1896] P. 165, and *Saunders* v. *Saunders*, [1897] P. 89, considered and explained.—EDWARDS *v.* EDWARDS, *P.D. & Ad.D.*

22. *Practice—Unknown adulterer—Wife's statement—Alleged adulterer named by wife—No other source of information—Motion for leave to proceed without citing any co-respondent—Motion adjourned—Inquiries ordered to be made from the wife.*—A wife, in answer to inquiries by her husband touching the paternity of a child with which she was pregnant, and of which he could not be the father, gave the name of a man, and made certain statements which she said were within the petitioner's knowledge, but of which he declared he knew nothing; neither did he know of the existence of such a man.

After petition filed, and upon motion by the husband (petitioner) for leave to proceed without citing any person as co-respondent,

The court directed the petitioner's solicitor to write to the respondent with a view to having a personal interview with and obtaining an explanation from her, and refused to make an order in the petitioner's favour until this had been done and the result made known to the court.—GROSE *v.* GROSE, *P.D. & Ad.D.*

23. *Practice—Substituted service.*—Though the fact that the respondent's whereabouts cannot be discovered may be due to the petitioner's delay in bringing his petition, substituted service of the petition and citation may be allowed.—JENSON *v.* JENSON, *P.D. & Ad.D.*

24. *Rape—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 27.—A respondent, who had been convicted

under section 4 of the Criminal Law Amendment Act, 1885, of an attempt to have unlawful and carnal knowledge of a girl under the age of thirteen, was found to have been guilty of rape, and a decree *nisi* granted for the dissolution of his marriage.—COFFEY *v.* COFFEY, *P.D. & Ad.D.*

25. *Restitution of conjugal rights—Alimony pendente lite—Answer of husband—Cross-examination—Registrar—Discretion—Divorce Court Rules*, 1865, *rr.* 86, 191—*Practice—Proceedings in chambers—Evidence—Note of registrar or master.*—Upon a petition before the registrar for alimony *pendente lite*, the wife is not entitled as a matter of course, under rules 86 and 191 of the Divorce Court Rules, 1865, to an order for cross-examination of her husband upon his answer, even though there may be a great discrepancy between the amount of his income as alleged by her in the petition and the amount as stated in his answer.

Whether the husband should be ordered to attend for cross-examination is a matter entirely for the discretion of the registrar, and the court will not interfere with the exercise of his discretion unless satisfied that he has either proceeded on a wrong principle or has exercised his discretion wrongly.

Where there is no very great discrepancy between the two figures, it is not the practice of the court to order the attendance of the husband for cross-examination.

Where a wife in her petition for alimony *pendente lite* put the income of her husband, a baronet, at £70,000 a year, while the husband in his answer put it at £16,000 only, supporting his statement by full and detailed particulars, the registrar, on the hearing of the petition, and the judge, on appeal from him, refused an application by the wife for an order on the husband to attend for cross-examination, and allotted the wife £3,000 a year as alimony. On appeal to the Court of Appeal,

Held, that £3,000 a year was an adequate allowance for the wife *pendente lite*, and that as the registrar had properly exercised his discretion in allotting that sum, the court would not interfere by ordering the husband to attend for cross-examination as to his means.

On an appeal from an order of a registrar or master the court will only recognize a note of the registrar or master as evidence of what took place before him, an affidavit by either party being inadmissible.—SYKES *v.* SYKES, *C.A.*

26. *Separation deed—Covenant not to molest—Divorce proceedings in foreign country.*—The taking of proceedings in a foreign court to procure a divorce is not of itself, without evidence of an intention to annoy, a breach of a covenant by the husband not to molest the wife contained in a separation deed.—HUNT *v.* HUNT, *C.A.*

27. *Variation of marriage settlement.*—Where under a marriage settlement a wife has power to resettle settled property in the event of surviving her husband and marrying again, and, having been divorced, has married the co-respondent during her husband's lifetime, the court may make an order preventing any resettlement on any husband married, or children born, during the husband's lifetime.

Noel v. *Noel*, 10 P. Div. 179, commented on, but followed.

The court will not make payment to a father, for maintenance of a child, conditional on the latter residing with the father and being under his control, on the ground that after sixteen the child may wish to reside with the divorced wife.

Payment to a child of an annual sum after attaining majority, to which he is not entitled under the settlement, will not be refused on the ground that he may receive larger benefits from the wife.—BRANTON-DAY *v.* BRANTON-DAY, *P.D. & Ad.D.*

28. *Variation of marriage settlement.*—The fact that, by reason of dissolution of a marriage in consequence of a wife's misconduct, an annuity provided by the husband will not be payable to the wife, and will be lost to the family, is a detriment to the children, and a ground for compensating them out of the wife's property brought into settlement.—NEWALL *v.* NEWALL, *P.D. & Ad.D.*

29. *Variation of settlements—Motion upon registrar's report—Legitimacy of child born in wedlock—Motion adjourned—Petition to be presented to decide question of legitimacy.*—In the course of an undefended suit for dissolution of marriage presented by the husband, it appeared that the respondent had made a written statement in the form of a letter to the petitioner as to the paternity of the only child with the object of retaining its custody. Upon petition for variation of the marriage settlement, it was urged on behalf of the trustees of the settlement that the respondent's statement was inadmissible, and that so important a matter as that of the legitimacy of the child ought not to be dealt with upon motion. The court thereupon adjourned the motion as to variation, and directed the official solicitor to present, on behalf of the child, a petition for declaration of legitimacy. — DOUGLAS *v.* DOUGLAS, *P.D & Ad.D.*

DOMICIL:—

Husband and wife—Mutual rights as to unsettled movables—Matrimonial domicil—Change of domicil.—The rights of married persons in each other's unsettled movable property are governed by the law of their domicil, even if that be a domicil different from the matrimonial domicil, and acquired after the marriage.

So held (reversing the decision of Kekewich, J., *ante*, p. 326), on the authority of *Lashley* v. *Hog* 4 Paton's Sc. App. Cas. 581.—DE NICOLS, RE, DE NICOLS *v.* CURLIER, *C.A.*, 532.

See also Divorce, 7, 12.

EASEMENT:—

Opening locks on river—Dominant and servient tenement—Prescription—Presumption of legal origin—Lost grant—Prescription Act, 1832 (2 & 3 *Will.* 4, c. 71), *s.* 2.—An easement, exercised for the benefit of the dominant estate, is not invalid merely because from the very nature of the right its exercise by the dominant estate confers some benefit upon other tenements.

The corporation of Godmanchester as owners of certain lands had for more than 200 years opened as of right the gates of certain locks belonging to the appellant upon the River Ouse in time of flood or danger of flood, in order to prevent damage to those lands.

Held, that that was a good easement, and was none the less so because its exercise also benefited the lands belonging to other persons; and that the corporation could maintain their right either by section 2 of the Prescription Act, 1832, or by the fiction of a lost grant.

Decision of the Court of Appeal, [1897] 1 Ch. 214, affirmed.—SIMPSON *v.* GODMANCHESTER CORPORATION, *H.L.*

ECCLESIASTICAL LAW:—

1. *Churchwardens—Criminal suit against—Jurisdiction—Duty of churchwardens to obtain faculty*

before removing human remains—Burials Act, 1857 (20 & 21 *Vict. c.* 81), *s.* 23—*Faculty to carry out directions in Order in Council for preventing vaults becoming dangerous to public health.*—The churchwardens of a parish church wholly closed for burials, who, purporting to act under the provisions of an Order in Council under the 23rd section of the Burials Act, 1857, directing the removal and reinterment elsewhere of human remains underneath the church, do or cause to be done the acts therein directed without obtaining a faculty from the Ordinary, are guilty of an offence against the laws ecclesiastical, in respect of which they may be cited to appear to answer articles to be administered to them in a criminal suit.

The 23rd section of the Burials Act, 1857, provides (*inter alia*) that it shall be lawful for Her Majesty, upon the representation of one of Her Majesty's principal Secretaries of State, by and with the advice of her Privy Council from time to time, to order such acts to be done by or under the direction of the churchwardens or such other persons as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health, and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid.

Orders in Council issued under the above section and served on the churchwardens of a parish church ordered that the churchwardens or the persons having the care of the vaults under the church should adopt or cause to be adopted the following measures—namely, that the whole of the human remains lying beneath the floor of the church should be removed, and reburied in a specified cemetery or in some other legal burial-ground. In consequence of the service of these Orders in Council, the churchwardens, without having obtained any faculty from the Ordinary, pulled down all the pews in the church, took up the flooring and monumental slabs in the same, and removed certain coffins and human remains buried thereunder, for the purpose of reinterring them elsewhere. It appeared that burials in the parish had been by law wholly discontinued in the year 1853, and that since that year no burial was recorded to have taken place there.

Held, that the acts of the churchwardens, not having been authorized by a faculty, were illegal, and the Orders in Council afforded no justification for what had been done by them; such Orders being either wholly *ultra vires* or to be construed as merely directing an application for a faculty to carry out their terms.

Held, also, that, on the petition of the rector of the parish church and the churchwardens, a faculty might issue authorizing for sanitary reasons the removal of the remains and their reinterment in consecrated ground.—LEE *v.* HAWTREY, *Q.B D.*

2. *Clergy—Offence against morality—Deprivation—Subsequent sentence of deposition—Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *s.* 8.—Where a clergyman is convicted of an offence specified in the Clergy Discipline Act, 1892, and the bishop of the diocese passes sentence of deprivation, the bishop may, under section 8 of the Act, on a subsequent occasion pass the further sentence of deposition from holy orders.—REG. *v.* DURHAM (BISHOP), *C.A.*, 36.

3. *Faculty—Application to open coffin—Jurisdiction of Chancellor—Licence of Home Secretary—Prohibition—Burials Act*, 1857 (20 & 21 *Vict. c.* 81), *s.* 25.—A Consistory Court has jurisdiction to issue a faculty for the removal of remains in consecrated ground, and has also jurisdiction to issue a faculty authorizing the opening of the coffin for the purpose of inspecting its contents.

If it is necessary that a licence should be obtained from the Home Secretary before a coffin can be opened for such a purpose as was contended by the interveners (on which point the court gave no decision), that licence, being in addition to, and not in substitution of, the faculty required to be obtained from the ecclesiastical court, would be inoperative unless and until the ecclesiastical faculty had been duly issued.—REG. *v.* TRISTRAM, *Q.B.D.*, 653.

4. *Faculty—Footpath across churchyard for use of parishioners and public—Proviso for closing footpath on one day in the year.*—In a faculty granted for a fenced-in footpath across a closed parish churchyard for the use of the parishioners with right of way for the public, a proviso was inserted for the footpath to be closed on one day in the year in order to show that it remained an integral portion of the churchyard with certain limitations on its use.—ST. JOHN THE BAPTIST, CARDIFF (VICAR OF) *v.* PARISHIONERS OF SAME, *P.D. & Ad.D.*

5. *Faculty—"Stations of the Cross"—Crucifix—Communion rails—Chancel platform—Darkening of windows in chancel—Lamps reflecting light on communion table—Faculty—Communion table—Reredos—Second communion table in side chapel.*—The incumbent of a parish church having without a faculty, and contrary to the vote of the vestry and the wishes of the parishioners, introduced into the church pictures representing the "Stations of the Cross" proved to have been used superstitiously and four crucifixes, placed curtains over the Ten Commandments, the Lord's Prayer, and the Apostles' Creed engraved on the east chancel wall, and darkened the chancel by affixing permanent blinds on the east window and a side chancel window, the court ordered that within three months the "Stations of the Cross," the crucifixes, and the curtains should be removed out of the church by the incumbent, and the outside blinds over the above-mentioned windows taken down by him.

If the incumbent should not comply with the order of the court within three months of its date, the court would be prepared to issue a faculty to the parishioners' churchwarden to carry out the order.

The erection in the chancel of a communion table with a reredos in substitution for the communion table formerly there, though made by the incumbent in opposition to a vote of the vestry, was sanctioned by a confirmatory faculty from the court, on the ground of its being an artistic improvement to the church, subject to the platform on which the communion table stood being extended round the north end of the table so as to enable the minister to officiate during the communion service standing at the north end.

The court also sanctioned by confirmatory faculty the erection in the church of a side chapel with a communion table in it, though objected to by the parishioners, subject to the chapel being separated from the church on a plan to be approved of by the court.

Sieveking v. *Kingsford*, [1866] 36 L. J. (Ecc.) 1, followed.—ST. MARK'S (VICAR OF) *v.* ST. MARK'S PARISHIONERS, *Q.B.D.*

6. *Jurisdiction—Criminal suit against rector for non-repair of chancel—Appeal—Practice—Surrogate*—The Ecclesiastical Courts have no jurisdiction to entertain a criminal suit against a lay rector who

has neglected to perform his duty of repairing the chancel of the church of which he is rector, unless the chancel was out of repair at the time of the institution of the suit.—NEVILLE *v.* KIRBY, *Q.B.D.*

EDUCATION :—

School board—Superannuation fund—Deductions from salaries of teachers—Ultra vires—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 35.—A school board established a fund, to be formed by means of deductions from the salaries of the teachers, for the purpose of providing superannuation allowances for the teachers. The board did not contribute to the fund nor insure its solvency, but they administered it under the advice of a superannuation committee, and they incurred certain expenses in the working of it.

A teacher who, by an agreement in writing with the school board, had contracted to come under the superannuation scheme and to permit deductions from her salary to be made, subsequently brought an action to recover the amount of the deductions so made.

Held, that the contract between the plaintiff and the school board was not illegal as being *ultra vires* of the board; and that even if the board had acted in any way *ultra vires* in administering the fund the plaintiff was not entitled to recover.

Judgment of Wright and Kennedy, JJ. (*ante*, p. 155), affirmed.—PHILLIPS *v.* LONDON SCHOOL BOARD, *C.A.*, 658.

See also Endowed School.

EJUSDEM GENERIS.—See also Charity, 4; Ship, 10; Will, 24.

ELECTION LAW:

1. *County council—Election of—Practice—Death of candidate between nomination and poll—Duty of returning officer to countermand poll—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 58—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *s.* 1.—Where, at a contested election for a county council, a candidate dies between the nomination and the poll, it is the duty of the returning officer for the division in which he was a candidate to countermand notice of the poll.—REG. *v.* STEWART, *Q.B.D.*

2. *Municipal election—County council—Death of candidate—Injunction—Prerogative* mandamus—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *s.* 1—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 58.—The last paragraph of section 1 of the Ballot Act, 1872, is incorporated in the Municipal Corporations Act, 1882, by virtue of section 38 of the latter Act.

Semble, for the purposes of municipal and county council elections, the paragraph must be read as if the words "as if the notice required by section 54 of the Municipal Corporations Act had been given . . ." were substituted for the words "as if the writ had been received . . ."

In an election for a county council the poll was fixed to take place on the 3rd of March. The nomination of candidates took place on the 23rd of February. On the 26th of February one of the candidates nominated died. The returning officer, though acquainted with the fact of the candidate's death, refused, on a request to do so by another of the candidates, to countermand the poll.

Held, that an injunction restraining the returning officer from proceeding with the poll was not the proper remedy, but that a prerogative writ of *mandamus* was, under the circumstances, the proper remedy.—WESTACOTT *v.* SMITH, *Q.B.D.*, 379.

3. *Municipal election—District council—Nomination paper—Election Order*, 1897, *r.* 7 (2).—A nomination paper of a candidate as a rural district councillor is not invalid because it was signed by the proposer and seconder before the name of the candidate was filled in.—COX *v.* DAVIES, *Q.B.D.*

4. *Municipal election—Election of councillors—Unopposed candidate—Return of expenses—No expenses in fact incurred—Municipal Elections (Corrupt and Illegal Practices) Act*, 1884, *s.* 21, *sub-sections* 4, 7.—Every candidate is required, under the Municipal Elections Act, 1884, to send to the town clerk, within twenty-eight days of the election, a return of his expenses with the accompanying statutory declaration.

By section 21, sub-section 4, if, after the time for making such return, the candidate in default shall, before the date of the allowance of such authorized excuse as is mentioned in the Act, sit or vote in the council, he shall forfeit £50 for every day on which he does so to any person who sues for the same. By sub-section 7, if a candidate appeals to the High Court, and shows that failure to make such return and declaration has arisen by reason of inadvertence or by any reasonable cause of a like nature, the court may make such order and declaration as to them seems just, notwithstanding the lapse of the prescribed statutory period for making the return.

P. was returned unopposed at a municipal election for the county borough of H., and believing that as he had incurred no expenses of any kind no return and declaration was required, omitted to return his expenses as "nil" until after the statutory period for making such return and declaration had expired.

Held, that there was sufficient evidence before the court that the omission had been under such circumstances as to amount to an authorized excuse under the Act, and that the relief sought ought therefore to be granted.

Ex parte Robson, 35 W. R. 290, 18 Q. B. D. 336, followed.—PENNINGTON, EX PARTE, *Q.B.D.*, 415.

5. *Parliament — Election expenses — Return — "Transmit"— Corrupt Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51), *ss.* 33, 34.—The fact that the return of election expenses transmitted to the returning officer under section 33 of the Corrupt Practices Prevention Act, 1883, contains an error does not make it a nullity so as to render the candidate liable to the penalties imposed by sub-section 5 of that section for sitting and voting before the return has been transmitted.—MACKINNON *v.* CLARK, *C.A.*

6. *Parliament—Election petition—Claim of seat—Scrutiny—Particulars—Election Petition Rules*, 1868, *rr.* 6, 7.—Where the petitioner in a parliamentary election claims the seat on the ground that he had a majority of lawful votes at the poll, rule 6 of the Election Petition Rules, 1868, does not apply, but rule 7 applies exclusively. The respondent, therefore, has no right to an order for particulars, as in the case of a petition where an election is sought to be avoided on the ground of corrupt and illegal practices, but is only entitled to a delivery of the list of the votes intended to be objected to and the grounds of objection, six days before the day appointed for trial.

Munro v. *Balfour*, 41 W. R. 143, [1893] 1 Q. B. 113, approved.—FURNESS *v.* BERESFORD, *C.A.*, 359.

7. *Registration—Occupiers' list of voters—Qualification described as "dwelling-house joint"—Suff-*

ciency of—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 6, 27—*Representation of the People Act*, 1884 (48 & 49 *Vict. c.* 3), *ss.* 2, 5.—In Division I. of the occupiers' list of voters in a county, the description of a voter's qualification was entered as "dwelling-house joint." A notice of objection that the voter's qualification was "expressly forbidden by law" had been duly given. The voter had not made either a new claim or a statutory declaration to amend the entry. The qualifying property was in fact a dwelling-house inhabited by the voter jointly with others, the annual value of which was more than sufficient to give £10 a year to each occupant.

Held (reversing the revising barrister), that the objection should be disallowed, as the description of the qualification was sufficient to describe an occupation qualification.

Townshend v. *St. Marylebone Overseers*, 20 W. R. 148, L. R. 7 C. P. 143, followed and approved.—BAGLEY *v.* BUTCHER, *Q.B.D.*, 189.

8. *School board election—Recount as between two candidates only—Finality as regards candidates not petitioned against—Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *s.* 2.—At a school board election, at which there were eight candidates for five seats, the result of the poll was duly declared by the returning officer. A petition was presented on behalf of the first unsuccessful candidate against the last successful candidate, asking, for a recount as between these two candidates only, and claiming the seat for the candidate for whom the petition was presented. No petition was presented against any of the first four successful candidates, and no recount of their votes was asked for. The result of the recount as between the two candidates was to place the unsuccessful candidate in a majority of lawful votes over the candidate petitioned against.

Held, that, as there had been no petition presented against the first four successful candidates, the numbers of the votes declared for them by the returning officer must be taken to be correct, and that, as the candidate for whom the petition had been presented had, upon such recount, shown that he had the majority of votes, he was entitled to the seat, although he had not shown that the candidate petitioned against would not have been among the five successful candidates upon a recount of all the votes given at the election.—MONKSWELL (LORD) *v.* THOMPSON. *Q.B.D.*, 382.

See also Practice, 3.

ELECTRIC LIGHTING:—

Electric inspector—Reasonable expenses—Electric Lighting Orders Confirmation (No. 15) Act, 1890 (53 & 54 *Vict. c. ccxxxix*), *s.* 47.—By section 47 of the Electric Lighting Orders Confirmation (No. 15) Act, 1890, it is enacted that, "Save as otherwise provided by this order or by any regulation under this order, all fees and reasonable expenses of an electric inspector . . . shall, in the absence of any agreement to the contrary between the undertakers and the local authority, be paid by the undertakers. Provided, that where the report of an electric inspector or the decision of the Board of Trade shows that any consumer was guilty of any default or negligence, such fees and expenses shall . . . be paid by such consumer or consumers as the court or board, having regard to such report or decision, shall direct."

Held, that "reasonable expenses of an electric inspector" here meant expenses specifically incurred by the electric inspector in making tests and inspections, and did not include the salary appointed to the inspector by the local authority under section 36, or the general expenses of his laboratory and staff.—CRAWFORD *v.* CITY OF LONDON ELECTRIC LIGHTING CO., *Q.B.D.*

EMPLOYERS' LIABILITY ACTS—See Master and Servant, 3.

ENDOWED SCHOOL:—

Locus standi *of petitioners—Ratepaying parents of scholars—Endowed Schools Act*, 1869 (32 & 33 *Vict. c.* 55), *ss.* 19, 39.—In appeal from a scheme relating to a grammar school,

Held, (1) that the petitioners, who were ratepayers of the borough where the school was situate and parents of scholars attending the school, were not, in either capacity, persons directly affected by the scheme within the meaning of section 39, and, therefore, had no *locus standi* for appeal; (2) that although an opinion of the commissioners that section 19 applies is appealable, it is so only as mentioned in the Act, which requires that the petitioners be aggrieved by the scheme and not by the opinion on which it is founded; (3) that they were not so aggrieved, for, whether that opinion was right or wrong, the scheme having received the consents required by the section, was in either view in conformity with the Act.—COLCHESTER GRAMMAR SCHOOL, RE, *P.C.*

ESTOPPEL.—See Highway, 4; Deed, 1; Married Woman, 4; Settlement, 4.

EXECUTOR:—

1. *Acting before probate—Delay in proving will—Recovering outstanding assets—Wilful default.*—A testator died in 1882, and his will was proved in 1889. A policy of insurance on the testator's life could not be got in until probate was obtained, and meanwhile interest at the rate of five per cent. per annum was paid upon a debt of the testator.

Held (affirming North, J., 45 W. R. 284, [1897] 1 Ch. 422), that the delay in proving the will and getting in the money due upon the policy did not amount to wilful default, and that, consequently, the ordinary accounts against the executors ought only to be taken.—STEVENS, RE, COOKE *v.* STEVENS, *C.A.*, 177.

2. *Conversion — Article pledged — Knowledge of pawnor — Statute of Limitations — Action against executor.*—In September, 1889, the plaintiff pledged a piano with the husband of the defendant. The same year he converted it to the knowledge of the plaintiff. In March, 1897, he died, and the plaintiff then tendered the money to the present defendant, his executrix and widow, and demanded the return of the piano.

Held, that the defendant could not be liable, and that, as she never had possession of or any property in the piano, no action of conversion would lie against her.—HINCHCLIFFE *v.* SHARPE, *Q.B.D.*

3. Devastavit — *Trustee — Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.—A testator died in June, 1894, with assets reckoned at £22,000, and debts as then known under £100. His executor paid an immediate legacy of £300 to the widow, and made other payments for the benefit of the children. In November advertisements for creditors were issued. In December a writ was served on the executor by certain large landowners claiming an account of rents received by the testator as their agent.

In spite of this action the executor continued to

make payments to the beneficiaries, without going to the court for directions, until judgment in April, 1896, when about £26,000 was found due to the plaintiffs from the testator's estate.

Held, that the executor, under the circumstances, had acted reasonably in paying the widow the £300 and such other payments necessary for the maintenance of the family up to the date of his receiving the writ; and that he should be relieved to this amount under section 3 of the Judicial Trustees Act, 1896.—KAY, RE, MOSLEY *v.* KAY, *Ch.D. Romer, J.*, 74.

4. *Probate—Intermeddling by an executor—Executor compelled to take up probate.*—If an executor have intermeddled with an estate, he may be compelled on the application of a legatee to take up probate, though from his conduct he appears an undesirable person to fill the office of executor.—COATES, IN GOODS OF, *P.D. & Ad.D.*

5. *Will—Trust for legatee—Discretion of executor as to time and mode of payment.*—A testatrix gave to her executors £1,000 in trust for her brother to be paid in such sum or sums, share or shares, and at such time and manner as they should think proper.

Held, that the brother was absolutely entitled to the legacy freed from the exercise of any discretion by the executors.—MELLOR, RE, CLANCY *v.* O'CALLAGHAN, *M.R.* (*Ir.*).

See also Bankruptcy, 8, 12; Inland Revenue, 13, 14; Probate, 13, 20, 21A; Solicitor, 5; Trustee, 9, 10, 12.

FACTORY:

1. *Bleaching and dyeing works—Processes of hooking, lapping, and making up and packing cloth—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 93, *Schedule IV., Part I.* (2).—By section 93 of the Factory and Workshop Act, 1878, the expression "non-textile factory" in that Act means "any works, warehouses, . . . or places" named in Part I. of the 4th Schedule to the Act, which includes "bleaching and dyeing works—that is to say, any premises in which the processes of (*inter alia*) hooking, lapping, and making up and packing any cloth, . . . or any one or more of such or any process incidental thereto, are or is carried on."

The respondents carried on at their premises the above-named processes as a separate business, and not as incidental to the business of bleaching and dyeing.

Held, that the respondents' premises were a "non-textile factory" within the definition in section 93 of the Act.—ROGERS *v.* MANCHESTER PACKING CO., *Q.B.D.*, 350.

2. *Fencing machinery—Liability of occupier—Person injured by his own negligence—Factory and Workshop Act*, 1878 (41 *Vict. c.* 16), *s.* 82.—Section 82 of the Factory and Workshop Act, 1878, provides: "If any person is killed or suffers any bodily iniury in consequence of the occupier of a factory having neglected to fence any machinery required by or in pursuance of this Act to be securely fenced, . . . the occupier of such factory . . . shall be liable to a fine."

Held, that the fact that the death or injury is due to the negligence of the person so killed or injured does not exempt the occupier from liability.—BLENKINSOP *v.* OGDEN, *Q.B.D.*, 542.

3. *Meal-times—Employment—"Work"—Factory and Workshop Act*, 1878 (41 *Vict. c.* 16), *ss.* 17, 83, 94.—Section 83 of the Factory and Workshop Act, 1878, provides that "where a child, young person, or woman is employed in a factory or workshop contrary to the provisions of this Act, the occupier of the factory or workshop shall be liable to a fine."

Held, that, in order to constitute the offence, it was not necessary to show that the child, young person, or woman was employed by order of the occupier.

A young person during the time allowed in a factory for meals, of his own accord and contrary to the regulations of the factory, cleaned and oiled the machinery. It was not part of his duties to clean and oil the machinery.

Held, that the young person "worked" in so cleaning and oiling, and ought, therefore, to be "deemed to be employed" within the meaning of section 94.—PRIOR *v.* SLAITHWAITE SPINNING CO., *Q.B.D.*, 488.

4. *Underground bakehouse—Vacant premises at date of Act—Factory Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 27 (3).—By section 27, sub-section 3, of the Factory and Workshop Act, 1895, "A place underground shall not be used as a bakehouse unless it is so used at the commencement of this Act." Premises which had long been used as an underground bakehouse were vacant at the commencement of the Act, but their owner was seeking a tenant for them as a bakehouse.

Held, that they were used as a bakehouse at the commencement of the Act.—SCHWERZERHOF *v.* WILKINS, *Q.B.D.*

FINANCE ACT, 1894.—See Inland Revenue, 2, 4-7.

FISHERY:—

1. *Salmon—Device to catch fish—Nets—"Other like instrument"—Salmon Fishery Act*, 1861 (24 & 25 *Vict. c.* 109), *s.* 8—*Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 18.—A fishing net with an illegally small mesh is not a "like instrument" to a snare within the meaning of section 8 of the Salmon Fishery Act, 1861, as extended by section 18 of the Salmon Fishery Act, 1873; and therefore the mere possession of such a net, although with the intention of catching salmon by means thereof, is not an offence within those Acts.—JONES *v.* DAVIES, *Q.B.D.*

2.—*Sea fishing—Trawl-net with beam—"Otter" trawl-net—Sea Fisheries Regulation Act*, 1888 (51 & 52 *Vict. c.* 54)—*Fishery Act*, 1891 (54 & 55 *Vict. c.* 37)—*North-Eastern Sea Fisheries District Bye-laws, bye-law* 1.—By bye-law 1 of the North-Eastern Sea Fisheries District Bye-laws, made under the Sea Fisheries Regulation Acts, 1888 and 1889, and confirmed by order of the Board of Trade, dated the 17th of July, 1894, it is provided that ". . . a person shall not use in fishing for sea fish any trawl or trawl-net having a beam which is pulled or pushed or otherwise propelled along or over the bottom of the sea . . ."

Held, that an "otter" trawl, which is a trawl not having any beam across from side to side, but which has two "otter" boards so fixed that the motion through the water keeps them apart, thus stretching a line across the net in the place of a beam, comes within the meaning of bye-law 1.—COLLEN *v.* ASHFORD, *Q.B.D.*, 302.

FIXTURES:—

1. *Bill of sale—Mortgage.*—C. took a lease of building ground and erected thereon a shop, which he fitted with trade fixtures suitable for the trade of a chemist, all of which were capable of being detached without injury to the freehold. After

the annexation of the fixtures C. mortgaged the premises; in the mortgage the parcels were simply described as "building ground" as in the lease, and no mention was made of the fixtures.

Held, that the fixtures passed to the mortgagees and that the mortgage did not come within the Bills of Sale Acts.—CALVERT, RE, *Q.B.D.* (*Ir.*).

2. *Movable chattels—Stuffed birds and animals—Mansion-house—Settled estate.*—Specimens of stuffed birds and animals, forming part of a natural history collection in a museum built on to the mansion-house, are not fixtures so as to devolve with the freehold under the limitations of a settlement.

The decision of Kekewich, J. (45 W. R. 587), affirmed.—HILL (VISCOUNT) *v.* BULLOCK, *C.A.*, 84.

FOOD.—See Adulteration; Criminal Law, 4.

FRAUDS, STATUTE of.—See County Court, 8; Vendor and Purchaser, 6.

FRIENDLY SOCIETY:—

1. *Alteration of rules—New rule made under statutory powers—Continuance of rule after repeal of statute—Effect of subsequent alterations on members' vested rights.*—A friendly society established in 1842, which had no provision in its rules for the alteration of its rules, made a new rule under the statutory power given by section 27 of the Friendly Societies Act, 1855, to alter or make new rules, the rule being in these terms: "No new rule shall be made, nor any of the rules herein contained or hereafter to be made, shall be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting."

Held, that, having regard to section 6 of the Friendly Societies Act, 1875, this rule continued in force notwithstanding the repeal in 1875 of the Act of 1855, under which it was made; that the rule conferred upon the society and kept alive the power to alter, amend, or make new rules; that members who joined the society when such rule was in force were bound by subsequent alterations properly made under the rule; and that under it the society had power to make an alteration of rules imposing upon members who were already in receipt of superannuation allowance conditions for breaches of which they might lose their allowance.—SMITH *v.* GALLOWAY, *Q.B.D.*, 204.

2. *Nomination by member—Revocation by subsequent will—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15, *sub-section* 3.—A nomination made by a member of a friendly society under section 15, sub-section 3, of the Friendly Societies Act, 1875, and in compliance with the rules of the society, may be revoked by a subsequent will of the nominator not communicated to the society during the lifetime of the testator.—BENNETT *v.* SLATER, *Q.B.D.*

GAME:—

1. *Trespass in pursuit of game—Leave and licence—Evidence—The Game Act*, 1861 (1 & 2 *Will.* 4, *c.* 32), *s.* 30.—By the Game Act, 1861, s. 30, if any person trespass in the daytime in pursuit of game, he shall on conviction forfeit £5, "provided always that any person charged with any such trespass shall be at liberty to prove by way of defence any matter which would have been a defence to any action at law for such trespass."

The appellant received leave from the wife of the occupier to hunt rabbits, and then coursed a hare. The sporting rights were not in the occupier.

Held, that the appellants had not brought themselves within the proviso, and it was not until they had done so that it was necessary to prove strictly—*e.g.*, by producing the deed—that the landlord had the right as against the occupier to take game.

Quære, whether the wife could give such leave as she had.—TAYLOR *v.* JACKSON, *Q.B.D.*

2. *Trespass in pursuit of game—Shot fired at game on land of another—Game dead and removed at time of search—Interval between killing and entry on land for search—Game Act*, 1831 (1 & 2 *Will.* 4, *c.* 32), *s.* 30.—R. standing in his own land shot at and killed a grouse sitting in the land of another person, but did not then enter upon the land to pick up the dead bird; some hours after he had shot the bird he went on to the land where it had been shot for the purpose of picking it up and there searched for the bird, which had previously been picked up and removed by a gamekeeper.

Held, that the two acts, the shooting of the bird and the subsequent going on to the land in search of it, were sufficiently connected to form one transaction, and that R. was therefore guilty of trespassing upon the land in search or pursuit of game within section 30 of the Game Act, 1831.—HORN *v.* RAINE, *Q.B.D.*

GAMING:—

1. *Betting house—Person found therein—Recognizance—Betting Houses Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 11.—Persons found in a betting house are liable to the same treatment as persons found in a gaming house, and the magistrate has power, in the case of any person found in a betting house who is arrested therein and brought before him in pursuance of the Betting Houses Act, 1853, s. 11, to order such person to enter into recognizances "no more to haunt, play, or exercise from thenceforth" at any gaming house.—MURPHY *v.* ARROW, *Q.B.D.*, 94.

2. *Betting—Reserved enclosure on racecourse—"Place"—"Using a place" for betting purposes—Betting Houses Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.—The defendants were the owners and occupiers of a racecourse, in which was a reserved enclosure, about a quarter of an acre in area, railed off from the rest of the racecourse. The public were admitted to the enclosure upon payment, and every person so admitted was entitled to walk about and stand in any part of it. Among those who paid for admission were a number of professional betting men, called bookmakers, who were admitted on the same terms as the rest of the public. The bookmakers when in the enclosure called out the odds they were prepared to bet against each horse, and were prepared to bet, and did bet, such odds with anyone who was desirous to bet, either on credit or upon the amount of the stake being deposited with the bookmaker. No bookmaker had any right, interest, or control in or over any part of the enclosure; he did not confine himself to any fixed spot in the enclosure, nor did he use any such apparatus as a desk, stool, umbrella, or tent, though any particular bookmaker was usually to be found in or near the same part of the enclosure. Betting of the same kind had been carried on by bookmakers in similar enclosures since the beginning of the century.

Held (Rigby, L.J., dissenting), that the enclosure was not a "place used" by the bookmakers for the purpose of betting with persons resorting thereto, and that therefore the defendants did not permit the same to be so used within the meaning of section 3 of the Betting Houses Act, 1853.

Hawke v. *Dunn*, 45 W. R. 359, [1897] 1 Q. B. 579, dissented from.—POWELL *v.* KEMPTON PARK RACECOURSE CO., *C.A.*, 8.

3. *Betting—Criminal law—Using place for betting—Archway forming private thoroughfare—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.—The defendant habitually made use of an archway which formed a thoroughfare from a public street to a private yard and dwelling-houses for the purpose of betting on horse-races with persons who resorted to the archway.

Held, that the archway was a "place" within the meaning of the Betting Act, 1853, and that the defendant was rightly convicted of an offence under that Act.

Powell v. *Kempton Park Racecourse Co.*, *ante*, p. 8, [1897] 2 Q. B. 242, commented on.—REG. *v.* HUMPHREY, *C.C.R.*, 543.

4. *Contract—Bill—Paid by acceptor—Recovery of amount so paid.*—C. and W. were engaged in transactions null and void under the Gaming Act, 1845. In respect of such transactions C. drew a bill, which was accepted by W. C. indorsed it to the C. bank, who sued W. and recovered the money. In an action to recover the money so paid from C.,

Held, that W. could not recover.—CRAWLEY *v.* WHITE, *Q.B.D.*

5. *Contract — Cheque — Illegal consideration* — 9 *Anne c.* 14—*Gaming Act*, 1835 (5 & 6 *Will.* 4, *c.* 41), *s.* 1.—Where defendant gave a cheque in payment of bets lost upon horse-races by the defendant, and the cheque was indorsed by the payee to the plaintiff for value with notice of the consideration for which it was given,

Held, that the plaintiff could not maintain an action upon the cheque as it was given for an illegal consideration under 5 & 6 Will. 4, c. 41.—WOOLF *v.* HAMILTON, *C.A.*

6. *Contracts for differences—Profits of gambling transactions applied to purchase of stock for investment—Non-delivery of stock—Damages—Deposit of sums as "cover"—"Cover" not used—Right to recover—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.—Gambling transactions between the debtor and the respondent in stocks and shares having resulted in the respondent's favour, the respondent directed the debtor to apply the balance due to him in the purchase of certain railway stock for investment. The debtor purchased the stock but died insolvent without having delivered the stock to the respondent.

Held, that the respondent could not prove against the debtor's estate for damages for non-delivery of the stock.

The respondent deposited with the debtor certain sums as "cover" to secure the debtor against loss on the gambling transactions, but as the transactions resulted in the respondent's favour the "cover" was not used for that purpose.

Held, that the respondent was entitled to prove against the debtor's estate for the amount of the "cover."—CRONMIRE, RE, WAUD, EX PARTE, *C.A.*, 679.

GARNISHEE.—See Bankruptcy, 6; Practice, 19A.

GOODWILL.—See Inland Revenue, 19; Partnership, 4.

GUARANTEE.—See Solicitor, 8; Trustee, 8.

HARBOUR:—

Jurisdiction of High Court—Right to recover expenses in court of summary jurisdiction—Wrecks, removal of—Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 *Vict. c.* 27), *s.* 56.—Where a statute gives a right to recover expenses in a court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a court of summary jurisdiction: he can only take proceedings in the latter court.

The construction of section 56 of the Harbours, Docks, and Piers Clauses Act, 1847, adopted in *The Crystal*, [1894] A. C. 508, applied to section 47 of the Aire and Calder Navigation Act, 1889 (52 & 53 Vict. c. xxxii.).—BARRACLOUGH *v.* BROWN, *H.L.*

See also Ship, 14.

HIGHWAY:—

1. *Cutting trees—Timber trees—Yew—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 65, 66.—The appellent was summoned under section 65 of the Highway Act, 1835, for that a yew tree growing on his lands obstructed a carriage-way, and the magistrates made an order for its removal. It was contended on his behalf that, as no order had been made for widening the road, under section 66 of that Act, he could not be ordered to remove it even if it was an obstruction. But, even if they could order its removal, they could not do so in July, when they made the order.

Held (affirming the magistrate), that the order was right, and that section 66 did not apply to such a case as this at all.—BULLEN *v.* WAKELY, *Q.B.D.*

2. *Extraordinary traffic—Person by whose order such traffic has been conducted—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.—The respondent contracted with several persons for the delivery to him at E. of various materials required for building and other operations, the price being payable by him on acceptance if according to sample, the price including free delivery at E. The respondent neither employed the persons who conveyed the goods there, nor did he pay them for such conveyance. The surveyor found, in pursuance of the provisions of section 23 of the Highways and Locomotives (Amendment) Act, 1878, "that extraordinary expenses had been incurred by reason of excessive weight passing along the highway or extraordinary traffic thereon."

Held, that the respondent was not the person, within the meaning of section 23, by whose order such weight or traffic had been conducted along the highway, and he was therefore not liable for the extraordinary expenses in repairing the road thereby occasioned.

Decision of the Court of Appeal, 45 W. R. 513, [1897] 1 Q. B. 351, affirmed.—KENT COUNTY COUNCIL *v.* GERARD (LORD), *H.L.*, 111.

3. *Extraordinary traffic—Person by whose order the traffic is conducted—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.—The appellants were the contractors for the erection of a lunatic asylum at Charminster, for the Dorset County Council. They entered into a contract with one T. for the haulage of goods, plant, and materials to the works. These were to be delivered as required by the appellants, and either by carts or trucks drawn by traction engines, but no route was prescribed by which these goods, plant, and materials were to be brought. This delivery caused extraordinary traffic, and the highway was thereby damaged.

Held, that the appellants were not the persons

by whose order the traffic was conducted within section 23 of the Highways and Locomotive (Amendment) Act, 1878, so as to make them liable for the damage done to the highway by such extraordinary traffic.—PETHICK *v.* DORSET COUNTY COUNCIL, *Q.B.D.*

4. *Liability to repair* ratione tenuræ—*Highway made a parish highway—Highway rate—Exemption—Highway Act*, 1862 (25 & 26 *Vict. c.* 61), *s.* 35—*Estoppel*—Res judicata—*Judgment of quarter sessions—Quashing previous rate.*—By an order of petty sessions made in April, 1881, under section 35 of the Highway Act, 1862, a highway, for the repair of which the appellant company had previously, as occupier of certain land, been liable *ratione tenuræ*, was declared to be a parish highway, and a sum was fixed to be paid in full discharge of all claims thereafter in respect of the repair and maintenance of the highway. In August, 1881, the appellant company was rated in respect of its occupation of the land to a highway rate for the district in which the highway was situate. On appeal the quarter sessions quashed the rate. In 1897 the appellant company was again rated to a rate for highway expenses in respect of its occupation of the land.

Held, that the appellant company was not, by reason of the order made under section 35 of the Highway Act, 1862, exempted from liability to be rated for highway expenses, and that the question of the appellant company's liability was not *res judicata* by reason of the decision of the quarter sessions in 1881 that the rate then in question was invalid.—NORTH-EASTERN RAILWAY CO. *v.* DALTON OVERSEERS, *Q.B.D.*, 582.

5. *Local government—Locomotive—"User" on highway—Licence—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 32.—Section 32 of the Highways and Locomotives Act, 1878, gave county authorities power to make bye-laws for granting annual licences to locomotives used within their county, and under this section a county council made a bye-law that "No locomotive shall be used on any highway within the county until an annual licence for the use of the same shall have been obtained by the owner thereof."

Held, that a locomotive which is only passing along a highway for the purpose of proceeding to another district is being "used" on such highway within the meaning of this bye-law, and that the owner thereof required a licence for such user.—LONDON COUNTY COUNCIL *v.* WOOD, *Q.B.D.*, 143.

6. *Nuisance—Defective fence adjoining highway—Child climbing on fence—Injury to child arising therefrom—Liability of owner of fence.*—The defendant was the owner of a piece of waste ground separated from a highway by a fence belonging to him. A child, who was passing along the highway, put his foot upon the fence in order to look at some boys who were playing in the adjoining ground, when the fence, in consequence of its ruinous condition, came down and injured him. In an action by the child to recover damages for personal injuries,

Held, that the action was maintainable, as the fence in its ruinous condition constituted a danger to those lawfully using the highway, and therefore amounted to a nuisance, and the nuisance was the cause of the injury.—HARROLD *v.* WATNEY, *C.A.*, 642.

7. *Public footway—Stile—Liability of occupier to repair* ratione tenuræ—*Evidence of liability.*—The defendant was the yearly tenant of a farm through which ran a public pathway at a certain point of which was a stile with stone steps. The steps being out of repair, the plaintiff in crossing fell and was injured, and he brought an action for the injuries against the defendant, as being liable *ratione tenuræ* to repair the stile. There was no evidence that the parish had ever repaired, or had ever required the defendant or any prior occupier to repair, but there was evidence that the defendant's predecessor, who was also owner, had done repairs to the path and stile; there was also some evidence that previous occupiers had repaired, and a witness stated that he had done some repairs at the defendant's instance. The repairs were all small and inconsiderable, and they were done on the defendant's own land.

Held, that evidence of such small repairs, done by the occupier on his own land and possibly for his own benefit, was not sufficient to show that the defendant was bound to repair *ratione tenuræ*.

Quære, whether an action will lie at the instance of a private person against one liable *ratione tenuræ* to repair.—RUNDLE *v.* HEARLE, *Q.B.D.*, 619.

8. *Right of passage—Extent of—Roadside strips—Special Act—Construction.*—Where a highway though of varying and unequal width runs between fences, the public right of way, *primâ facie*, extends over the whole space between the fences. The effect of descriptions in special Acts of Parliament affecting interests in land considered.—LOCKE-KING *v.* WOKING COUNCIL, *Ch.D. Kekewich, J.*

9. *Surveyor—Supplying team work—Member of district council—Surveyor or not—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 46—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 144—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 25, 46.—By the Highway Act, 1835, s. 46, the surveyor of the parish may contract for the purchasing, getting, and carrying of materials required for the repairing of the highways, but he may not share or have any interest in any such contract without the licence in writing of two justices of the peace previously obtained by him under certain penalties.

By the Public Health Act, 1875, s. 144, urban authorities have the powers of surveyors of highways and of parish vestries under the Highways Acts.

By the Local Government Act, 1894, s. 25, the district council of every rural district ". . . shall also have, as respects highways, all the powers, duties, and liabilities of an urban sanitary authority under sections 144 to 148 of the Public Health Act, 1875, and those sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority." And by section 46 of that Act a person is not to be disqualified from being a member of the council "by reason of being interested . . . in the transport of materials for the repair of roads or bridges in his own immediate neighbourhood."

The respondent H. was a member of the Saddleworth District Council, and in March, 1897, he on his own account let to hire a team to be used in repairing a highway within the district of the council of which he was a member, and he received from the council payment in respect thereof. He did not, before letting for hire as aforesaid, obtain any licence in writing from two justices of the peace. He was thereupon summoned before the magistrates for the penalties contained in the Highways Act, 1835, s. 46, who, however, dismissed the summons.

Held (dismissing the appeal), that the magistrates were right.—BUCKLEY *v.* HANSON, *Q.B.D.*

See also Local Government, 13-15, 23, 32, 34; Vendor and Purchaser, 11.

HOTCHPOT.—See Will, 16.

HUSBAND and WIFE.—See Divorce, 1-7, 10-19; Domicil; Inland Revenue, 2; Married Woman, 1, 2, 6, 7, 9; Practice, 34.

INCLOSURE ACTS:—

1. *Award—Bed of river* ad medium filum—*Several fishery.*—An award under an Inclosure Act dealing with moors, commons, and waste grounds will not by implication convey the bed of a river adjoining the land awarded *usque ad medium filum.*

A fortiori, such an award will not convey the bed of the river where it has been treated as a separate tenement, and not subject to commonable rights, and is exclusively in the possession of lessees of the lord at the date both of the Act and the award.

Decision of North, J. (*ante*, p. 119), affirmed.—ECROYD *v.* COULTHARD, *C.A.*

3. *Custom—Parish bull and boar—Parson—Great tithes, Charge on—Allotment of lands in lieu of tithes—Transfer of liability to custom.*—Where, under an Inclosure Act, lands have been allotted "in satisfaction and discharge of" the great tithes, the burden of keeping up a custom that the parson as owner of the great tithes shall provide and keep a bull and boar for the common use of the parishioners is not, in the absence of express words in the Act to that effect, shifted to the allottees of those lands.—LANGHBURY *v.* BODE, *Ch.D. Kekewich, J.*

INCOME TAX.—See Inland Revenue, 8-12.

INFANT:—

1. *Agreement to settle action—Plea in bar—Contract to benefit.*—The plaintiff, an infant, commenced an action by his next friend for wages and damages for assault, false imprisonment, and malicious prosecution.

He voluntarily came to the defendant and offered to take 30s. in respect of all his claims as he wished to go abroad, which was paid him, and he signed an acknowledgment that all his wages had been paid, and that he had brought the other claims out of vengeance.

The next friend continued the action, and the plaintiff came over to give evidence.

The defendent pleaded the agreement in bar to the action.

The jury found for the defendant as to the wages and malicious prosecution, but for the plaintiff upon the false imprisonment with £20 damages.

The infant never ratified the agreement.

Held, that under the circumstances the infant was not bound by the agreement, so as to make it a bar to the action.—MATTEI *v.* VAUTRO, *Q.B.D.*

2. *Necessaries—Contract—Racing bicycle.*—A racing bicycle may be a necessary for an infant apprentice earning 21s. a week, and living with his parents.—CLYDE CYCLE CO. *v.* HARGREAVES, *Q.B.D.*

See also Divorce, 8

INJUNCTION:

1. *Letters—Property in—Right of writer to restrain publication.*—The defendant H., who was the proprietor of a newspaper, published on the 2nd of October, 1897, a violent attack upon the plaintiff's conduct in certain Stock Exchange transactions some years ago, founded upon letters written by the plaintiff to B. The same supplement contained a threat to publish on the 1st of January, 1898, proofs which the defendant had in his possession that the plaintiff had carried on similar transactions in later years.

The plaintiff, who was also the proprietor and editor of a newspaper, published on 7th of October, 1897, an article dealing with and denying the defendant's charges, in which he wrote: "You may publish and republish my letters to B. as often as you please," adding that he could restrain their publication by injunction if he chose, but that he had no intention of doing so.

The plaintiff afterwards published a letter, alleged to have been written by the defendant to a third person, as proof that the defendant was a person wholly unworthy of confidence.

The plaintiff afterwards discovered that the proofs referred to in the defendant's threat consisted wholly or partly of letters written by the plaintiff to S., and obtained by the defendant H. from S.'s widow.

The plaintiff now moved to restrain the defendants H. and S.'s widow from publishing any letters written by the plaintiff to S., and from informing anyone of the contents thereof.

Held, that the court will restrain any person in the possession of letters from publishing them against the will of the writer, except under special circumstances—*e.g.*, where the publication is necessary for the purpose of clearing the defendant's character; that there was nothing in the plaintiff's conduct to disentitle him to this relief, and the defendant had not shown that his purpose in publishing the letters was to clear his own character.

The injunction was granted against publication of the letters from the plaintiff to S., but not against informing anyone of the contents thereof.

S.'s widow was not proved to have given the letters to H. for the purpose of publication, or to have colluded with him, and the action was dismissed against her with costs.—LABOUCHERE *v.* HESS, *Ch.D. North, J.*

2. *Trader—Misleading advertisement—Sale of goods at less than cost price.*—A trader may offer for sale goods at any price he chooses, and it is immaterial whether such goods are actually in his possession or not. Consequently, where a trader advertised for sale goods at less than cost price, not having any such goods in his possession, and by so doing injured the plaintiffs,

Held, that he could not be restrained from so doing, as the damage to the plaintiffs arose not from the misrepresentations in the advertisements, but from the underselling of their goods, which was not an actionable wrong.—AJELLO *v.* WORSLEY, *Ch.D. Stirling, J.*, 245.

See also Contract, 6, 7; Copyright, 1, 2; County Court, 1; Election Law, 2; Libel, 2; Local Government, 20; Practice, 10; Trade-Name, 1-4; Vendor and Purchaser, 1.

INLAND REVENUE:—

1. *Building society—Reconveyance of mortgage—Exemption—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 41, 42—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39).—By the Building Societies Act, 1874, s. 41, certain documents, including transfers and receipts, are not to "be subject or liable to be charged with any stamp duty or duties whatsoever, provided that the exemption shall not extend to any mortgage."

And by section 42, where moneys secured by any mortgage or further charge are paid a receipt in the form in the schedule to the Act indorsed on the deed is sufficient release.

A deed was executed by the society, its trustees and the mortgagor, reconveying the mortgaged property as all the money due under the mortgage had been duly paid.

Held, that the deed was exempt from duty.—OLD BATTERSEA BUILDING SOCIETY *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*

2. *Estate duty—Exemption—Husband and wife—Income of wife's fund settled on husband for life—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 21 (5).—By a marriage settlement after-acquired personal property of the wife was settled upon trust (in the events that happened) for the husband for life, with remainder to the wife, the survivor, absolutely.

The husband having died after the commencement of the Finance Act, 1894,

Held, that section 21, sub-section 5, of that Act did not apply, and that estate duty became payable immediately upon the husband's death.—ATTORNEY-GENERAL *v.* STRANGE, *C.A.*, 663.

3. *Estate duty — Gift* inter vivos — *Possession assumed to entire exclusion of donor—Interest reserved —Power of revocation—Customs and Inland Revenue Act*, 1881 (44 *Vict. c.* 12), *s.* 38 (2) (a) (c), *as amended by Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *s.* 11.—G. by deed transferred his estates, including a manor-house, to the defendant, his nephew, subject, as regards property other than the mansion-house, to an annual rent-charge in favour of G. for life, and subject also to the manor-house being enjoyed as theretofore by G. By the same deed the defendant entered into several covenants relating to the estates, and a power of revoking the deed and reassuming the property in the estates was reserved to G. upon the breach of certain of the said covenants by the defendant. The annual value of the estate at the death of G. was considerably in excess of the rent-charge reserved.

Held, that a sufficient interest and a sufficient power of revocation were reserved in the property so as to bring it within the description of property contained in the Customs and Inland Revenue Act, 1881, s. 38 (2) (c), and that, on the death of G., in October, 1894, the whole of the property became chargeable with estate duty under the Finance Act, 1894, s. 1.—ATTORNEY-GENERAL *v.* GREY (EARL), *Q.B.D.*, 251.

4. *Estate duty — Property passing on death — Settlement—Tenant for life and remainderman—Surrender of life estate to remainderman—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (b).—Under a marriage settlement the wife was entitled to certain property for her life, with remainder to her son absolutely. More than twelve months before her death the wife surrendered her life interest in the property to the trustees of the settlement, to the end and intent that such life interest might merge in the interest in remainder of her son. Upon the death of the wife,

Held, that, as by the surrender her life interest had ceased to exist more than twelve months before she died, no property passed on her death within the meaning of section 2, sub-section 1 (*b*), of the Finance Act, 1894, and estate duty was not payable.

Judgment of the Queen's Bench Division (*ante*, p. 44) reversed.—ATTORNEY-GENERAL *v.* BEECH, *C.A.*, 435.

5. *Estate duty—Settled property—Value of property passing on death—Mortgage created by tenant for life and remainderman—Annuity charged upon estate in favour of remainderman during life of tenant for life—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 7.—Property was settled upon a person for life, with remainder to his son in tail. The tenants for life and in tail by deed barred the entail and reserved to themselves a joint power of appointment over the property, the limitation in default of the exercise of the power being to the father for life, with remainder to the son in tail. They then joined in creating mortgages whereby, in the exercise of their joint power of appointment and by virtue of their respective estates, they conveyed the property in fee simple to the mortgagees to secure £230,000. Part of this sum was applied for the benefit of the tenant for life, the remainder being paid to or for the benefit of the tenant in tail. By a resettlement subsequently executed this property was charged with an annuity of £3,000 in favour of the tenant in tail during the life of the tenant for life. The tenant for life died in 1895.

Held, that, in determining the value of the property passing on the death of the tenant for life, no deduction could be made in respect of either (1) the £230,000; or (2) the capital value of the annuity of £3,000.

Decision of the Divisional Court (45 W. R. 538, [1897] 2 Q. B. 47) reversed as to (1) and confirmed as to (2).—COWLEY (EARL) ESTATE DUTY, RE, *C.A.*, 223.

6. *Estate duty—Settlement estate duty — Settled legacy—Duty payable out of residue—"The deceased" —Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *ss.* 19, 24, 39.—By section 19 of the Finance Act, 1896, the settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate.

Held, that this section is not retrospective and does not apply to the estate of a testator who died before the commencement of the said Act of 1896.

In re Webber, Gribble v. *Webber*, 44 W. R. 489, [1896] 1 Ch. 914, followed.—GIBBS, RE, THORNE *v.* GIBBS, *Ch.D. Stirling, J.*, 477.

7. *Estate duty—Specific sum payable out of policy moneys—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 14.—The holder of a policy of assurance on his own life for £5,000 by his marriage settlement assigned the policy to trustees upon trust to raise at his death £4,000 to be held on certain trusts, and as to the remaining part of the policy moneys in trust to pay the same to his executors.

Held, that section 14, sub-section (1), of the Finance Act, 1894, was not applicable, and that the estate duty on the fund must be borne by the residue remaining after payment thereout of the £4,000.—WADE *v.* WADE, *Ch.D. Kekewich, J.*

8. *Income tax—Bodies corporate or unincorporate—Exemption—Property appropriated for promotion of science—Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 11 (3).—By section 11 of the Customs and Inland Revenue Act, 1885, a duty of 5 per cent. is imposed upon the annual value, income, or profits of all property, real and personal, belonging to or vested in any body corporate or unincorporate during the year of assessment, after deducting the costs and expenses of the management of such property, subject to the exemption from duty in sub-section 3 in the case of "property which, or the income or profits

whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

The Royal College of Surgeons was established by Royal Charter in the year 1800 as a body corporate for the promotion of the art and science of surgery and the encouragement of the study thereof. It is also the custodian, at its own expense, of the Hunterian Collection, which is national property. The college consists of general offices, an examination hall, a library, a museum which contains the above collection, and the conservator's official residence.

For some time past the purposes of the college had been mainly the examination of persons for certificates of proficiency in surgery, and the largest source of income and the surplus of expenditure had arisen from such examinations.

Held, that the general offices, the examination hall, and the library were liable to be assessed under the above section; but that the museum and the conservator's official residence came within the exception provided by sub-section 3.—ROYAL COLLEGE OF SURGEONS, RE, *Q.B.D.*, 538.

9. *Income tax—Distress—Costs and charges—Man in possession—Constructive possession—Abandonment of possession—57 Geo.* 3, *c.* 93, *s.* 1, *Schedule*—7 & 8 *Geo.* 4, *c.* 16—*Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 86.—Where a distress is made upon the goods of a taxpayer for unpaid income tax not exceeding £20, the collector is not entitled to charge 2s. 6d. a day for a man in possession, if the man has only been in constructive possession and not in real possession of the goods distrained upon, unless the taxpayer, in order to avoid the inconvenience of having a man in real possession, has expressly agreed to pay that sum.—LUMSDEN *v.* BURNETT, *C.A.*, 664.

10. *Income tax—Distress for non-payment by former occupier—Owner not in possession—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 70—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 35.—On the 22nd of April, 1897, a lease was granted to the plaintiff of premises, beginning the 25th of December, 1896, for sixty years at £65 a year rent. The rent was to be paid quarterly, the first payment being payable on the 29th of September, 1897. He did not take possession until April, 1897, and for several years before he entered the premises had been unoccupied. An assessment for income-tax of £9 3s. 4d. was made for the year April, 1896, to April, 1897. In August and again in September, 1897, demands were made for payment, and as the plaintiff refused to pay, on the 17th of November a distraint was put in.

The present action was then commenced against the defendant, a duly appointed collector for the purpose of the Income Tax Acts, for wrongful distress.

Held, that this was a lawful entry, and that no action would lie, as it was covered by section 70 of the Income Tax Act of 1892.—READING *v.* CREW, *Q.B.D.*

11. *Income tax—Profits of trade—Deductions—Money expended for repairs of premises—Money expended for purpose of trade—Brewers—Tied houses—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D.*, *case* 1, *r.* 3; *cases* 1 *and* 2, *r.* 1.—The appellants, a brewery company, were owners of a number of tied public-houses, which they had acquired for the purpose of increasing their trade. The tied houses were in the occupation of the appellants, tenants in part for the purpose of the trade of publicans and in part as the private dwelling apartments of themselves and their families. The appellants, in making up their return of profits for assessment to the income tax, sought to deduct the sum which they had spent in repairing the tied houses.

Held, that they were not entitled to make such a deduction.—BRICKWOOD *v.* REYNOLDS, *C.A.*, 130.

12. *Income tax—Trade exercised within the United Kingdom—Foreigner resident abroad—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 42—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—Provision merchants in America consigned goods for sale on commission to the respondents, commission merchants in England. The goods were invoiced in the name of the respondents, who sold the goods and received the proceeds, rendering an account to the merchants in America. The respondents, beyond their charges and commission, made no profit or gain out of the sales.

Held, that the merchants in America exercised a trade within the United Kingdom within Schedule D. of the Income Tax Act, 1853, s. 2, and that the respondents, their agents in England, were assessable to the income tax in respect of the profits arising therefrom.—WATSON *v.* SANDIE, *Q.B.D.*, 202.

13. *Probate duty—Executor* de son sort—*Foreign will—Transfer of shares in English company to foreign executors—Liability of company.*—A testator, the registered owner of shares and debentures in an English company, was domiciled and died in America. By his will, made according to American law, the shares and debentures passed to his executors. At the request of the executors the company transferred into their names two of the shares and one of the debentures, and paid them the dividends and interest due thereon. The executors, to the knowledge of the company, had not obtained, and did not intend to obtain, probate of the will in England.

Held, that the company had intermeddled with the estate of the deceased so as to constitute itself an executor *de son tort*, and had rendered itself liable to the payment of probate duty.

Judgment of Wills and Grantham, JJ. (45 W. R. 606), reversed.—ATTORNEY-GENERAL *v.* NEW YORK BREWERIES CO., *C.A.*, 193.

14. *Probate duty—Proceeds of plantation in Jamaica—English testator—Share bequeathed to English legatee—Death of legatee—Liability of estate to probate duty.*—An English legatee of a share of the proceeds of sale of a West Indian plantation, which was devised by an English testator, after the expiration or failure of certain prior interests, in trust for sale and division of the proceeds, died before the expiration of prior interests for life.

Held, that his share ought to be regarded as an English, and not as a foreign, asset; and probate duty was consequently payable in respect thereof.

Sudeley (Lord) v. *Attorney-General*, 45 W. R. 305, [1897] A. C. 11, applied and followed.—SMYTH, RE, LEACH *v.* LEACH, *Ch.D. Romer, J.*, 104.

15. *Stamp duty—Agreement for sale—Equitable estate—Property locally situate out of the United Kingdom—Purchase in England of equity of redemption—*Ad valorem *duty—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-section* 1—*Trust Property Act of* 1862, *New South Wales* (26 *Vict. No.* 12), *s.* 25.—By the Stamp Act, 1891, s. 59, sub-section 1, "any contract or agreement made in England under seal, or

under hand only, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except property locally situate out of the United Kingdom," is charged with *ad valorem* duty.

By the New South Wales Trust Property Act of 1862, s. 25, "All mortgages of real or personal estate shall hereafter be deemed at law, as now in equity, pledges only of the property thereby mortgaged; and nothing in any such mortgage shall prevent the title of any mortgagor, or person claiming and being in possession, from being deemed a good title at law, subject to such pledge, as against all persons other than the mortgagee and those claiming under him."

The appellants entered into a written agreement in England to purchase property in New South Wales, subject to a mortgage.

On a case stated by the Commissioners of Inland Revenue, pursuant to section 13 of the Stamp Act, 1891,

Held, that the words of exception in the Stamp Act, 1891, s. 59, sub-section 1, do not apply to an equitable estate or interest in property locally situate out of the United Kingdom, and therefore the general words, "any equitable estate or interest in any property whatsoever," apply, and *ad valorem* duty is payable on an agreement made in England for the purchase of such an estate:

Held, also, that the New South Wales Trust Property Act does not confer the legal estate in mortgaged property on the mortgagor:

Held, therefore, that *ad valorem* duty was payable on the purchase by the appellants of the equity of redemption.—FARMER *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*

16. *Stamp duty — Agreement between the county council and urban council—Repair and improvement of roads—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Schedule.*—On the 26th of November, 1897, an agreement was made between the appellants and the Urban District Council of Frizington, whereby the payment for the year ending March, 1898, in pursuance of the Local Government Act, 1888, towards the cost of maintenance, and repair and reasonable improvement connected with the maintenance and repair of all main roads within the district of the urban council was fixed at a certain sum.

The money was to be paid in four instalments, and there was a proviso that nothing, except as expressly declared, should alter the rights and liabilities of the parties thereto.

Held, that this was not an agreement made pursuant to the Highway Acts for or relating to the making, maintaining, and repairing of highways, which would only require a 6d. stamp, but that it was made under the Local Government Act, and came under the heading "deed of any kind whatsoever not described in the schedule" of the Stamp Act, and so required a 10s. stamp.—CUMBERLAND COUNTY COUNCIL *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*

17. *Stamp duty—Annuity payable quarterly—"Bond, covenant, or instrument"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Schedule.*—By a deed of separation between a husband and wife, the husband agreed that so long as the wife observed the stipulations of the deed he would pay her every three months £625 by quarterly payments on the 29th of September, the 25th of December, the 25th of March, and the 24th of June in every year.

Held, that this was an annuity of £2,500, and that *ad valorem* duty was payable on that sum, and not on £625.—LEWIS *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*

18. *Stamp duty—Annuity secured by bond—"Conveyance on sale"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 60, 87 (2), *Schedule I.—Mersey Dock Acts Consolidation Act*, 1858.—A dock company had statutory powers to borrow money for certain purposes, and "all money so borrowed by the board of directors was to be secured either by bonds or by annuities." The company having by deed granted a large number of annuities, the question was raised by the Commissioners of Inland Revenue at what rate the instruments by which they were secured to the annuitants should be charged with stamp duty under section 87 (2) of the Stamp Act, 1891, the annuity deeds having been presented to the Commissioners stamped as securities on an *ad valorem* duty of 2s. 6d. per cent. under the head "Mortgage, Bond, Debenture, Covenant, &c."

Held, that, as the annuities were payable for an indefinite period, and could only be redeemed or extinguished by the board purchasing them at the then market price, the deed securing such an annuity was in the nature of a "conveyance on sale" and not a bond to secure the repayment of an advance or loan to the company, and was therefore chargeable at the rate of 10s. per cent. as a contract of sale and purchase.

Decision of Queen's Bench Division (45 W. R. 448) affirmed.—MERSEY DOCKS CO. BOARD *v.* INLAND REVENUE COMMISSIONERS, *C.A.*

19. *Stamp duty—Conveyance on sale—Agreement—Leasehold interest in licensed house—Goodwill—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59 (1).—By an agreement under seal the vendor agreed to sell the goodwill of the business of an hotel proprietor and licensed victualler, and the lease of the hotel in which the business was carried on, together with the household furniture, stock-in-trade, cash, and book debts; of the total consideration £4,085 was apportioned to "lease and goodwill," £1,462 to furniture, stock-in-trade, and cash, and £37 to book debts. The vendor was to show a good title to the lease and to assign the lease and goodwill to the purchasers; in the event of the consent of the landlords to the assignment of the lease not being obtained, it was provided that the vendor should, at the option of the purchasers, execute a declaration of trust of the leasehold premises in their favour. The consent of the landlords not having been obtained, a declaration of trust was executed in favour of the purchasers, which was stamped with the fixed duty of 10s.

Held, (1) that the agreement was not an agreement for the sale of an equitable interest in property within the meaning of section 59, sub-section 1, of the Stamp Act, 1891; (2) that, inasmuch as the goodwill was incapable of being severed from the enjoyment of the leasehold premises, the instrument was not an "agreement for the sale of an estate or interest in any property except lands," and was therefore not liable to *ad valorem* duty upon that portion of the consideration attributed to "lease and goodwill"; (3) that it was liable to *ad valorem* duty upon the amount of the book debts only.—WEST LONDON SYNDICATE *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*

20. *Stamp duty—Conveyance on sale*—Ad valorem *duty—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 57—*Heritable Securities (Scotland) Act*, 1894 (57 & 58 *Vict. c.* 44), *ss.* 8, 9.—A bond and disposition in

security contained a power of sale. The creditor exposed for sale the property held in security at a price less than the amount due under his security, and failed to find a purchaser. The creditor then applied to the sheriff under section 8 of the Heritable Securities (Scotland) Act, 1894, and the sheriff issued a decree that the debtors had forfeited their rights of redemption, and that the creditor was vested absolutely in the subjects at the price named.

Held, that the transaction constituted a sale to the creditor, and was chargeable by virtue of sections 54 and 57 of the Stamp Act, 1891, and the first schedule thereto, with *ad valorem* duty.—INLAND REVENUE COMMISSIONERS *v.* TOD, *H.L.*

21. *Stamp duty—Exchange of shares in company for shares in other company—Conveyance or transfer on sale—Exchange—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 55, *Schedule.*—A transfer of shares in a company in exchange for shares in another company held to be a conveyance or transfer on sale within the meaning of the Stamp Act, 1891.—COATS *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 1.

22. *Stamp duty—Foreign security issued in the United Kingdom—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-section* 1 (b) (i).—The appellant was the holder of one of a series of bonds given by a newly-formed American company in exchange for bonds in an old company which was being wound up under a reorganization scheme. It was stated on the bond that it should not be valid for any purpose unless authenticated by the trustee's certificate thereon indorsed. The bond was executed by the new company in the United States and delivered to a trust company, which was to act as trustee. The trust company did not immediately sign the certificates on the bonds which were destined for England; but, in order to avoid a heavy premium for insurance, forwarded the bonds unsigned, and at the same time sent over an official to sign the certificates in London. The appellant's bond was handed to him in London after the certificate had been so signed.

Held, that the bond was issued in the United Kingdom within the meaning of section 82, sub-section 1 (*b*) (*i*), of the Stamp Act, 1891.—BARING *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 98.

23. *Stamp duty—Mortgage—Trust deed for securing debentures—Transfer of mortgage—Substituted security—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *sub-section* 1; *s.* 88, *sub-section* 1; *Schedule 1.*—A limited company issued in 1892 £500,000 4 per cent. debenture stock, secured by a trust deed which was duly stamped. By a subsequent trust deed for securing debenture stock made in 1897, and having the same trustees, after reciting that the £500,000 debenture stock was still outstanding and that the company was intending to issue further irredeemable 3½ per cent. debenture stock, the amount of stock to be issued was limited in the first instance to £300,000, the company acknowledging in the deed that they were indebted to the trustees in that sum carrying interest at 3½ per cent. The company were to be at liberty to issue further 3½ per cent. debenture stock not exceeding £540,000, making a total of £840,000; such further stock was only to be issued for the purpose of redeeming or paying off the £500,000 4 per cent. stock at the rate of not more than £108 of the new stock for every £100 of the stock redeemed or paid off. Before issuing any of the further debenture stock the company were to execute and deliver to the trustees an acknowledgment of indebtedness for the amount of the further proposed issue, and the trustees were to certify on the trust deed that the company were entitled to make the issue.

Held, first, that the trust deed was a security for the repayment of £840,000 advanced or to be advanced within the meaning of section 86, sub-section 1, and section 88, sub-section 1, of the Stamp Act, 1891, notwithstanding that certain preliminaries must necessarily be complied with before the issue of any further stock in excess of £300,000; and secondly, that in respect of £500,000 the deed was not a transfer of a mortgage, but was a substituted security, and was therefore only liable to the reduced *ad valorem* duty of 6d. per cent. under the heading "Mortgage, Bond, Debenture, Covenant" in the first schedule to the Stamp Act, 1891.—CITY OF LONDON BREWERY CO. *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*

24. *Succession duty—Father and son in partnership—Death of father—Acquisition by son of father's share in business—Succession—Sale and purchase—Construction of partnership deed—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 2.—A father admitted his son into partnership for a term of five years. The son brought no capital into the business, but the value of the business was estimated at £62,445, of which two-thirds was to be deemed the father's share and one-third the son's; and one condition of the partnership deed was that, in the event of the father dying during the partnership, the son was to take the whole of the business and pay to the father's executors or administrators £10,000. By a deed of even date the son agreed to pay to the father and his executors a rent-charge of £139 per annum in respect of the freehold property of the partnership.

On the death of the father during the partnership the Crown claimed succession duty in respect of the father's share of the business which passed to the son, less the sum of £10,000 payable by the son to the estate of the deceased.

Held, that the son's acquisition of his father's share of the business was a succession, on which succession duty was payable.

Judgment of Vaughan Williams and Kennedy, JJ. (45 W. R. 446), reversed.—ATTORNEY-GENERAL *v.* BROWN, *C.A.*, 145.

See also Settlement, 1.

INNKEEPER:—

1. *Deposit—Expressly for safe custody—Non-disclosure of value or nature of article deposited—Innkeepers Act*, 1863, *s.* 3.—The plaintiff, a guest at defendant's inn, handed a parcel containing jewellery to the defendant's manager, saying, "Keep that for me," but not stating its nature or contents. The parcel was stolen, but not through the wilful act or neglect of the defendant or any of his servants. The usual notices in compliance with the Innkeepers Act were hung up in the inn.

Held, that the deposit so made was not a deposit "expressly for safe custody" within the Innkeepers Act, 1863, and that the defendant was not liable beyond the sum of £30.—O'CONNOR *v.* GRAND INTERNATIONAL HOTEL CO., *Q.B.D.* (*Ir.*).

2. *Liability for property of guest—Temporary refreshment.*—Where a person uses an inn, either temporarily or otherwise, for the purpose of receiving such refreshment or accommodation as the innkeeper offers, the relation of landlord and guest exists between the parties, so as to make the landlord liable for the loss of the guest's property

during his stay in the inn.—ORCHARD *v.* BUSH, *Q.B.D.*, 527.

INSURANCE:—

1. *Burglary and housebreaking—"Actual forcible and violent entry"—Entry by turning handle of door.*—A policy of insurance against loss of jewellery in the assured's shop by burglary and housebreaking defined these terms as "loss by theft following upon actual violent and forcible entry upon the premises." At 8 a.m., during the temporary absence of the porter in charge of the shop, an entry was effected by turning the handle of the door of the shop, which was shut, but neither bolted or locked, and jewellery was stolen.

Held, that the loss was covered by the policy.—GEORGE AND GOLDSMITHS' INSURANCE ASSOCIATION, ARBITRATION, RE, *Q.B.D.*, 557.

2. *Life—Proviso for cash payment of premium—*Onus probandi*—Duties of insurers' agent—Payment of premium by notes discounted and then dishonoured.*—Where a life policy contains provisions to the effect that it shall not be in force till the first premium is paid, and that if a note be taken for the first or renewal premium and not paid the policy is void at and from default, the *onus* is on the policy-holder to prove cash payment of the premium.

Where the insurers' agent accepts in payment of a premium a note which is not paid when due, there is no presumption that he was to raise money thereon as an agent for the insured and pay the premium out of the proceeds.

And where the insurers accept their agent's note in discharge of an account current between them in which the agent was debited with the amount of the premium, that affords no presumption of an intention to treat their own agent as agent for the insured, or the insurance as subsisting contrary to the terms of their contract with the policy-holder.

Acey v. *Fernie*, [1840] 7 M. & W. 151. approved.—LONDON AND LANCASHIRE LIFE ASSURANCE CO. *v.* FLEMING, *P.C.*

3. *Life policy—Trust for wife and children—Mode of payment—Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 10—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 72), *ss.* 11, 22.—Section 11 of the Married Women's Property Act, 1882, does not apply to a policy effected by a husband in favour of his wife and children before the commencement of that Act, even though the husband dies after that Act has come into operation. The moneys payable under a policy effected under the Married Women's Property Act, 1870, should, therefore, be paid to a trustee appointed in accordance with section 10 of that Act, and not to the legal personal representatives of the husband.

In re Adams' Policy Trusts, 31 W. R. 810, 23 Ch. D. 525, followed.

In re Soutar's Policy Trusts, 32 W. R. 701, 26 Ch.D. 236, discussed.—TURNBULL *v.* TURNBULL, *Ch. D. Stirling, J.*, 3.

4. *Marine—Collison clause—Exemption of underwriters—Proviso—Construction.*—A collision clause in a policy of insurance upon a ship stipulated that no liability was to attach to the underwriters in respect of "any sum which the assured may become liable to pay, or shall pay, for removal of obstructions under statutory powers, . . . consequent on such collision . . ."

Held, that the underwriters were exempt from liability, whether by way of damages or otherwise, for the removal of obstructions consequent on collision.

The North Britain, 42 W. R. 243. [1894] P. 77, approved.—"ENGINEER," THE, *H.L.*, 530.

5. *Marine—Freight—Notice of abandonment—Personal negligence of the assured.*—Where a ship carrying a cargo sustains sea damage to such an extent as would justify an abandonment to the underwriters on ship, and under such circumstances that the cargo could not possibly be carried on in any substituted ship, it is not necessary that notice of abandonment should be given to the underwriters on freight.

Rankin v. *Potter*, 22 W. R. 1, L. R. 6 H. L. 83, followed.

It is no defence to an action on a policy of marine insurance, claiming as for a loss by perils of the sea, that the loss was brought about by the personal (though not wilful) negligence of the assured in the navigation of the ship.—TRINDER, ANDERSON, & CO. *v.* THAMES INSURANCE CO., *C.A.*, 561.

6. *Marine—Mortgage of shares in ship—Policy on ship—Right of mortgagee to sue on policy—Mortgagor master of ship—Barratry of master.*—The plaintiff advanced a sum of money to a person who was about to purchase certain shares in a ship upon the terms that the latter should be appointed captain, and that the advance should be secured by a mortgage of the borrower's shares in the ship, and that an insurance should be effected on the ship to cover the plaintiff's interest as mortgagee. A policy on the ship was accordingly effected by the ship's husband "as well in their own names as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all." The policy covered a loss by perils of the sea and by barratry of the master. The mortgagor was appointed captain, and the ship was lost through his barratrous act. In an action on the policy,

Held, that, as the plaintiff's interest in the ship was covered by the policy, he was entitled to recover, the *causa proxima* of the loss being a peril of the sea; and, further, that, if the mortgag r was appointed captain by the plaintiff as well as by the co-owners, the wrongful act of the captain was barratrous as against the plaintiff, and the latter could recover as for a lost by barratry.—SMALL *v.* UNITED KINGDOM MARINE INSURANCE ASSOCIATION, *C.A.*, 24.

7. *Marine—Policy—Perils to the hurt of ship—Damaged cargo—Liability of ship's underwriters.*—A ship was insured by her owners, the plaintiffs, under a time policy, and the perils insured against were, among others, "of the sea, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship or any part thereof."

The vessel was laden with cotton seed, and, while proceeding up the Thames, was run into and so damaged that she had to be run aground to save her from sinking in deep water. After having undergone some temporary repairs, she was floated and taken into dock, but her cargo was so damaged with mud and water that the cargo owners abandoned it, and neither they nor their underwriters would pay freight or take delivery. In dock the damaged cargo became a nuisance, and had to be discharged and got rid of by the plaintiffs, who sought to recover from the ship's underwriters the costs of so doing.

Held, that the expense so incurred by the

plaintiffs was not covered by the policy.—FIELD STEAMSHIP CO. *v.* BURR, *Q.B.D.*, 490.

8. *Marine—Policy on freight—Exception—Claim consequent on loss of time—Delay by peril of sea.*—A time policy of marine insurance against total loss of freight of a ship contained the following exception: "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise."

While the ship was proceeding on a voyage under a charter her main shaft broke by perils of the sea, the damage being of such a character that the necessary delay for repairs frustrated the objects of the adventure, and the owners lost their chartered freight. In an action by the owners against the underwriters,

Held, that the claim was within the terms of the warranty, and therefore the underwriters were not liable.

Decision of the Court of Appeal (45 W. R. 114, [1897] 1 Q. B. 29) affirmed.—BENSAUDE *v.* THAMES AND MERSEY INSURANCE CO., *H.L.*, 78.

9. *Marine—Policy on freight—Loss by fire—Meaning of general words "all other losses and misfortunes."*—A portion of a cargo of coals, the freight on which was insured against loss by fire, and also against "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the subject-matter of the aforesaid subject-matter of insurance, or any part thereof," having become heated during the course of the voyage, on which freight was insured, was discharged and sold at an intermediate port, where the master, having discovered the heating of the cargo, had put in for the general safety of the ship, freight, and cargo. None of the cargo had been on fire, and the portion sold fetched the price of sound coals, less the expenses of discharging and an allowance for damage by handling.

The shipowners claimed from the underwriters for a loss of their freight on the portion of cargo so discharged and sold; and it was agreed that the underwriters would not rely on the defence that the ship was unseaworthy, or the condition of the cargo improper.

Held, that the shipowners were entitled to recover the loss of freight claimed as a partial loss under the policy.—"KNIGHT OF ST. MICHAEL," THE, *P.D. & Ad.D.*, 396.

10. *Marine—Repairs to ship in dock—Survey for Lloyd's classification—Apportionment of expenses between shipowners and underwriters.*—A ship owned by the plaintiffs was placed in dry dock, for the purpose of repairs for which the defendants, as underwriters on the ship, were liable. The plaintiffs took advantage of the ship being in dock to have her surveyed for the purpose of retaining her class at Lloyd's, which they were entitled to have done at any time within twelve months of the date when the survey was due.

Held that the dock dues for the time when the survey was being done must be borne equally by the plaintiffs and the defendants.

Held, also, by Chitty and Collins, L.JJ. (A. L. Smith, L.J., dissenting), that the cost of getting the ship into and out of the dock must be borne equally by the plaintiffs and the defendants.

Marine Insurance Co. v. *China Transpacific Steamship Co.*, 35 W. R. 169, 11 App. Cas. 573, followed.—RUABON STEAMSHIP CO. *v.* LONDON ASSURANCE, *C.A.*, 417.

11. *Marine—Re-insurance—Collision clause—Collision with sunken barge.*—The plaintiff underwrote a time policy on a steamer, containing a clause that if the steamer should come into collision with any other vessel, and the insured should have to pay damages, the insurers would pay.

The defendant underwrote a policy of re-insurance, on the same steamer, for the same period, subject to the same clauses and conditions as the original policy, and to pay as might be paid thereon, but only to pay all claims for loss or damage done or received through collision.

During the period covered the steamer struck a barge, which had just been sunk by collision with another vessel, and the steamer was damaged. The barge was raised next day, and sailed to her home port, and was repaired.

Held, that, although at the moment when the steamer struck her the barge could not have been navigated, yet, as she became navigable as soon as she was raised, there was a collision between two navigable vessels, in respect of which the plaintiff was entitled to recover on the policy of re-insurance.—CHANDLER *v.* BLOGG, *Q.B.D.*

12. *Marine—Re-insurance—Cotton on deck—Damaged cotton—Concealment.*—The plaintiffs, who had insured a cargo of damaged cotton, re-insured the same with the defendant, but did not inform him that it was damaged cotton.

The slip contained the terms, "cotton on deck, f. p. a. & c., including jettison and washing overboard." When the policy of re-insurance was tendered to the defendant for signature it differed from the slip, for, instead of the words "f. p. a. and c., &c.," it was "f. p. a., &c., as in original policy," and in that policy the risk was described as "f. p. a., but including risk of jettison and washing overboard"; but he signed it without inquiry or objection. The quantity of cotton insured "on deck" amounted to £7,500.

Held, that the instructions being to insure such a quantity "on deck" clearly showed that it was damaged cotton, and that, under the circumstances, there was no concealment; also, that, although an attempt had been made to establish that the course of business was to say that cotton was damaged, no such course of business was established.—BRITISH AND FOREIGN MARINE INSURANCE CO. *v.* STURGES, *Q.B.D.*

13. *Marine — Re-insurance — Lapse of original policies—New policy—Alteration of risk—Liability under policy of re-insurance.*—The defendant re-insured certain risks with the plaintiffs. Of the two original policies covering these risks, one expired by effluxion of time and the second was cancelled, the defendant at the time that the policy was cancelled issuing a fresh policy to his assured, which, however, contained provisions differing somewhat from those in the two original policies. No notice of these changes was sent to the plaintiffs, who subsequently, in ignorance of these circumstances, paid the defendant as and for a total loss.

Held, that the plaintiffs could not recover back from the defendant the money so paid. The defendant had paid under his policy for a total loss, and was entitled to recover from the plaintiffs under their re-insurance policy because at the time he re-insured with them, and at the time of the loss, he had an insurable interest in the subject-matter of the insurance.

Held, also, that the difference in terms between the two policies merely affected the defendant's position with his assured, and gave no ground for the plaintiffs cancelling their liability under their

policy of re-insurance.—LOWER RHINE INSURANCE ASSOCIATION *v.* SEDGWICK, *Q.B.D.*, 380.

14. *Marine—Ship—Open cover—Re-insurance—Contract for sea insurance—Policy—Sum or sums insured—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 93.—A marine insurance company made a claim under an open cover of re-insurance subscribed by the defendant and other underwriters at Lloyd's on excesses over certain amounts upon certain risks taken by the plaintiffs. By the terms of the open cover £4,000 was specified as the limit of excess taken on any one ship, and £400 was specified as the defendant's proportion of this limit. The other underwriters' proportions were also specified, but beyond this there was no statement of the sum or sums insured.

Held, that this open cover was a contract for sea insurance within the meaning of section 93, sub-section 1, of the Stamp Act, 1891; but that it was not valid as a policy, because it did not specify the sum or sums insured as required by sub-section 3.—HOME MARINE INSURANCE CO. *v.* SMITH, *C.A.*, 661.

15. *Marine—Ship "sailing on or after a specified date."*—In an action on a policy of marine insurance on goods in ships "sailing on or after the 1st of March," it appeared that the ship in question, having cleared the Custom House, finished loading her cargo about ten o'clock at night on the 29th of February, and was then ready to go to sea, but by a regulation of the port ships were not allowed to leave the port after dark. The master, however, with the object of keeping his crew on board so as to be ready to start early in the morning, moved away from the wharf about five hundred yards out into the river and there anchored. In so moving the ship he placed her in a slightly more advantageous position for starting than she would have been in had she remained at the wharf, but the gaining of such advantage was no part of the master's motive in moving her. On the following morning, the 1st of March, she proceeded on her voyage.

Held, that the ship "sailed" on the 1st of March, and not on the 29th of February, and that the policy attached.—SEA INSURANCE CO. *v.* BLOGG, *C.A.*

See also Practice, 12.

INTEREST.—See Mortgage, 5; Vendor and Purchaser, 7, 10, 14.

INTESTATES' ESTATES ACT.—See Probate, 4.

JUDGMENT.—See Bankruptcy, 9-11; Practice, 10, 14, 22-23A.

JUSTICES:—

1. *Conviction—Principal and accessory—"Cause" act of cruelty—Knowingly advise and counsel—Cruelty to Animals Act*, 1849 (12 & 13 *Vict. c.* 92), *s.* 2—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 5.—The effect of section 5 of the Summary Jurisdiction Act, 1848, is to enable the prosecution to proceed against a person who aids, abets, counsels, or procures the commission of an offence punishable on summary conviction as if he himself had committed the offence.

The owner of a horse which was lame consulted a veterinary surgeon as to whether the horse was in a fit condition to work. The veterinary surgeon advised that it was, and that the work would not cause it additional suffering. The owner worked the horse. The veterinary surgeon was summoned, under section 2 of the Cruelty to Animals Act, 1849, for cruelly ill-treating the horse "by causing it to be worked while in an unfit state." The magistrate found that the defendant knew, when he advised the working of the horse, that to work it in its then state would be an act of cruelty, and, if the defendant had been proceeded against for counselling the act of cruelty, the magistrate would have convicted him, but, as he did not "cause" the act of cruelty, the summons was dismissed. On appeal,

Held, that the learned magistrate should have convicted, since, by section 5 of the Summary Jurisdiction Act, 1848, anyone who counsels the commission of an offence punishable summarily may be proceeded against as a principal.—BENFIELD *v.* SIMMS, *Q.B.D.*

2. *Disqualification—Pecuniary interest—Bias—Membership of the Incorporated Law Society—Proceedings against an unqualified person for acting as a solicitor.*—On a prosecution by the Incorporated Law Society under section 12 of the Solicitors Act, 1874, against a person for pretending to be a solicitor, one of the justices before whom the case was heard was both a practising solicitor and an ordinary member of the prosecuting society, but not one of the council of that society. The solicitor for the accused was aware the magistrate in question was a solicitor, but he did not raise any objection. He was not, however, aware that the magistrate was a member of the society. The evidence showed that the whole responsibility for prosecutions rested solely with the council of the Law Society.

Held, on a rule for a *certiorari* to quash, that the justice was not disqualified from adjudicating by reason of the fact that he was a mere ordinary member of the Incorporated Law Society; that he was not affected by bias or pecuniary interest; and that he was not the prosecutor.—REG. *v.* BURTON, YOUNG, EX PARTE, *Q.B.D.*, 127.

3. *Disqualification—Solicitor—Clerk to magistrates—Ex officio justice—Justices' Qualification Act*, 1871 (34 & 35 *Vict. c.* 18), *ss.* 1, 2—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 22.—D., a solicitor, had acted as clerk to the magistrates of the Ringwood Division of the county of Southampton for many years, and recently became *ex officio* a justice of that division by virtue of being elected chairman of the district council. He tendered his resignation of the office of clerk to the magistrates, but no steps were taken to accept it, and he continued to draw the salary attached to the office and to perform the duties connected therewith as before by means of a deputy.

W. was tried and convicted of an assault upon a woman before D. and six other justices, and he applied for a *certiorari* to bring up the conviction to be quashed.

Held, that the conviction must stand, as D. could lawfully adjudicate upon the case, because he had ceased in fact to be a practising solicitor at the time of the conviction, and by his accepting the office of chairman to the district council his former office of clerk to the justices had been vacated, since the two offices were incompatible.

Reg. v. *Mayor, &c., of Bangor*, 35 W. R. 158, 18 Q. B. D. 349, followed.—REG. *v.* DOUGLAS, *Q.B.D.*, 377.

4. *Jurisdiction—Right to be tried by jury—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 17, *sub-section* 2.—Where a person appears before a court of summary jurisdiction, charged with an

offence to which section 17 of the Summary Jurisdiction Act, 1879, applies, the court ought, in pursuance of sub-section 2, to inform him of his right to be tried by a jury before he pleads to the charge. If he be not informed of that right and, after the charge has been gone into, pleads guilty, the conviction is bad.

Semble: It is immaterial whether or not he knew of his right to be tried by a jury, and immaterial whether or not the court knew, before the proceedings commenced, that he meant to plead guilty in the course of the case.—REG. *v.* COCKSHOTT, *Q.B.D.*

5. *Licensing law—Appeal—Transfer of licence*—Certiorari—Mandamus—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4. 14.—By section 4 of 9 Geo. 4, c. 61, it is provided that at special transfer sessions "it shall be lawful for the justices there and then assembled, in the case and in the manner and for the time hereinafter directed, to licence such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as they, the said justices, shall . . . deem fit and proper persons."

A. for ten years had obtained an annual certificate for a licence to sell beer on certain premises. These premises, however, had been kept as a draper's shop during that time, and not as an inn, and A. had never sold beer therein, nor had he during that time been in occupation thereof. He applied at transfer sessions for a grant by way of transfer to B. of the licence or certificate. The justices granted the application.

Held, (1) following *Reg.* v. *Sharman*, *ante*, p. 367, that a *certiorari* would not lie; (2) that the justices had not heard and determined the matter according to law, and that a *mandamus* ought to be granted against them. They had not merely misconstrued the statute, but had taken into consideration matters outside the ambit of their jurisdiction.—REG. *v.* COTHAM, *Q.B.D.*, 512.

6. *Licensing law—Appeal against refusal to transfer—Notice of appeal served on justices—Order by court of quarter sessions on justices to pay appellant's costs*—Certiorari—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 27, 29.—D. appealed to quarter sessions against a refusal of the licensing justices to transfer a licence. At the hearing of the appeal the justices appeared by counsel to inform the court of the reasons on which had acted; but the quarter sessions allowed the appeal and made an order directing that the justices should pay all the costs that the appellant had incurred.

Held, that so much of the order as directed the justices to pay costs was *ultra vires*, as the quarter sessions had no jurisdiction under sections 27 and 29 of the Alehouse Act, 1828, to make such an order.—REG. *v.* LONDON (STRAND DIVISION) JUSTICES, *Q.B.D.*, 558.

7. *Licensing law — Excess of jurisdiction* — Certiorari — Mandamus.—At a general annual licensing meeting an application was made for a licence to sell intoxicating liquors. The justices granted the licence upon the applicant paying to them a sum of money, which money they intended to apply in reduction of the rates of the borough, or for some other similar public purpose. Certain persons, who had appeared before the justices in opposition to the application, then obtained a rule for a *certiorari* to bring up the licence to be quashed, and also a rule for a *mandamus* to hear and determine the application for a licence according to law.

Held, that the rule for a *mandamus* must be made absolute, on the ground that the objectors had a right to be heard before the licensing justices according to law, that the justices in annexing to the grant of the licence the condition of the payment of money showed that they had allowed their decision to be influence by extraneous considerations, and that the hearing under such circumstances was equivalent to no hearing at all; but that the rule for a *certiorari* must, on the authority of *Reg.* v. *Sharman*, *ante*, p. 367, [1898] 1 Q. B. 578, be discharged on the ground that the grant by licensing justices of a licence to sell intoxicating liquor is not a judicial order.—REG. *v.* BOWMAN, *Q.B.D.*

8. *Licensing law—New licence*—Certiorari *to quash—Objections by one of the public—Refusal of justices to hear statements of fact except upon oath*—Mandamus—*Discretion of justices—Practice.*—At a meeting of the licensing justices D. desired to make statements of fact in opposition to the granting of a licence for new premises.

The justices decided that they would not hear him unless he was sworn as the other witnesses who had given their evidence had been.

D., after the provisional licence had been confirmed, obtained a rule for a *certiorari* to bring up the provisional licence to be quashed, but as it appeared doubtful if that was the proper remedy, a rule for a *mandamus* was also obtained.

Held, discharging both rules, that as the granting of a licence was not a judicial order, the remedy by *certiorari* was inapplicable; and, as to the *mandamus*, that it was in the discretion of the justices to impose, if they thought fit, the obligation of an oath, and that in the exercise of their discretion they had jurisdiction to refuse to hear the objector unless he was sworn.—REG. *v.* SHARMAN, *Q.B.D.*, 367.

9. *Licensing Law—Renewal—Refusal—Appeal—Appearance of licensing justices—Costs—Jurisdiction—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 27, 29.—Where on an appeal to quarter sessions against the refusal of the licensing justices to renew a licence, the justices appeared and opposed the appeal, the quarter sessions have no jurisdiction under section 27 of the Alehouse Act, 1828, to order the justices to pay costs to the appellant in the event of the appeal being allowed.—REG. *v.* STAFFORDSHIRE JUSTICES, *Q.B.D.*

10. *Licensing law—Renewal—Refusal to renew—Appeal to quarter sessions—Costs—Non-appearance of objector—Jurisdiction to give costs against objector—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict.* *c.* 49), *ss.* 31, 50—*Alehouse Act*, 1828 (9 *Geo.* 4, *c* 61), *s.* 27—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict.* *c.* 43), *s.* 7—*Interpretation Act*, 1889 (52 & 53 *Vict.* *c.* 63), *s.* 13.—Justices at a licensing meeting are not a court of summary jurisdiction, and therefore section 31 of the Summary Jurisdiction Act, 1879, does not apply to an appeal from them to quarter sessions; that court has no jurisdiction to order an objector to the renewal of a licence to pay the costs of the appeal.

Decision of the Court of Appeal, 45 W. R. 4, [1896] 2 Q. B. 306, reversed.

Reg. v. Justices of Glamorganshire, 40 W. R. 436, [1892] 1 Q. B. 621, overruled.—BOULTER *v.* KENT JUSTICES, *H.L.*, 114.

11. *Married woman—Duty of clerk to justices—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict.* *c.* 39), *ss.* 4, 5, 11.—On an application by a married woman for an order for judicial

separation, custody of children, or maintenance, under section 5 of the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the clerk to the justices to make a note of the evidence and of the reasons for the decision, and supply the note, should there be an appeal, to the Probate Division.—ROBINSON *v.* ROBINSON, *Q.B.D.*

12. *Married woman—Persistent cruelty—Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict. c.* 39), *s.* 4.—A number of acts of cruelty committed on one day may amount to persistent cruelty.—BROAD *v.* BROAD, *P.D. & Ad.D.*

13. *Practice—Two informations—Separate offences—Hearing of second information before giving decision of first—Legality of conviction.* — M., a licensed victualler, was charged on two informations with two separate offences. The first with permitting drunkenness on his premises on the 7th of February, 1898; and the second with selling on the 8th of February intoxicating liquor during closing hours. The justices heard the first information, and decided to convict, but did not announce their decision until they had heard the second information, which they dismissed; when they then convicted on the first information. In acting on each information the justices proceeded solely on the evidence applicable to that information.

Held, that the conviction was good.

Hamilton v. *Walker*, 40 W. R. 476, [1892] 2 Q. B. 25, discussed.—REG. *v.* FRY, MASTERS, EX PARTE, *Q.B.D.*, 649.

14. *Practice—Vaccination—Order to have child vaccinated — Costs of complainant — Distress—Imprisonment—"Civil debt" — Summary Jurisdiction Acts,* 1848 (11 & 12 *Vict. c.* 43), *s.* 18; 1879 (42 & 43 *Vict. c.* 49), *s.* 6.—An order was made by justices, under the Vaccination Act, 1867, s. 31, ordering the parent of a child to have the child vaccinated within a certain time, and to pay 8s. 6d. costs to the informant. The order further provided that the payment of the costs should be enforced by distress and imprisonment.

Held, the justices had power under section 18 of the Summary Jurisdiction Act, 1848, to order that the payment of the costs should be so enforced, and that such power was not affected by section 6 of the Summary Jurisdiction Act, 1879.—REG. *v.* BURROWS, *Q.B.D.*, 29.

See also Adulteration; Criminal Law, 2; Licensing Law, 1-4, 6; Local Government, 2, 16; Metropolis, 2.

LANDLORD and TENANT:—

1. *Assignment—Equitable lease—Personal arrangement.*—Where premises are let upon the terms, "We hereby agree to let you keep peaceable possession . . . for ten years on condition that you commit no nuisance and pay . . . rent thereof. You to pay local board rates, . . ." it is only a personal arrangement between the parties, and no estate passes.—DUXBURY *v.* SANDIFORD, *Q.B.D.*

2. *Compensation for improvements — Notice of claim — Time — Determination of tenancy — Farm buildings held over by tenant—Agricultural Holdings (England) Act,* 1883 (46 & 47 *Vict. c.* 61), *s.* 7.—Where, under the terms of his lease and the custom of the country, the tenant of a farm held over the farm buildings for a period after he had given up possession of all the agricultural land,

Held, that the determination of his tenancy within the meaning of section 7 of the Agricultural Holdings (England) Act, 1883, took place when he gave up the agricultural land, and that a notice of claim for compensation given after that date, but more than two months before he gave up the buildings, was bad.

Dictum of Lord Watson in *Black* v. *Clay*, [1894] A. C. 368, 43 W. R. Dig. 161, followed.

In re Paul, 24 Q. B. D. 247, 38 W. R. Dig. 99, distinguished.—MORLEY *v.* CARTER, *Q.B.D.*, 77.

3. *Lease—Breach of covenant—Sufficiency of notice to repair—Re-entry—Continuing breach—Damages—Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 14 (1).—A notice given by a lessor to a lessee in respect of breaches of covenant, "that you have not kept the said premises well and sufficiently repaired, and the party and other walls thereof," is not sufficiently definite; and even assuming that other parts of the notice sufficiently specify other breaches, the notice is invalidated by that part of it which is insufficient, and a claim to enforce a right of re-entry will therefore fail.

A notice requiring a lessee to repair "within one month, or a reasonable time thereafter," when the lease itself allows three months, is good within the Conveyancing Act, 1881, s. 14 (1).

A breach of covenant is not the less a continuing breach because the premises have been demolished, and, apart from the question of notice, will entitle a lessor to damages up to the time of demolition. —SERLE, RE, GREGORY *v.* SERLE, *Ch.D. Kekewich, J.*, 440.

4. *Lease—Breach of covenant not to assign without consent—Forfeiture—Equitable relief.*—By a lease, granted by the plaintiffs to the defendants, the defendants covenanted (*inter alia*) not to underlet, assign, or part with the possession of the rooms or offices and premises, or any part thereof, to any person or persons, without the consent in writing of the plaintiffs for that purpose first obtained, such consent not to be unreasonably withheld, and there was a further clause entitling the plaintiffs to re-enter upon and into the said rooms or offices or premises, or any part thereof, in the name of the whole, if the said defendants should not perform or keep the covenants contained in the deed.

The defendants received a letter from B. & B., in which all the terms of a sub-letting were set forth, and they were actually permitted by the defendants to partly move into the room.

No consent in writing had been obtained from the plaintiffs, but it was admitted that B. & B. were desirable tenants.

Held, that there was a sub-letting, for the letter amounted to an agreement, which could have been enforced, and so a forfeiture ensued, and the plaintiffs were entitled to possession.

Further, that the defendants were not entitled to equitable relief on the authority of *Barrow* v. *Isaacs & Son*, [1891] 1 Q. B. 417.—EASTERN TELEGRAPH CO. *v.* DENT, *Q.B.D.*

5. *Lease—Covenant—Brewer's lease—Tied house—Covenant to buy from lessor—Assignment of reversion—Severance of business.*—A brewer's lease of a beerhouse contained a covenant by the lessee to deal exclusively with the lessor or his firm, or his or their successors in business, and there was also an interpretation clause whereby the expression "lessor" and "lessee" were to include their respective executors, administrators, and assigns, where the context allowed. The lessor assigned the reversion of the house to a brewery company, who did not, however, purchase his business, which was still being carried on as at the date of the lease.

Held that the context did not allow of the

insertion in the covenant of the words "executors, administrators, and assigns" after the word "lessor"; that the meaning of the covenant was that the lessee was to buy all his beers, &c., from the lessor or his successors in business; and that he could not be compelled to buy from the company.

Clegg v. *Hands*, 44 Ch. D. 503, and *Doe d. Calvert* v. *Reid*, 10 B. & C. 849, discussed.

Decision of Byrne, J. (*ante*, p. 375), reversed.—BIRMINGHAM BREWERIES *v.* JAMESON, *C.A.*

6. *Lease—Covenant to pay rates, taxes, and assessments—Paving expenses—Claim by owner against tenant—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.—Expenses of paving a street recovered by an urban authority from the owner of premises outside the metropolis under section 150 of the Public Health Act, 1875, cannot be recovered by the owner from his tenant, under a covenant by the tenant to pay "all rates, taxes, and assessments whatsoever which now are, or during the term shall be, imposed or assessed upon the premises or the landlords or tenants thereof by authority of Parliament or otherwise, except the landlords' property tax."—BAYLIS *v.* JIGGINS, *Q.B.D.*

7. *Lease—Covenant for quiet enjoyment—Reversion assigned to a railway company—Exercise of statutory powers—Damages—Lands Clauses Act*, 1845, *s.* 68—*Railway Clauses Act*, 1845, *s.* 6.—A. was lessee of a house under a lease containing a covenant for quiet enjoyment. The reversion, subject to the lease, was acquired by agreement by a company empowered under a special Act to construct a railroad, and for that purpose to acquire certain lands, which included the demised house. The house was not, however, required for the actual construction of the railroad. The special Act was passed previously to the lease. In the construction of the railroad the company damaged, but did not destroy, the house, without being guilty of negligence.

Held, that an action by A. against the company for damages for breach of the covenant for quiet enjoyment would not lie; and

Held, that, in an action by the company against A. for rent, the alleged breach of the covenant was no defence, and that the damage sustained by the house could not be set off against the demand for rent.

A railway company taking lands under statutory powers, and constructing works within such powers, is entitled to take the interest of any person having an interest in land without incurring liability in respect of any existing covenant entered into by the owner whose interest the company acquires, so far as the enforcement of such a covenant would impose a burden upon such company in derogation of its statutory rights and obligations.

Semble, that such a covenant only covers the acts of the voluntary assignees of the original lessor.

Decision of Byrne, J. (*ante*, p. 509), affirmed.—ANDERSON *v.* MANCHESTER, &c., RAILWAY CO., *C.A.*

8. *Lease—Covenant—Specific devise of lease—Burden of covenant—Residuary legatee—Liability of lessor's estate.*—By a deed dated the 2nd of September, 1868, a lessor covenanted as follows: "The lessor, his heirs or assigns, will, at his or their own expense, on or before the 1st day of September, 1869, completely finish laying down in good English grass, and in accordance with the rules of good husbandry, the 1,000 acres which the lessor has already commenced laying down in English grass."

This covenant was followed by a declaration at the end of the lease in these words: "It is hereby declared that there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto."

The lessor died, and by his will specifically devised the land which was subject to the lease. The covenant was broken, and the damages assessed.

Held, that the covenant must be construed as qualified and controlled by the declaration, and therefore did not run with the reversion; and, moreover, that, since the covenant was not incident to the relation of landlord and tenant, the liability for the breach should be borne by the testator's general estate.

On the death of a lessor the burden of a covenant to ensure premises being put into a condition fit for occupation by a tenant should, as between the specific devisee and the testator's general estate, be borne by the general estate; but should the nature of the obligation constitute part of the relation of landlord and tenant, then the burden falls upon the devisee.

Mansel v. *Norton*, 31 W. R. 325, 22 Ch. D. 769, and *Marshall* v. *Holloway*, 5 Sim. 196, considered.—ECCLES *v.* MILLS, *P.C.*, 398.

9. *Lease — Ejectment — Forfeiture — Continuing breach of covenant—Claim for rent—Waiver of forfeiture—Notice—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.—The defendant was tenant to the plaintiff under a lease containing a general covenant to repair and also a covenant to repair upon notice. The premises having become out of repair, the plaintiff, on the 22nd of September, 1896, gave notice to the defendant under section 14 of the Conveyancing Act, 1881, requiring him within three months to execute the repairs therein specified. The notice not being complied with, the plaintiff, on the 14th of January, 1897, commenced an action in which he claimed possession of the premises and rent to the 25th of December, 1896. The defendant pleaded that the plaintiff, by claiming rent in the action, had waived the forfeiture, and was not entitled to recover possession.

Held, that the plaintiff was entitled to recover possession, for (1) the breach being a continuing breach, he could rely on the breaches between the 25th of December and the 14th of January; and (2) the premises being in the same state of disrepair at the commencement of the action as at the giving of the notice, the notice was sufficient.—PENTON *v.* BARNETT, *C.A.*, 33.

10. *Lease—Grant of way-leave—Reservation of payments—Rent or sum—Rent running with reversion*—32 *Hen.* 8, *c.* 34.—In a grant of a way-leave to a railway company sums made payable to the grantor in respect of traffic passing over the line are a rent within the statute 32 Hen. 8, c. 34, and the benefit of such rent runs with the reversion to the land.—HASTINGS (LORD) *v.* NORTH-EASTERN RAILWAY CO., *Ch.D. Byrne, J.*

11. *Lease—Proviso to determine—Mesne assignments—Who can give notice.*—In an action brought to recover two quarters' rent, the plaintiff S. was the assignee of the orignal lessor H., and the defendant D. was the original lessee. The defendant had assigned to the third party F., who had covenanted to indemnify him. F. in turn assigned to one Y., who had covenanted to indemnify him.

Y. deposited the lease with H. & Co. to secure an advance of £50. He then disappeared and left the premises unoccupied. F. purchased the rights of H. & Co. for £10, and he then took possession of the premises and let them and received the rents, and paid the present plaintiff the rent due to him, he being aware what was being done. The original lease, which was for twenty-one years, contained the following proviso: "In case the said Richard Drew, his executors, administrators, or assigns, shall be desirous of determining this present lease or demise at the end or expiration of the first seven or fourteen years of the said term hereby granted, and of such his or their desire or intention shall give notice in writing to the said Frederick Hose, his heirs or assigns, or shall leave the same at his or their usual or last-known place of abode in England, six calendar months before the expiration of the said seven or fourteen years of the said term hereby granted . . . then and in such case forward and immediately after the expiration of such seven or fourteen years of the said term this indenture and every covenant, clause, matter, or thing herein contained shall cease and determine." Notices were duly given by D. and F. to determine the lease at the end of the fourteenth year, and the question was whether the lease was thereby determined.

Held, that the notice should have been given by Y., and that, therefore, the lease was still subsisting.—SEAWARD *v.* DREW, *Q.B.D.*

12. *Lease—Public-house — Covenant by lessee — Lessee and assigns not wilfully to do anything which might be a reasonable ground for withholding licence —Drunkenness permitted by under-tenant of assignee of lessee—Action against assignee.*—A lease of a public-house granted by the plaintiff contained a covenant on the part of the lessee that he, his executors, administrators, and assigns, would not wilfully do or suffer anything which might be a reasonable ground for withholding the licence. The defendants, who were assignees of the lessee, let the premises to a monthly tenant, who on one occasion permitted drunkenness to take place on the premises, in consequence of which the licensing justices refused to renew the licence.

Held, that there had been no breach of covenant on the part of the defendants.—BRYANT *v.* HANCOCK, *C.A.*, 386.

13. *Lease — Re-entry—Company— Re-construction.* —A lease contained a proviso for re-entry if the lessees, being a company, "shall enter into liquidation voluntary or compulsory." The lessees, while solvent, entered into liquidation for the purpose only of re-construction with additional capital.

Held, that this was a liquidation within the above proviso.— HORSEY ESTATE *v.* STEIGER, *Q.B.D.*

14. *Lease—Rooms — Outer walls — Signboards — Derogation from grant.*—A lease of rooms in a house constituting a dwelling by itself includes the outer walls of the house so far as they are solely appropriate to the rooms let.—CARLISLE CAFÉ Co. *v.* MUSE, *Ch.D. Byrne, J.*, 107.

15. *Lease—Three years' agreement—"With the option of renewal"—Purchaser—Notice of agree ment —Ejectment—Specific performance.*—On the 30th of August, 1894, C. agreed to let for three years to the defendant S. certain premises at a fixed yearly rent, "with the option of renewal."

In July, 1896, the plaintiff L. purchased C.'s interest in the premises, and knew that S. was in possession under an agreement, but, till early in 1897, was not aware of the clause giving the option of renewal.

At the expiration of the three years L. commenced an action of ejectment, and S. counterclaimed for specific performance of the agreement to renew.

Held, that L., as purchaser, must be fixed with notice of the contents of the agreement with S., and, further, that the words in the agreement relating to the renewal were sufficiently definite to enable a decree for specific performance to be made to grant a renewed agreement for a lease for the same period and on the same terms, except as to renewal, as contained in the agreement of the 30th of August, 1894.—LEWIS *v.* STEPHENSON, *Q.B.D.*

16. *Market garden—Tenancy from year to year—Compensation—Agricultural Holdings (England) Act,* 1883 (46 & 47 *Vict. c.* 61), *s.* 61—*Market Gardeners' Compensation Act,* 1895 (58 & 59 *Vict. c.* 27), *s.* 4.—By an agreement made in 1886 certain land was let as market garden ground to a tenant at a certain rent "a year, payable quarterly, on the usual quarterly days for payment of rent in each year." The agreement also contained the following proviso: "That the said tenancy may be determined by either party giving to the other three calendar months' notice to quit or of his intention of quitting, as the case may be, on any day of the year." This contract was still current on the 1st of January, 1896, on which date the Market Gardeners' Compensation Act, 1895, came into operation.

Held, that there was a letting from year to year, and a contract of tenancy within the meaning of section 4 of the above Act as interpreted by section 61 of the Agricultural Holdings (England) Act, 1883, notwithstanding the proviso in the agreement as to the giving of the three months' notice; and that the tenant was consequently entitled to claim compensation for improvements effected by him on the land prior to the commencement of the Market Gardeners' Compensation Act, 1895.

In re Threlfall, 29 W. R. 128, 16 Ch. D. 274, followed.—KING *v.* EVERSFIELD, *C.A.*, 51.

17. *Notice to quit—Tenancy for one year certain and so on from year to year—Proviso for notice to quit at any time—Notice to quit during first year.*—Premises were let, under a written agreement, "for the term of one year certain from the date thereof and so on from year to year, unless or until the tenancy thereby created should be determined by either party giving to the other twenty-eight days' notice in writing, such notice to expire at any period of the year without any reference to the time of entry, the date of the agreement, or the commencement of the tenancy."

Held, that the tenancy could not be determined by notice during the first year.—CANNON BREWERY Co. *v.* NASH, *C.A.*

18. *Part of the freehold—Chattels thrown in heaps upon the land—Intention—Mines and minerals—"Tap-cinder" — Artificial product* — Mounds of "tap-cinder," the refuse arising from the puddling of pig-iron, thrown upon land held on a tenancy by the tenant, with the intention of its once more forming part of the earth out of which it was produced, become part of the land and belong to the owner of the freehold.

In a lease of mines of coal and ironstone and "all mines, seams, veins, and beds as well opened as unopened, of all other minerals and clay lying within and under the lands from the surface down

to" a certain mine named, these words do not include such mounds of tap-cinder as above mentioned.—BOILEAU *v.* HEATH, *Ch.D. Bigham, J.*, 602.

LANDS CLAUSES ACTS:—

1. *Compensation—Land taken by school board—Depreciation of adjoining land—Damages.*—The London School Board took a part of the land of which P. was lessee for the purpose of erecting thereon a school. P. claimed compensation for the depreciation of the adjoining part of his land, on which he had erected houses, owing to the noise that would probably be caused by the children at the school. The jury assessed the damages at £1,000.

Held, that the jury were entitled to take the matter into consideration in assessing damages and that the court would not disturb their verdict.—REG. *v.* PEARCE, LONDON SCHOOL BOARD, EX PARTE, *Q.B.D.*

2. *Compensation — "Part of house" — Material detriment to remainder—Access over land taken—Railway company—"Road"—Power of company to grant right of way—Arbitration—Finality of Scottish award—Right of one tenant in common—Lands Clauses Consolidation (Scotland) Act*, 1845 (8 & 9 *Vict. c.* 19), *s.* 90—*Railways Clauses Consolidation (Scotland) Act* (8 & 9 *Vict. c.* 33), *ss.* 46, 49, 60.—A railway company were entitled by a section in their special Act, notwithstanding section 90 of the Lands Clauses Consolidation (Scotland) Act, 1845, to take a portion of certain houses or other buildings or manufactories scheduled in their Act without being obliged to take the remainder, if the portion taken could, in the opinion of the authority to whom the question of disputed compensation should be submitted, be severed from the remainder of the property without material detriment thereto. The company gave notice to treat for 232 square yards, a portion of the scheduled property, which formed an access used jointly by the respondents and another firm. The respondents required the railway company to take the whole of their property. A statutory submission to arbitration containing the question whether or not the portion of land containing the 232 square yards could be severed from the remainder of the property of the respondents without material detriment, reserving only the question whether section 90 of the Lands Clauses Consolidation (Scotland) Act, 1845, applied, was entered into. Before the arbitrator the railway company offered to allow access to the remainder of the respondents' property under a bridge over the portion taken. The arbitrator found that the portion containing 232 square yards could not be severed without material detriment to the remainder of the respondents' property, and awarded compensation upon the assumption that the company were bound to take the whole. In an action to recover the amount awarded,

Held, that whether the arbitrator was right or wrong in declining to take the offer of the company into consideration in assessing the compensation, his award, until set aside by a proper process, was binding on the court, and could not be reviewed.

Gonty v. *Manchester Railway Co.*, [1896] 2 Q. B. 439, distinguished.—CALEDONIAN RAILWAY CO. *v.* TURGAN, *H.L.*

See also Landlord and Tenant, 7; Railway, 5, 7.

LAND TRANSFER ACT, 1897.—See Probate, 9-11.

LEASE.—See Landlord and Tenant, 2-15; Trustee, 6; Will, 17, 18.

LIBEL:—

1. *Practice—Payment into court—Newspaper—Pleading—Libel Act*, 1843 (6 & 7 *Vict. c.* 96), *s.* 2—*Rules of Supreme Court, ord.* 22, *r.* 1.—The defendants in an action for a libel published in a newspaper pleaded by way of defence, in accordance with the Libel Act, 1843, s. 2, that the libel was published without actual malice, and without gross negligence, an apology, and payment into court of £5. The jury at the trial found that the libel was published without actual malice, but not without gross negligence, and that the apology was sufficient, and they assessed the damages at £5.

Held, that the defendants, having made the payment into court as part of a defence under the Libel Act, 1843, s. 2, and having failed at the trial on that defence, were not entitled to avail themselves of the payment into court as being made under ord. 22, r. 1, and therefore the plaintiff was entitled to judgment.—OXLEY *v.* WILKES, *C.A.*

2. *Slander—Unauthorized use of name—Calculated to injure plaintiff in his profession—Slander of goods—Injunction.*—An injunction will not issue to restrain the unauthorized use of a person's name even though such use is calculated to injure him in his profession, unless such use is shown to be injurious to the plaintiff's reputation, or to his property.

A., a medical man, made certain statements to B., the owner of a certain medicinal liquid, as to his use of the liquid without any view as to such statements being used to puff the sale of the liquid. Subsequently B. published these statements in the advertisement of the liquid. A. applied for an injunction to restrain this unauthorized use of his name, and gave evidence to show that such a use of it tended to injure him in his profession. The jury found that the advertisement was not libellous.

Held, that since the publication was not injurious to A.'s reputation, nor injurious to his property, no action lay.—DOCKRELL *v.* DOUGALL, *Q.B.D.*

See also Corporation, 4; Practice, 25.

LICENSING LAW:—

1. *Appeal against confirmation of new licence—Rules of quarter sessions*—Ultra vires—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 37, 43.—By section 43 of the Licensing Act, 1872, "Any person who appears before the licensing justices and opposes the grant of a new licence, and no other person, may appear and oppose the confirmation of such grant by the confirming authority." The same section requires the quarter sessions to make rules "as to the proceedings to be adopted for confirmation of new licences" in their county.

A rule made by quarter sessions under this section required every person intending to oppose the confirmation of a provisional licence to give certain notices of his intention, as a condition precedent to his being heard in opposition to the confirmation.

Held, that the rule was *ultra vires* as imposing a condition on the statutory right of a person who had opposed before the licensing justices to be heard in opposition to the confirmation.—REG. *v.* BIRD, NEEDES, EX PARTE, *Q.B.D.*, 528.

2. *Licence—Inn—House pulled down—Transfer of licence—Intoxicating Liquors Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4, 14—*Rule* nisi *for* mandamus *to justices—Costs of persons opposing rule.*—In the case of a licensed public-house which has been, or is about to be, pulled down, the person who applies

under section 14 of the Intoxicating Liquors Act, 1828, for a transfer of the licence of that house to a new house must be the person who is the licensed holder of the inn at the time the premises are pulled down, and the house itself must be kept as an inn at the time it is pulled down. The court has jurisdiction to grant costs to a person who successfully shows cause against a rule *nisi* for a *mandamus* to licensing justices, notwithstanding the decision of the House of Lords that licensing justices are not a court of summary jurisdiction (see *Boulter* v. *Justices of Kent, ante*, p. 114, [1897] A. C. 556).—REG. *v.* YORKSHIRE JUSTICES, SHAW, EX PARTE, *Q.B.D.*, 334.

3. *Licence—Order sanctioning removal—Grant of licence on condition of surrendering other licence—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 50.—At a general annual licensing meeting a publican, having obtained a renewal of a licence in respect of his licensed house, proceeded to apply for a new licence in respect of a neighbouring house. The justices made an order granting him such new licence subject to the condition of his giving up the licence of which he had just obtained a renewal.

Held, that the order was in substance an order sanctioning the removal of a licence, and that, inasmuch as the requirements of section 50 of the Licensing Act, 1872, had not been complied with, there was no jurisdiction to make such order.—REG. *v.* THORNTON, *C.A.*, 241.

4. *Licence—Renewal—Objection on same grounds as previous objection to transfer—Estoppel—Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19.—Where upon an application for the transfer of a licence to sell beer by retail on or off premises licensed before the 1st of May, 1869, an objection is made upon one of the four grounds specified in section 8 of the Beerhouse Act, 1869, but the justices granted the transfer, the same objection upon the same facts may be taken at the next general annual licensing meeting to the renewal of the licence, and the renewal may be refused on that ground.—SMITH *v.* SHANN, *Q.B.D.*

5. *Refusal to quit licensed premises—Person not drunken, violent, quarrelsome, or disorderly—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 18.—A person cannot be convicted under section 18 of the Licensing Act, 1872, for refusing to quit licensed premises, if he is not drunken, violent, quarrelsome, or disorderly, although he may have been requested by the landlord to leave.—DALLIMORE *v.* TUTTON, *Q.B.D.*

6. *Serving reputed prostitutes—Reasonable time for refreshments—Affirmative evidence of offence alone will support conviction—Licensing Act*, 1879 (*c.* 49), *s.* 14—*Justices—Summary Jurisdiction Act*, 1879 (*c.* 49), *s.* 39.—M. was convicted under section 14 of the Licensing Act, 1872, of having permitted a reputed prostitute to remain on licensed premises longer than a reasonable time for the woman to take refreshments.

Held, that the conviction must be quashed because the evidence of the offence having been committed given by the prosecution was in fact circumstantial; and before a publican could be convicted affirmative evidence in every case must be given by the prosecution;

Held, also, that under the Summary Jurisdiction Act, 1879, s. 39, the onus of proving the offence rests on the prosecutor, and that the defendant was right in not calling evidence to rebut the charge.—MILLER *v.* DUDLEY JUSTICES, *Q.B.D.*, 606.

7. *Sunday closing—Beer ordered and paid for on Saturday, but delivered on Sunday—Opening licensed premises during prohibited hours—Conviction for—Sunday Closing (Wales) Act*, 1881 (44 & 45 *Vict. c.* 61), *ss.* 1, 2—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.—Section 9 of the Licensing Act, 1874, provides that any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed, "opens or keeps open such premises for the sale of intoxicating liquors" shall be liable to a penalty.

A dozen bottles of beer were ordered from a beerhouse-keeper and paid for on a Saturday evening, and they were to have been delivered at the house of the purchaser on the Saturday night, but in consequence of an accident the delivery was overlooked, and did not take place on the Saturday as arranged.

On the Sunday during closing hours the purchaser of the beer sent his servant to the public-house for two bottles of the beer, which were delivered to the servant, who was seen to come out of the public-house with the beer.

Held, that, although the beer had been ordered and paid for during the time the premises were allowed to be open, the beerhouse-keeper, by the delivery of the two bottles of beer during prohibited hours, had "opened his premises for the sale of intoxicating liquors" within the meaning of section 9, and was liable to the penalty imposed by the section.—SAUNDERS *v.* THORNEY, *Q.B.D.*

8. *Theatre—Selling intoxicating liquors after closing hour—Licensing Act*, 1872 (35 & 36 *Vict c.* 94), *s.* 72—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *ss.* 3, 9, 16.—The appellant was convicted at quarter sessions of having sold intoxicatng liquors at the bar of his theatre after the performance had ended and after closing hour for ordinary licensed premises in that borough.

Held, that section 72 of the Licensing Act, 1872, which provides that nothing in the Act "shall affect or apply to the sale of intoxicating liquors by proprietors of theatres in pursuance of the Act in that behalf," did not affect the question of closing hours, and that the conviction under section 9 of the Licensing Act, 1874, was therefore right.—GALLAGHER, *v.* RUDD, *Q.B.D.*, 108.

See also Justices, 5-10.

LIMITATIONS, STATUTE of:—

1. *Acknowledgment—Two letters—Parol evidence to connect—Admissibility of.*—Parol evidence is admissible to show that a letter was written in answer to a former one, in order to read the two letters together that they may constitute an acknowledgment to take a debt out of the Statute of Limitations.—MCGUFFIE *v.* BURLEIGH, *Q.B.D.*

2. *Money charged on land—Payment of interest by co-debtor—Real Property Limitation Act.* 1874 (37 & 38 *Vict. c.* 57), *s.* 8—21 *Jac.* 1, *c.* 16, *s.* 3—*Mercantile Law Amendment Act*, 1856, *s.* 14.—The defendants, trustees of a will, in 1882 borrowed money from the plaintiffs, the payment of which was secured as follows: the defendants being beneficial owners of certain mortgages of lands caused the person who had the legal estate to assign the mortgages to the plaintiffs, the defendants not being parties to the deed of assignment. Then by a further deed to which both defendants and plaintiffs were parties it was agreed that the money advanced by the plaintiffs should be a first charge upon the principal and interest to be received or recovered by the plaintiffs by virtue of the mortgages so assigned to them,

and that the plaintiffs should not realize the mortgages without first giving the defendants the opportunity of paying off the amount advanced to them.

There was no express covenant by the defendants to repay the advance. One of the defendants L. shortly after retired from the trust. Interest was paid to the plaintiffs by the other defendants down to 1896. In 1897 the plaintiffs brought this action against L. and the other trustees to recover the amount of the advance.

Held, that the money advanced by the plaintiffs was "money secured by mortgage and charged upon or payable out of land" within section 8 of the Real Property Limitation Act, 1874, and that that Act and not the Act of James I. applied; that consequently L. was not within the protection of section 14 of the Mercantile Law Amendment Act, 1856, and that the plaintiffs' claim was not barred against him.—BARNES *v.* GLENTON, *Q.B.D.*

3. *Mortgage of land — Arrears of interest— Acknowledgment by one of the two executors and devisees in trust of the mortgagor*—3 & 4 *Will.* 4, *c.* 27, *s.* 42.—The defendants A. and N. were the executors and devisees in trust of S., who died in 1887 having in 1885 mortgaged certain land belonging to her to the plaintiff. On the 19th of May, 1897, the defendant A., without the consent of the defendant N., executed an acknowledgment admitting that the whole of the principal moneys and interest secured by the mortgage were then due and owing to the plaintiff.

Held, that such acknowledgment could not be treated as the valid act of both trustees with reference to the land vested in them; that it did not prevent the operation of the statute; and that six years' arrears of interest only could be recovered.—ASTBURY *v.* ASTBURY, *Ch.D. Stirling, J.*, 536.

4. *Mortgage — Conveyance subject to mortgage— "Person claiming under a nortgage"—Real Property Limitation Act*, 1837 (7 *Will.* 4 *and* 1 *Vict. c.* 28)—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 9.—By 7 Will. 4 and 1 Vict. c. 28 it is provided that it shall be lawful for any person entitled to or claiming under any mortgage of land to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage. By 37 & 38 Vict. c. 57, s. 9, the aforesaid period of twenty years was altered to twelve years.

In 1886 the owner of one undivided moiety of certain land which for the previous eleven years had been in the possession of the owners of the other moiety, mortgaged his moiety, and in 1890 he conveyed his said moiety, subject to the mortgage, to the plaintiff, the land still continuing in the possession of the owners of the other moiety. The plaintiff subsequently paid off the mortgage.

In 1896 the plaintiff brought an action to recover the said moiety.

Held, that the plaintiff, on paying off the mortgage, did not become a "person claiming under a mortgage" within the meaning of 7 Will. 4 and 1 Vict. c. 28, and that that Act does not confer a new right of entry on the mortgagee where, at the time of making the mortgage, a man is in possession holding adversely to the mortgagor, and the statute 3 & 4 Will. 4, c. 27, has already begun to run in his favour against the mortgagor.

Doe v. *Massey*, 17 Q. B. 373, questioned.—THORNTON *v.* FRANCE, *C.A.*, 56.

See also Company, 10, 21; Executor, 1; Partnership, 5; Trustee, 1.

LITERARY INSTITUTION:—

1. *Construction—"In the nature of a joint-stock company"—Literary and Scientific Institutions Act*, 1854 (17 & 18 *Vict. c.* 112), *s.* 30 (1).—A literary and scientific institution, in the property of which proprietors were interested in proportion to the number of their shares, which shares were transferable and transmissible,

Held, to be in the nature of a joint-stock company within the meaning of the Literary and Scientific Institutions Act, 1854, section 30.

In re The Bristol Athenæum, 43 Ch. D. 236, discussed.—RUSSELL INSTITUTION, RE, FIGGINS *v.* BAGHINO, *Ch.D. North, J.*

2. *Institution in the nature of a joint-stock company—Literary and Scientific Institutions Act*, 1854 (17 & 18 *Vict. c.* 112), *ss.* 30, 33.—The proviso to the 30th section of the Literary and Scientific Institutions Act, 1854, whereby institutions "which shall have been founded or established by the contributions of shareholders in the nature of a joint-stock company" are exempted from the operation of that section, does not require that the institution to be exempted should be actually in all respects a joint-stock company, but merely that such institution should, in some respects, partake of the nature of such a company.

Held, therefore, that a society in which the following elements of a joint-stock company were present—that is to say, first, the existence of a joint-stock or common property; secondly, the contribution of members as the source of such property; and, thirdly, the holding of that property by numerous persons in transferable shares—fell within the exemption.

The observations of Kay, J., in *In re The Bristol Athenæum*, 38 W. R. 396, 43 Ch. D. 236, discussed and dissented from.—CLEGG *v.* ELLISON, *Ch.D. Stirling, J.*, 577.

LOCAL GOVERNMENT:—

1. *Borough over* 10,000 *population—New county bridges—Liability to contribute—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 6, 35.—By section 6 of the Local Government Act, 1888, the county council shall have power to purchase or take over, on terms to be agreed on, existing bridges not being at present county bridges, and to erect new bridges and to maintain, repair, and improve any bridges so purchased, taken over, or erected.

And by section 35, in the case of a quarter sessions borough . . . containing . . . a population of 10,000 or upwards the following provisions shall . . . apply. (2) Where such borough is at the passing of this Act exempt in whole or in part from contributing towards costs incurred for any purpose for which the quarter sessions of the county in which the borough is situate are authorized to incur costs, the parishes in the borough shall not, save as in this Act expressly mentioned, be assessed by the county council to county contributions in respect of costs incurred for any such purpose.

A writ was issued by the plaintiffs against the defendants indorsed as follows: The plaintiffs' claim is for a declaration that the plaintiffs are not liable to contribute rateably to the cost of erecting, maintaining, or repairing new county bridges, and for £137 13s., money received by the defendants for the plaintiffs' use.

Bury St. Edmunds is a quarter sessions borough,

containing according to the census of 1881 a population of over 10,000.

The defendants have since 1892 paid £1,570 4s. 4d. in respect of these bridges which they have charged to their county accounts as general expenses, and the plaintiffs have been assessed to their county rate and have contributed thereto the sum of £137 13s., their rateable proportion of the whole sum.

Held, that the borough was exempt from contributing, and were entitled to the declaration they asked for on their writ, but as to the sum of money, they could only recover what had been paid within six months on the authority of *Mayor of Thetford* v. *Norfolk County Council*, [1898] 1 Q. B. 41.—BURY ST. EDMUNDS (MAYOR) *v.* WEST SUFFOLK COUNTY COUNCIL, *Q.B.D.*

2. *Building line — Information — Dismissal — Justices equally divided—Continuing offence—Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 55), *s.* 3.—On the 5th of March, 1897, the appellant was charged, in an information before justices, with an offence under section 3 of the Public Health (Buildings in Streets) Act, 1888. The justices, being equally divided, dismissed the information upon that ground. On the 19th of November, 1897, the appellant was charged with continuing the acts which formed the subject-matter of the first information.

Held, that the justices who heard the first information must be taken to have decided that no offence was committed, and that the appellant was therefore entitled to an acquittal upon the second information.—KINNIS *v.* GRAVES, *Q.B.D.*, 480.

3. *Bye-law—Sanitary authority—Reasonableness —Prohibition of sales on foreshore.*—A sanitary authority was empowered by a local Act to make bye-laws and regulations with reference to the sea-beach and foreshore in the district, which were vested in the sanitary authority for the purpose of public walks and pleasure grounds. Subsequently to the passing of the local Act a part of the foreshore was converted into an esplanade. The sanitary authority made a bye-law prohibiting the sale of any goods on any part of the sea-beach, foreshore, or esplanade, except by the direction of the sanitary authority.

Held, that the bye-law was not unreasonable or *ultra vires*.—GRAY *v.* SYLVESTER, *Q.B.D.*, 63.

4. *Contract under seal—Alterations and variations not under seal—Agreement to compromise disputes not under seal—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 173, 174.—Where an urban authority enters into a contract in writing, sealed with the common seal of such authority, pursuant to sections 173 and 174 of the Public Health Act, 1875, with a contractor for the construction by him—*e.g.*, of sewerage works, and the contract contains the usual power for the engineer, who has the control and supervision of the works, to vary, alter, enlarge, or diminish any of them, all variations and alterations coming within the terms of the power conferred on the engineer can be validly made without being under the common seal of the urban authority.

An agreement between an urban authority and a contractor employed to construct works for them, as a compromise and in full settlement of all claims by him against the urban authority, is not a contract within section 173 of the Public Health Act, 1875, necessary for carrying that Act into execution, so as to require to be sealed with the common seal of the urban authority under section 174; and therefore such agreement, though not under seal, is capable of being enforced against the urban authority.—WILLIAMS *v.* BARMOUTH COUNCIL, *C.A.*

5. *County council—Bye-law—Validity—Music in streets—No annoyance.*—The K. County Council, under section 16 of the Local Government Act, 1888, made a bye-law as follows: "No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable or by an inmate of such house personally, or by his or her servant, to desist."

Held (*dissentiente* Mathew, J.), that the bye-law was not invalid or *ultra vires*.—BROWNSCOMBE *v.* JOHNSON, *Q.B.D.*

6. *County council — Bye-law — Validity — Using streets for betting—No obstruction.*—The S. County Council, under section 16 of the Local Government Act, made a bye-law as follows: "No person shall frequent any street or public place and use the same for the purpose of betting or wagering, or agreeing to bet or wager, either on behalf of himself or any other person."

Held, that the bye-law was one properly made for the good rule and government of the administrative county, and was therefore not *ultra vires* or invalid.—JONES *v.* WALTERS, *Q.B.D.*

7. *County council—Bye-law for good rule and government — Validity — Reasonableness — Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41) *s.* 16.—A bye-law made by a county council under section 23 of the Municipal Corporations Act, 1882, and section 16 of the Local Government Act, 1888, and duly confirmed, provided that "No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable or by any inmate of such house personally, or by his or her servant, to desist." The appellant continued to sing on a highway within fifty yards of a dwelling-house after being requested by a constable to desist.

Held, by Lord Russell of Killowen, C.J., Sir F. Jenne, P., Chitty, L.J., and Wright, Darling, and Channell, JJ. (Mathew, J., dissenting), that the bye-law was reasonable, and that the appellant was rightly convicted of an offence against it.

Observations as to the principles to be applied by the court in deciding as to the validity of the bye-laws of local representative bodies.

Slattery v. *Naylor*, 36 W. R. 897, 13 App. Cas. 446, applied.—KRUSE *v.* JOHNSON, *Q.B.D.*, 630.

8. *Custody of parish documents—Tithe map and apportionment—Tithe Act*, 1836 (6 & 7 *Will.* 4, *c.* 71), *s.* 64—*Tithe Act*, 1846 (9 & 10 *Vict. c.* 73), *s.* 17—*Tithe Act*, 1860 (23 & 24 *Vict. c.* 93), *s.* 28—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 17.—Where no order has been made by quarter sessions as to the custody of a document which is required by section 64 of the Tithe Act, 1836, to be kept with the parish documents, the parish council have now power to give directions as to its custody.

A parish council gave directions as to the custody of the copy of a tithe apportionment and map, but the rector, in whose possession it was, refused to comply with such directions. The parish council then obtained an order from the county council confirming the directions of the parish council. As the rector still refused to give up possession of the document, an application was made to two justices by a person interested in lands and rent-charge comprised in the apportionment for an order

for the removal of the document into the custody directed by the parish council. The justices decided they had no jurisdiction to make such an order.

Held—without deciding whether the power of the justices to make the order was discretionary or merely ministerial—that they had jurisdiction to make it.—LEWIS *v.* POOLE, *Q.B.D.*, 93.

9. *Drain — Public health — Nuisance — "Single private drain"—Notice to execute works addressed to owners collectively—Work done different from work specified in notice—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Public Health Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.—Three houses belonging to A. and two belonging to B. were connected by a single private drain with a public sewer. The drain was complained of as a nuisance, and the surveyor of the local sanitary authority opened a part of the drain situated at the back of B.'s two houses and one of A.'s houses, and found it there choked with sewage. The local authority then, under section 41 of the Public Health Act, 1875, served a notice on both A. and B., addressed to them jointly, requiring them to relay the whole drain. A. and B. having neglected to comply, the local authority themselves repaired the whole drain, and also lowered the level of it in relaying it. They then sued A. under section 19 of the Public Health Act, 1890, for his proportion, as apportioned by their surveyor, of the expenses so incurred. The apportionment was not disputed by A.

Held, (1) that the fact that the notice to repair was in form a joint notice to A. and B. did not render it invalid; (2) that it was not necessary that the whole of the drain should have been previously examined; and (3) that if the work done in respect of which the expenses were sought to be recovered was not substantially the same as that specified in the notice, the expenses incurred were not recoverable.—LANCASTER *v.* BARNES DISTRICT COUNCIL, *Q.B.D.*, 623.

10. *Drain—"Sewer"—New street—Street taken over by local authority—"Frontager"—Drains constructed by "frontager"—Liability for expense of sewering street—Omission to serve notice "to sewer" on one frontager—Condition precedent—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 18, 150, 257, 268.—Where a "street" was vested in the local authority, and there were drains—some of which drained more than one house—existing under the street and leading into public sewers in other streets, and the local authority had served the usual notices under section 150 of the Public Health Act, 1875, on the owners of houses, as frontagers to the street, to sewer, &c., the street, but in so doing had omitted to serve one frontager with such notice; and the local authority, on non-compliance with the notice by the frontagers, had proceeded to do the work themselves, and their surveyor had, under the same section of the Act, apportioned the expense among the frontagers, and, the apportionment having been objected to, the parties had gone to arbitration thereon, and an award had duly been made apportioning the payments among the frontagers:

In an action by the local authority to recover the apportioned amounts from the frontagers,

Held, (1) that the words "respective owners and occupiers" in section 150 mean "all and every one of" the owners and occupiers; that service of notice to sewer on all such owners or occupiers is a condition precedent to enforcing the Act, and consequently failure to serve notice on a single occupier is a failure to comply with the requirements of the section; but held, also (on the facts), that the frontagers should have raised the objection previously—*e.g.*, before the arbitrators—and it was too late to take it now; (2) on the facts, that the road was not sewered to the satisfaction of the local authority, and that the authority, therefore, were not liable under section 15 for maintenance, alteration, &c., of the sewers; and, further, that a street could not be considered to be sewered when all that had been done was to lay a series of drains draining some of the houses on one side in one direction and the houses on the other side in another direction, these drains not forming parts of one system of sewering.—HANDSWORTH DISTRICT COUNCIL *v.* DERRINGTON, *Ch.D. Kekewich, J.*, 168.

11. *Drain—Sewer—Single drain draining several houses—Repair—Public Health Act*, 1875, *s.* 41—*Public Health Act*, 1890, *s.* 19.—A drain-pipe passing through private property received the drainage of several houses belonging to different owners before it joined the public sewer. The pipe having become a nuisance the local authority, who had adopted the Public Health Act, 1890, took proceedings against the owners of the several houses under section 41 of the Public Health Act, 1875.

Held, that the pipe in question was a single private drain within the meaning of section 19 of the Act of 1890.

Bradford v. *Eastbourne Corporation*, [1896] 2 Q. B. 205, followed.

Hill v. *Hair*, [1895] 1 Q. B. 906, disapproved.—SEAL *v.* MERTHYR TYDFIL COUNCIL, *Q.B.D.*

12. *Drainage—Surface water—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 16, 17, 308.—A local authority has power to make such sewers as may be necessary for draining their district, and may carry such sewers into, through, or under any lands whatsoever within their district, provided that the water conveyed by them is free from all excrementitious or other foul or noxious matter.

Surface water charged with sand or silt is not within the above proviso, and may be discharged by a local authority into a natural stream or watercourse.—DURRANT *v.* BRANKSOME DISTRICT COUNCIL, *C.A.*, 134.

13. *Highway—Bicycle—Bicyclist riding at night without a light—Power of police-constable to stop—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 85—*Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50.), *ss.* 78, 79.—Section 85 of the Local Government Act, 1888, which declares bicycles to be carriages within the meaning of the Highway Act, and lays down additional regulations (as to having lighted lamps at night and as to the sounding of a bell) to be observed by the riders of the same, does not include the power given in sections 78 and 79 of the Highway Act, 1835, to apprehend without a warrant; and, therefore, a police-constable who sees a person offending against such regulations by riding at night without a lighted lamp, and who, in order to ascertain the name and address of the offender, who refuses to stop, lays hold of and stops the bicycle, and thereby throws the rider off the bicycle, commits an assault upon such offender.—HATTON *v.* TREERY, *Q.B.D.*, 6.

14. *Highway—Bridge repairable* ratione tenuræ—*Recovery of expenses incurred by district council in effecting repairs—Local Government Act*, 1894 (56 & 57 *Vict c.* 73), *s.* 25, *sub-section* 2.—By section 25, sub-section 2, of the Local Government Act, 1894, it is provided that, where a highway repairable *ratione tenuræ* is not repaired by the person liable to

repair when requested to do so by the district council, that body may place the highway in proper repair and recover from the person liable to repair such highway the necessary expenses of so doing.

Held, that the remedy provided by this sub-section is confined to the occupier of the land so chargeable, and does not impose any liability on the owner of the land who is not the occupier thereof to refund to the district council the expenses incurred by the latter in effecting such repair.—CUCKFIELD DISTRICT COUNCIL *v.* GORING, *Q.B.D.*, 541.

15. *Highway — Footway — Main road — County borough—Frontagers—Local Act—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11.—A local Act passed in 1871 gave power to the corporation of a municipal borough to order that in any street (whether or not a highway repairable by the inhabitants at large) footways should be made by the frontagers of such form, size, and materials as the corporation should direct, and provided that if the frontagers made default in the execution of the work the corporation might cause the work to be executed and recover the expense incurred in respect thereof from the frontagers.

Held, that where the municipal borough had, by virtue of the Local Government Act, 1888, become a county borough, the provisions of section 11 of that Act had not the effect of repealing the provisions of the local Act as regards streets which were main roads within the meaning of the Highways and Locomotives (Amendment) Act, 1878.—LODGE *v.* HUDDERSFIELD (MAYOR), *Q.B.D.*

16. *Justices—Private street works—Objection by frontagers — Insufficiency and unreasonableness — Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *s.* 7 (d).—The appellants, an urban authority, passed a resolution under section 6, sub-section 1, of the Private Street Works Act, 1892, to do what were "private street works" within that section. Such works did not include the widening of the particular street in question. Specifications and plans were prepared, and the appellants passed a resolution approving the same. The respondent, a frontager in the said street, objected, the ground of his objection being that the proposed works were "insufficient or unreasonable" within the meaning of section 7, clause (*d*), of the Act. It was proved before the justices that the proposed works were necessary and proper for the user of the street as a street. The justices held that the proposed works were "insufficient or unreasonable" within section 7, clause (*d*), on the ground that the street was too narrow and that the proposed works did not include the widening of it; and accordingly allowed the objection.

Held, that the jurisdiction of the justices upon an objection under section 7, clause (*d*), was limited to determining whether the proposed works were sufficient to effect the purpose proposed to be effected; and that the order of the justices should be quashed, as they had based their decision upon other considerations—viz., the widening of the street.—MANSFIELD (MAYOR) *v.* BUTTERWORTH, *Q.B.D.*, 650.

17. *Land—Purchase of—Land acquired for sewage works—Land "not required" for purpose—Land not immediately required—User of land—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), s. 175.—Circumstances under which lands acquired by a local authority under section 175 of the Public Health Act, 1875, shall be ordered to be sold as "not required for the purpose for which they were acquired" within the meaning of the section, in cases where the whole of the lands is not immediately required for the purpose.

Consideration of the question what is a lawful *interim* user of such land not immediately required.

A portion of lands which were bought by the defendants, and as to the greater part used, for the purpose of permanent sewage works, was used by them to receive dustbin refuse, and works had been executed thereon for this purpose.

Held, (1) that the whole of the lands were required for sewage purposes; (2) that the defendants had not dealt with any part of it so that it could not be used for sewage purposes, and the plaintiff was therefore not entitled to a declaration that any portion should be sold under section 175; and (3) that, though the works did not make that portion wholly unfit for sewage purposes, such user was injurious to its proper user for sewage purposes and inconsistent with the purpose for which the land was acquired, and was not a lawful user of the land.

Another portion of the same lands was used as a recreation ground, and a path had been made and some benches put there, and the defendants were alleged to intend making a lake and a bathing-place there.

Held, that it was not unlawful to permit this portion, which was not at the time required for the ultimate purpose for which it was acquired, to be temporarily used as a recreation ground, provided that care was taken to prevent any rights from being acquired over it which would interfere with the user of the land for its ultimate purpose whenever required; but

Held, on the evidence, that the defendants had contemplated using some of this portion for purposes which were not justifiable *interim* purposes. — ATTORNEY-GENERAL *v.* TEDDINGTON DISTRICT COUNCIL, *Ch.D. Romer, J.*, 88.

18. *London County Council—New street—Improvement charges — "Initial valuation" — Licensed premises—Evidence of takings and payments—Value of the tying covenant—"Trade interest"—London County Council (Tower Bridge Southern Approach) Act*, 1895 (58 & 59 *Vict. c. cxxx.*).—In estimating the "initial value" of licensed premises under the London County Council (Tower Bridge Southern Approach) Act, 1895, the arbitrator must not take into consideration the takings and payments, nor any tying covenant, as elements of the value of the site, nor must he take into consideration the takings and payments as evidence of value of the site and buildings, and such evidence should not be admitted even for the purpose of testing the evidence of witnesses.

In the case of a tying covenant in a lease whereof less than twenty-one years are unexpired, the value of the site and buildings must be treated as the same whether the covenant is considered or not, though the benefit of it may be differently apportioned between the lessor and lessee.

In estimating the value of the owner's estate and interest in the site and building, the tying covenant should be taken into consideration, as it is not a trade interest within section 36.—LONDON COUNTY COUNCIL AND CITY OF LONDON BREWERY CO.'S ARBITRATION, RE, *Q.B.D.*, 172.

19. *Nuisance—Non-removal of milk—"Building" —Dairies, Cowsheds, and Milk Shops Order*, 1885.—No. 29 of the Regulations of the London County Council as to Dairies, Cowsheds, and Milk Shops provides that every purveyor of milk shall, on any outbreak of infectious disease within the building or upon the premises in which he keeps milk

coming to his knowledge, remove all milk for sale from such building until it has been disinfected.

The respondent, a purveyor of milk, was tenant of a three-storied building, each floor of which was adapted for separate occupation, but with a central staircase common to each. He occupied the ground-floor for the purpose of his business, sublet the first-floor, and occupied the second-floor as a residence for himself and his family. One of his children had scarlet fever in a room on the second-floor.

Held, that this was an outbreak of infectious disease within the building in which the respondent kept milk, and, therefore, that the non-removal from the ground-floor of milk for sale there was an infringement by him of the above regulation.—LONDON COUNTY COUNCIL *v.* EDWARDS, *Q.B.D.*

20. *Practice—Costs—Action against corporation—Action for injunction—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (b).—By the Public Authorities Protection Act, 1893, s. 1, where, after the Act, "any action is commenced . . . against any person for any act done in pursuance or execution, or intended execution, . . . of any public duty or authority, the following provision shall have effect: (*b*) Wherever, in any such action, a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

Held, that the word "action," as used in the Act, referred to every action, and its generality ought not to be restricted, and therefore that an action for an injunction to restrain a municipal corporation from using a building as a small-pox hospital was within the Act.

Held, also, that the court had no discretion under the Act, and that, judgment having been given for the corporation in the action, the Act must be followed, and costs given as between solicitor and client.—HARROP *v.* OSSETT (MAYOR), *Ch.D. Romer, J.*, 391.

21. *Privies and water-closets—Powers of local authority—No general resolution—Notice to provide sufficient water-closet—Specification—Validity of notice—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 36.—The Public Health Act, 1875, provides by section 36 that if a house appears to the local authority to be without a sufficient water-closet, earth-closet, or privy, the authority shall by written notice require the owner or occupier "to provide a sufficient water-closet, earth-closet, or privy," and that "if such notice is not complied with," the authority may do the work and recover the expenses from the owner.

The plaintiff R. was the owner of a house, and on the 24th of November, 1897, the defendants served on him a notice that, as the house was without a sufficient water-closet he was "to provide a sufficient water-closet to the said house according to the specification given by this notice," and then followed the usual notice that if the work was not done the authority would enter and do the work, and a specification of the kind of water-closet to be put in.

In an action for an injunction to restrain the authority from entering,

Held, that the notice was bad on the ground that it did not allow the owner to comply with it by providing any other "sufficient" water-closet than that specified, although it was not given in pursuance of a general resolution without regard to the particular requirements.

Semble, that it might be bad also for leaving out the words "earth-closet or privy," which, according to the section, the premises should be without before the notice can be given.

In such a case the remedy of the plaintiff is not by appeal to the Local Government Board under section 268 of the Public Health Act, 1875, but appeals to that body lie only in cases where the question arises as to the sufficiency.—ROBINSON *v.* SUNDERLAND (MAYOR), *Q.B.D.*

22. *Provisional order—Construction of—Two provisional orders confirmed by Act of Parliament the same day—Inconsistency between.*—Where a provisional order gives power to a local authority to purchase an undertaking upon terms of issuing or transferring to the undertakers such an amount of stock as will produce by the interest or dividends thereon an "annuity" of 5 per cent. per annum upon the sum properly expended by the undertakers upon the undertaking, and chargeable to the capital account, the local authority can only exercise the power to purchase the undertaking by issuing or transferring "irredeemable" stock.

Where a subsequent provisional order took away the power of the local authority to issue "irredeemable" stock, the power to purchase given in the above form is then no longer exerciseable; and the fact that the two provisional orders were confirmed by Act of Parliament on the same day does not give the local authority implied power to issue irredeemable stock to carry out the power to purchase.—SHEFFIELD CORPORATION *v.* SHEFFIELD ELECTRIC LIGHT CO., *Ch.D. North, J.*, 485.

23. *Public Health—Local statute—Implied repeal of special by general Act—Paving expenses in street—Highway repairable by inhabitants at large—Liability of frontagers—Ashton-under-Lyne Improvement Act*, 1849 (12 & 13 *Vict. c. xxxv.*), *s.* 20—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 149, 150, 340.—Under a local Act passed in 1849, if any street, whether repairable by the inhabitants at large or not, was not sewered, levelled, paved, and otherwise completed to the satisfaction of the urban authority, the latter might order the frontagers to execute the necessary works, and, upon the frontagers making default, might themselves execute the works and apportion the expenses among the frontagers.

By section 149 of the Public Health Act, 1875, all streets repairable by the inhabitants at large within any urban district were vested in the urban authority, who were bound to cause them to be levelled, paved, altered, and repaired as occasion might require. By section 150 the urban authority had power, in the case of streets not repairable by the inhabitants at large, to charge the expenses of sewering and paving them upon the frontagers.

Held, that there was nothing in the Public Health Act, 1875, which showed an intention to repeal the above provision of the local Act, and that, therefore, the urban authority could, under that section, charge the frontagers with the expenses of sewering, paving, and otherwise completing a street repairable by the inhabitants at large.—ASHTON-UNDER-LYNE (MAYOR) *v.* PUGH, *C.A.*, 100.

24. *Public health—Notice to provide sufficient water-closet—Validity of notice—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 36.—A local authority acting under section 36 of the Public Health Act, 1875, served a notice on the owner of a house requiring him to provide a sufficient privy on the waste water-closet system in accordance with plans which might be seen at the office of the borough surveyor.

Held, that such notice was not in compliance with the statute.

Decision of the Divisional Court (*ante*, p. 30) affirmed.—WOOD *v.* WIDNES (MAYOR), *C.A.*, 293.

25. *Rating—Drainage board—Classification of properties in district according to amount of benefit received—Proportionate rating—Legality of.*—Drainage commissioners, who have all the powers of commissioners of sewers in the levying of drainage rates, cannot classify the different rateable properties in their district and levy proportionate or differential rates upon properties in each class according to the supposed *quantum* of benefit received or danger avoided by the properties in that class; but they must levy an equal rate upon all properties in their district which are benefited by the works.—KNIGHT *v.* LANGPORT DRAINAGE BOARD, *Q.B.D.*, 392.

26. *Rating—Local Act—Limit imposed by—Public Health Act*, 1875, *s.* 207.—By the Crediton Improvement Act, 1836, after defining the limits of the town of Crediton for the purposes of the Act, the commissioners appointed thereunder were authorized to levy a rate within the limits of the Act not exceeding 2s. 1d. in the pound, and further, all persons assessed under the Act should be released from liability for repairs of highways outside the limits of the Act.

The commissioners are the urban authority under the Public Health Act, 1875, and by section, 207 of the Act if all expenses incurred by them in the execution of the Sanitary Acts, which at the time of the passing of the Act were payable out of a general district rate, then the expenses incurred by the authority in the execution of the Act of 1875 shall be paid out of such rate.

At the time of the passing of the Local Government Act, 1894, the parish of Crediton was partly within and partly without the urban district of Crediton, but by the County of Devon (Crediton) Confirmation Order, 1894, the urban district was extended to include the part of the parish outside the former urban district, and it was further provided that the district should be deemed to have been extended prior to the passing of the Act, and the part of the parish transferred by the Order was deemed not to have been in the rural sanitary district.

The appellant is the occupier of a dwelling-house and lands wholly within the limits of the Improvement Act.

On the 22nd of September, 1896, the Crediton Urban District Council made a rate for the whole district, including the added area, headed "The Crediton Improvement Rate for the year ending Midsummer, 1897."

The rate was at 3s. 6d. in the pound on all houses and buildings, &c., and 10½d. on arable meadow, &c.

The rate was levied to defray expenses to be incurred by the council under the Public Health Act, 1875, including the purposes for which the rates were leviable under the Improvement Act. The rate was for the repair of highways within the area of the Improvement Act, as in that Act defined, and also in the added area.

The court of quarter sessions amended the rate by expressing that it was also made under the Public Health Act, 1875, and so amended held the rate good. The appellant appealed.

Held, that, although a court of quarter sessions has power to amend a rate, the rate in the present case was bad, as it exceeded the limit imposed by the Improvement Act, for that Act was still in force and unaffected by subsequent legislation.—HILL *v.* CREDITON DISTRICT COUNCIL, *Q.B.D.*

27. *Rating—Retrospective rate—Judgment debt due from local authority*—Mandamus *to levy—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 230—In 1893 the T. Council agreed to supply the L. Rural Council with water on certain terms. In May, 1895, the T. Council demanded of the L. Council payment of £92 for water supplied in excess of the minimum quantity. The L. Council complained of a breach of contract on part of the T. Council, and claimed to be entitled to damages. In March, 1897, the T. Council brought an action to enforce their claim; and the L. Council delivered a counter-claim. In May, 1897, judgment by consent was entered for the plaintiffs for £63. In October, 1897, the T. Council obtained a rule *nisi* for a *mandamus* to the L. Council to levy a rate to pay the judgment debt. In January, 1898, the rule was made absolute. The L. Council contended that they had no power to make a retrospective rate.

Held, that, inasmuch as the debt due from the L. Council was not ascertained till the judgment, and the *mandamus* was obtained within the rating year, the rate which was ordered was not retrospective.

Held, also, that, even if it was retrospective, yet, being not a poor rate, but a rate for special expenses, excuse might be shown for not having moved for a *mandamus* earlier, and that in this case ample excuse had been shown.—REG. *v.* LEIGH DISTRICT COUNCIL, *C.A.*, 471.

28. *Rating—Water supply—Water rates—Water rents—Contributory place—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 229.—When a district council provide a supply of water to a contributory place, in pursuance of section 51 of the Public Health Act, 1875, it is within their discretion how much of the sum required to meet the expenses of such supply shall be raised by water rates and water rents. The residue may be raised by a rate upon the contributory place, as for special expenses, under section 229.

Semble, section 229, by which the expenses of providing a water supply to any contributory place are made special expenses, includes such supply to a part of a contributory place.—HORN *v.* SLEAFORD DISTRICT COUNCIL, *Q.B.D.*, 555.

29. *Sewer—Bye-law—Cesspools—Conduit.*—B., the owner of certain houses, constructed a series of cesspools for their drainage on his own land. He then constructed a conduit, which conveyed the overflow therefrom to a larger cesspool. He was summoned for constructing these cesspools so as to have an outlet into a sewer—viz., the conduit and the large cesspool, contrary to the local bye-law.

The magistrates were of opinion that the conduit, being used for the drainage of several dwelling-houses occupied by different persons, was a sewer, and that an offence had been committed.

Held, that the magistrates were wrong, and that the appellant had not constructed these cesspools contrary to the bye-law.—BUTTON *v.* TOTTENHAM COUNCIL, *Q.B.D.*

30. *Sewers—Factory refuse*—Mandamus—*Complaint to Local Government Board—Public Health Act*, 1875 (*c.* 55), *ss.* 15, 299—*Rivers Pollution Prevention Act*, 1876 (*c.* 75), *s.* 7.—The duty of a local authority, under section 15 of the Public Health Act, 1875, to make such sewers as may be necessary for effectually draining their district for

the purposes of that Act, cannot be enforced by an action for *mandamus* brought by a private person; the only remedy for neglect of the duty is that given by section 299 of the Act, a complaint to the Local Government Board.

The decision of the Court of Appeal in *Peebles* v. *Oswaldtwistle Urban District Council*, [1897] 1 Q. B. 625, affirmed. — PASMORE *v.* OSWALDTWISTLE DISTRICT COUNCIL, *H.L.*

31. "*Sewer*" *or* "*drain*"—*Land drains constructed by railway company—Sewer made for draining land under a local or private Act—Vesting in local authority—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *s.* 68—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13.—The special Act of a railway company expressly incorporated the provisions of the Railways Clauses Consolidation Act, 1845, and, pursuant to such last-mentioned Act, the railway company laid down pipes and constructed certain drains for the purpose of carrying away water from lands lying near the railway. Down such pipes and drains, but without the knowledge of the railway company, some sewage from houses erected on adjoining lands within the district of the local authority found its way.

Held, affirming the decision of Stirling, J. (*ante*, p. 121), that the drains were sewers within the meaning of the Public Health Act, 1875, but, being made under a private Act of Parliament, fell within the second exception contained in section 13 of the Public Health Act, 1875, and were consequently not vested in the local authority.—LONDON AND NORTH-WESTERN RAILWAY CO. *v.* RUNCORN COUNCIL, *C.A.*, 484.

32. *Sewer made for profit—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 13 (1)—*Highways Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 66, 67.—The word "profit" in section 13 (1) of the Public Health Act, 1875, is not to be restricted to a direct money payment, and where a sewer is made, not for sanitary or mere ordinary drainage purposes, but in order to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, it will be deemed to have been made for the profit of the occupier within the meaning of that section.—CROYSDALE *v.* SUNBURY-ON-THAMES DISTRICT COUNCIL, *Ch.D. Stirling, J.*, 667.

33. *Street—Charges for paving, &c.—Duty imposed by Act of Parliament—Memorial to Secretary of State—West Hartlepool Extension and Improvement Act*, 1870 (38 & 39 *Vict. c. cxiii.*), *ss.* 3, 69, 80, 82, 349, 350—Where one of two adjoining owners laid out a strip of land 18ft. wide at the edge of his land to make a road, the other agreeing to give a similar strip to make the road 36ft. wide,

Held, under the West Hartlepool Extension and Improvement Act, 1870, that the 18ft. strip so first laid out was a "street" and not merely part of a street, and that, therefore, charges for paving, &c., that strip could properly be made and enforced against the other owner, notwithstanding that he had laid out the agreed additional strip, and had paved and made it good at his own sole expense.

If such charges constitute, in the circumstances, any hardship upon the owner, his remedy is, under section 349 of the Act, to appeal to the Secretary of State by memorial for relief.

Decision of Stirling, J. (45 W. R. 312), affirmed. —WEST HARTLEPOOL (MAYOR) *v.* ROBINSON, *C.A.*, 218.

34. "*Street*"—*Sewering—Powers*—"*Highway repairable by the inhabitants at large*"—*Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 5, 6. —The definition of "street" in the Private Street Works Act, 1892, s. 5, excludes "a highway repairable by the inhabitants at large."

By section 6 an urban authority is empowered, with respect to streets, to do certain sewering works.

An urban authority proposed to do sewering works in a certain place in their borough. The place in question (which was called a street) was formed before 1816, and had always been open at both ends into highways, and the place and buildings had existed in the same condition for seventy years, and since its formation the way had been used by foot-passengers without interruption. Neither public nor private repairs were proved.

On a case stated on the hearing and determination by justices of objections to the proposed works,

Held, that the place in question was not a "street" within the meaning of the Act, being a footway repairable by the inhabitants at large, and therefore the urban authority had no power to execute the proposed works.—RISHTON *v.* HASLINGDEN CORPORATION, *Q.B.D.*

35. *Transfer of areas—Adjustment—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 68.—By the Local Government Act, 1894, s. 68, (1) when any adjustment is required for the purpose of this Act, or of any order . . . under this Act, then, if the adjustment is not otherwise made, the authorities interested may make agreements for the purpose, and may thereby adjust any property, income, debts, liabilities, and expenses so far as affected by this Act, or such scheme, order, or thing of the parties to the agreement; (2) in default of an agreement, and as far as any such agreement does not extend, such adjustment shall be referred to arbitration in accordance with the Arbitration Act, 1889, . . . and his (the arbitrator's) award may provide for any matter for which an agreement might have provided.

By an order of the L. County Council a part of the township of B. was detached from the R. Union, and was included in the H. Union.

The guardians of the R. Union gave notice that this detachment caused them a loss and demanded adjustment by arbitration.

Held, that an adjustment was necessary, and that in making such adjustment the amount of the outstanding loans chargeable upon the common fund of the R. Union, the large amount of workhouse accommodation provided by the R. Union, and the unsuitability and unfitness of a great part of the R. Workhouse for the purposes for which it was provided, should be taken into consideration, as the loan and the workhouse would both require adjustment.

Also, though the fact of the large number of paupers requiring relief in the R. Union owing to the situation and dense population of the town of R., the absence of pauperism in the transferred area, the loss of contribution in that area, and the increase of rates leviable in the remainder of the R. Union by reason of such transfer, might not if it stood without the other considerations need adjustment, yet when adjusting the other matters it might rightly be taken into consideration.—ROCHDALE UNION *v.* HASLINGDEN UNION, *Q.B.D.*

36. *Unsanitary area acquired under the Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70) —*Improvement scheme—Provisional order—Confirmatory Act—Valuation for compensation—Property in premises acquired—Reversioner—Right to use*

—*Costs — Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *ss.* 4, 5, 6, 7, 8, 12, 20, 21. —Where property in an unhealthy district is compulsorily acquired by a local authority under the Housing of the Working Classes Act, 1890, persons interested therein retain all their legal rights in respect of the same until the provisional order made in respect thereof under section 8 of the Act has been confirmed by Act of Parliament under sub-section 6 of section 8.

Where property is taken under this Act the estimate of the value payable by way of compensation under section 21 is not limited to the value of the property as given in the estimate made under the improvement scheme provided for by sections 4 and 6.—DYE *v.* PATMAN, *Ch.D. Byrne, J.*, 200.

37. *Vendor and purchaser—Burial—Purchase of land by district council for—Action for injunction under Burial Act*, 1855 (18 & 19 *Vict. c.* 128), *s.* 9 —*Costs—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61).—The rule that a grantor cannot derogate from his own grant disentitles the vendor of land for the purposes of a cemetery from claiming the benefit of the prohibition in section 9 of the Burial Act, 1855, against burying within 100 yards of a dwelling-house, in respect of a house situate on other land of the vendor; and a lessee or occupier thereof, after and with full knowledge of the vendor's grant, cannot be in a better position than his own grantor.

In the above action, which was for an injunction under section 9 of the Burial Act, 1855, to restrain a district council from using land for the purposes of a cemetery within 100 yards from the plaintiff's dwelling-house, judgment was accordingly given for the defendants.

The defendants then claimed that they were entitled as of right to costs as between solicitor and client by virtue of the Public Authorities Protection Act, 1893.

Held, that the action was for an "act done in pursuance of public duty, and was therefore one to which the Act applied.—TOMS *v.* CLACTON DISTRICT COUNCIL, *Ch.D. Romer, J.*, 629.

See also Charity, 2, 3; Corporation, 4; Election Law, 1, 2; Highway, 9; Justices, 3; Poor Law, 4, 12.

LOCKE-KING'S ACT.—See Partnership, 2.

LONDON BUILDING ACTS.—See Metropolis, 1-6.

LUNACY:—

1. *Conditional devise to lunatic—Performance of condition by committee of lunatic's estate—Benefit of lunatic—Jurisdiction of court to order performance—Statute* De Prerogativa Regis (17 *Edw.* 2, *statute* 1, *c.* 10)—*Lunacy Act*, 1890 (53 *Vict. c.* 5).—Notwithstanding the statute *De Prerogativa Regis*, the court has power, under its general jurisdiction, to direct the committee of the estate of a lunatic to elect on behalf of the lunatic to accept a devise of land made to him, on condition that the devisee should within a year from the death of the testator execute a re-settlement of certain family estates, and to execute on behalf of the lunatic a re-settlement of those estates.—SEFTON (EARL), RE, *C.A.*

2. *Lunatic judgment debtor — Maintenance — Receiver—Execution—Seizure by sheriff—Priority—Lunacy Act*, 1890 (53 *Vict. c.* 5), *ss.* 116, 117.—The Court in Lunacy cannot deprive execution creditors of a lunatic of their rights over his property not under the control of the court when seized under legal process.

The property of a lunatic, though coming within the jurisdiction of the Crown as soon as a summons in Lunacy is issued, is not withdrawn from legal process by a creditor of the lunatic until an order is made showing that the Crown has actually taken the property of the lunatic under its protection.

In Re Winkle, 42 W. R. 513, [1894] 2 Ch. 519, explained.—CLARKE, RE, *Lun.*, 337.

3. *Lunatic out of jurisdiction—Property within jurisdiction—Curator according to law of Jersey—Right to transfer—Discretion.*—A lunatic who was resident in Jersey owned stock and shares in this country. The curator of the person and property of the lunatic appointed according to the law of Jersey applied for a transfer to him of such stock and shares.

Held, that, under section 134 of the Lunacy Act, 1890, the court had a discretion to refuse such transfer.

In re Brown, 44 W. R. 17, [1895] 2 Ch. 666, considered.—KNIGHT, RE, *Lun.*, 289.

4. *Lunatic sole trustee—Government stock—Vesting order—Transfer of stock—Form of order—Lunacy Act*, 1890 (53 *Vict. c.* 5), *ss.* 136 (1) (4), 137.—Where a vesting order is made under sub-section 1 of section 136 of the Lunacy Act, 1890, with reference to Government stock standing in the name of a lunatic trustee, the order should direct the person in whom the right to call for a transfer, and to transfer the stock, and to receive the dividends due and to accrue due thereon, is vested, to transfer the stock into his own name, to be held by him upon the trusts applicable thereto.

Re Gregson, [1893] 3 Ch. 233, approved and followed.

Such an order is not an order appointing a person to make a transfer of stock within the meaning of section 137 of the Act of 1890, and it is not necessary to appoint an officer of the Bank of England to make the transfer.—G——, RE, *C.A.*

5. *Maintenance—Committee of person—Liability to account—Allowance paid quarterly in advance—Death of lunatic before expiration of quarter.*—Payment was made quarterly in advance by the committee of a lunatic's estate to the committees of the person of a fixed annual sum which the master had allowed for the lunatic's maintenance, but the order in lunacy did not expressly authorize payment to be made in advance. The lunatic having died shortly after the beginning of the fourth quarter, for which the allowance had been paid in advance as usual, the executors of the lunatic brought an action against the committees of the person to recover so much of the said quarterly allowance as had not been expended in the maintenance of the lunatic.

Held, that, inasmuch as the lunatic was only maintained for nine months and a few weeks, and the committees of the person had received a whole year's allowance, the lunatic's executors were entitled to recover such part as could not be said to have been properly expended by the committees in her maintenance, regard being had to the provisions of the order in lunacy.

The observations of Lord St. Leonards in *In re Ponsonby*, 3 Dru. & War. 27, 31, 2 Connor & L. 30, 32, must be considered to be made with regard to the ordinary case where the lunatic is properly maintained for the whole year.—STRANGWAYS *v.* READ, *Ch.D. Romer, J.*, 671.

6. *Person of unsound mind not so found—"Lawfully detained"—Determination of reception order—Effect of—Lunacy Act*, 1890 (53 *Vict. c.* 5), *s.* 116, *sub-section* 1 (c).—Where an order had been made by the judge in lunacy, under sub-section 1 (c) of section 116 of the Lunacy Act, 1890, it does not come to an end by the mere fact of the person to whom it refers ceasing to be under detention; but an order is required to discharge the lunatic, and the discretion to make such an order ought not to be exercised unless the court is satisfied that the delusions under which the lunatic was suffering have ceased.—S——, RE, *C.A.*

See also Administration, 3; Probate, 8; Will, 25.

MALICIOUS INJURIES ACTS. — See Criminal Law, 7-9.

MANDAMUS:—

Refusal to produce minutes of burial board to ratepayer—Application not bonâ fide—*Ulterior motive—Burial Act*, 1852 (15 & 16 *Vict. c.* 85), *ss.* 16, 17.—By the Burial Act, 1852, s. 16, the minutes of the burial board are to be entered in a book, and by section 17 "all such books are to be open to the examination of every . . . ratepayer . . . who may take copies," and if this is not permitted there is a penalty of £5. A ratepayer named Hatton made an application to the district council of Wimbledon, being the burial board, for his solicitors to inspect and take copies of these minutes. Those solicitors were acting for a company, who for another matter wished to obtain inspection of those books. The board refused to allow the solicitors to inspect, on the ground that the ratepayer alone was the person to whom they were bound to produce the books, and that the present application was not made *bonâ fide*, but for another purpose, that was indirectly obtaining inspection on behalf of the company for whom the solicitors were also acting.

Held, that the court would not in the exercise of their discretion make absolute this rule for a writ of *mandamus*, as the application was not made *bonâ fide* for the purpose of the ratepayer, but for another purpose.—REG. *v.* WIMBLEDON COUNCIL, *Q.B.D.*

See also Election Law, 2; Justices, 5, 7, 8; Licensing Law, 2; Local Government, 27, 30; Metropolis, 2.

MARRIED WOMAN:—

1. *Bankruptcy — Married woman not trading separately from her husband — Receiving order — Marriage after petition presented—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 5.—A receiving order in bankruptcy cannot be made against a married woman not trading separately from her husband, notwithstanding that she was a spinster when the debt was incurred, judgment obtained, the act of bankruptcy committed, and the petition presented, and when, at a preliminary hearing of the petition, she admitted the debt and the act of bankruptcy.—DEBTOR, A, RE, *C.A.*, 675.

2. *Bankruptcy—Money lent for private purposes—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.—Section 3 of the Married Women's Property Act, 1882, does not apply to a case where money has been advanced by a wife to her husband for purposes other than that of the husband's trade or business.—CLARK, RE, SCHULZE, EX PARTE, *C.A.*, 678.

3. *Protection order—Power to contract debts—Appointment—Liability of appointed fund for debts—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 4—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1 (a), (b), (c)—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 21, 25, 26.—A married woman who has obtained a protection order under the Matrimonial Causes Act, 1857, is to be regarded as, for the purpose of contracting, a *feme sole*. Consequently funds appointed by her by a will exercising a general power of appointment will become liable for a debt contracted by her after the protection order, but before the creation of the power of appointment, and before the passing of the Married Women's Property Act, 1882.

Judgment of Kekewich, J. (*ante*, p. 220), affirmed.—HUGHES, RE, BRANDON *v.* HUGHES, *C.A.*, 502.

4. *Restraint on anticipation—Life interest determinable on condition*—Bonâ fide *but incorrect admission that condition had been fulfilled—Estoppel.*—A married woman, who had, subject to a restraint on anticipation, a life interest in certain estates determinable on her coming into an income of £8,000 a year, executed a deed-poll whereby she admitted that she had come into £8 000 a year and released her life interest.

A mortgagee of her husband, relying on this deed, entered into certain arrangements for the benefit of her husband. It was subsequently discovered that the married woman had not in fact come into £8,000 a year.

Held, that a married woman could not, by an incorrect admission, deprive herself of the benefit of the restraint on anticipation, even though by the admission she had induced someone else to alter his position for the worse.

Judgment of Kekewich, J. (*ante*, p. 151), affirmed.—BATEMAN (LADY) *v.* FABER, *C.A.*, 215.

5. *Separate estate—Restraint on anticipation—Judgment against married women—Marriage settlement—Divorce—Second marriage—Appointment of receiver.*—By a settlement made upon the marriage of the defendant with P. her property was settled upon trust to pay the income to her for life for her separate use without power of anticipation, and there was an ultimate trust for her absolutely if she survived P. The defendant obtained a divorce from P. and subsequently married E. There was no evidence whether P. was alive or not. The plaintiff obtained judgment against the defendant as a married woman, and then obtained an order appointing a receiver of her interest under the settlement.

Held, that the restraint on anticipation became operative upon the second marriage, and, that, therefore, an order for a receiver ought not to have been made.—STROUD *v.* EDWARDS, *C.A.*

6. *Separate property—Removal of restraint on anticipation—Charge for payment of husband's debts—Wife's right to indemnity—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 39.—If a married woman raises money for payment of her husband's debts by means of a charge upon her separate property, the presumption in equity ordinarily is that her husband becomes bound to indemnify her; but this is merely an inference of fact, and may be excluded, without express waiver of her right, by the circumstances of the particular case.

Effect of orders creating such a charge upon property subject to a restraint on anticipation, and not reserving any right to indemnity, considered.

Where the money was raised for the purpose of

providing means for both husband and wife, who were living together in an expensive style, and of averting the bankruptcy of the husband, which would have seriously affected the social position of both,

Held, on the whole facts of the case, that no presumption arose of a right to be indemnified.

Decision of Kekewich, J. (*ante*, p. 232), affirmed. —PAGET *v.* PAGET, *C.A.*, 472.

7. *Testamentary capacity—Assent by husband to will—Practice of Probate Division.*—A married woman, who died in 1892, and who had no power of disposition by will, except with the assent of her husband, bequeathed all her property to her husband, subject to the payment of a legacy of £10,000, and appointed him sole executor. The husband proved the will generally in accordance with the ordinary practice of the Probate Division.

Held, that, as probate of a married woman's will is now granted only in general terms, the husband had not estopped himself from saying that he had not assented to the dispositions therein contained. —ATKINSON, RE, WALLER *v.* ATKINSON, *Ch.D. Stirling, J.*, 439.

8. *Vendor and purchaser—Mortgagee—Conveyance to purchaser—Concurrence of husband—Acknowledgment—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1—*Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *s.* 77.—A married woman who is a mortgagee of real estate can convey the same without the concurrence of her husband or acknowledgment of the deed of conveyance by her.

In re Harkness and Allsopp's Contract, 44 W. R. 683, [1896] 2 Ch. 358, distinguished.—BROOKE AND FREMLIN'S CONTRACT, RE, *Ch.D. Kekewich, J.*, 442.

See also Domicil; Insurance, 3; Justices, 11, 12; Probate, 9-11; Settled Land, 2.

MASTER and SERVANT:—

1. *Apprentice—Employed not with master—Master's consent—"Duly and truly serve."*—An apprentice "duly and truly" serves his master if, with that master's consent, he is employed otherwise than actually by that master during the term of apprenticeship.—RICHARDSON *v.* COLNE FISHERY Co., *Q.B.D.*

2. *Contract—Domestic service—Custom—Reasonableness—Notice during first fortnight to determine service at end of first month.*—A custom with regard to the hiring of domestic servants, that, in the absence of special contract, there is a right for either party by notice given during the first fortnight of the service to determine the service at the end of the first month, is not a notorious custom of which judicial notice will be taken. But such a custom is not unreasonable, and, if its existence were proved by evidence in any particular case, the court would give effect to it.—MOULT *v.* HALLIDAY, *Q.B.D.*, 318.

3. *Injury of workman—Defect in plant—Chartered ship—Gang employed by agent of defendants—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1 (1), (2), (3).—The defendants were coal contractors, and contracted to supply coal to the London, Brighton, and South Coast Railway. They ship coal at Cardiff in vessels belonging to the London, Antwerp, and Continental Steam Navigation Co. to be carried to Newhaven.

The defendants have to unload the coal there, and engage agents to employ a gang to carry out the work.

One of their agents, W., had a gang unloading the vessel, amongst whom was the plaintiff.

Owing to the hold of the vessel not being properly ventilated there was an accumulation of gas, and when the hatch was removed a violent explosion took place, and the plaintiff was injured.

Held, that the injury was caused by the defective "plant" of the defendants.—CARTER *v.* CLARKE, *Q.B.D.*

4. *Trades union—Procuring dismissal of servant—Intention to injure—Malice—Motive—Cause of action.*—Outside the criminal law an act lawful in itself does not cease to be so, no matter how reprehensible the motive for doing it may be. The existence of a bad motive is therefore immaterial when considering whether an act is a civil wrong or not.

To induce employers, therefore, to dismiss their workmen, and not to employ them in future, in consequence of which the workmen suffer loss, is not, where no breach of contract is involved, a wrongful act, whatever the motive for doing it may be.

Decision of the Court of Appeal (43 W. R. 453, [1895] 2 Q. B. 21) reversed (Lord Halsbury, L.C., and Lords Ashbourne and Morris dissenting.)

Keeble v. *Hickeringill*, 11 East 574n; *Lumley* v. *Gye*, 1 W. R. 432, 2 E. & B. 216; and *Temperton* v. *Russell*, 41 W. R. 565, [1893] 1 Q. B. 715, considered.—ALLEN *v.* FLOOD, *H.L.*, 258.

5. *Tramway company—Conductor—Scope of employment—Alleged counterfeit coin—Giving into custody—Liability of company.*—The plaintiff Knight was travelling in one of the defendant company's trams, and tendered sixpence in payment of the fare, and received fourpence change. Shortly after, the conductor alleged it was counterfeit, and, on the plaintiff refusing to give another, the conductor gave him in charge. An inspector of the company, who happened to be passing, sent the conductor down to charge the plaintiff, and went on with the tram. The next morning the magistrate dismissed the charge, the sixpence turning out to be a good one. Another inspector of the company was present in court during the proceedings. In an action against the tramway company for malicious prosecution and false imprisonment,

Held, that there was no evidence to show that the conductor acted within the scope of his authority express or implied, or that the defendant company ratified his proceedings.—KNIGHT *v.* METROPOLITAN TRAMWAYS Co., *Q.B.D.*

See also Contract, 3, 6; Criminal Law, 10; Railway, 3.

MAYOR'S COURT.—See Practice, 25.

MERGER.—See Tolls.

METROPOLIS:—

1. *Building—"Dwelling-house"—"To be inhabited or adapted to be inhabited by persons of the working class"—London Building Act*, 1894 (57 & 58 *Vict. c. cxxiii.*), *ss.* 5 (25) (26) (27) *and* 13 (5).—By section 13 (5) of the London Building Act, 1894, a building may, without the consent of the London County Council, be re-erected on the site of buildings existing at the passing of the Act, though such site is within the prescribed distance of the centre of the roadway, subject to the proviso that, if such new building be a "dwelling-house to be inhabited or adapted to be inhabited by persons of the working class," it shall not exceed in height

the distance of its front wall from the opposite side of the street.

Held, that "to be inhabited" here means intended when erected to be so inhabited, and "adapted to be inhabited" means structurally adapted to be so inhabited.

Held, further, that a public building in the nature of a hotel for poor men is not a dwelling-house within the proviso.

Held further, that, though a building is a "public building" within the definition in section 5 (27), it may also be a "dwelling-house" within section 13 (5).

Per Channell, J.: By "working class" in this section is meant that class of persons who ordinarily live in such a condition of life that overcrowding is likely to take place.

Per Channell, J.: *Quære*, whether in section 13 (5), where height of dwelling-houses is regulated by distance of their front wall from the opposite side of the street, "street" does not mean a roadway on the opposite side of which buildings are or may possibly be erected. — LONDON COUNTY COUNCIL *v.* DAVIS; SAME *v.* ROWTON HOUSE CO., *Q.B.D.*

2. *Building*—Mandamus—*Service of summons—Unknown owner — Dangerous structure—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 1—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*) *s.* 188 (i.).—By section 188 of the London Building Act, 1894, it is enacted that any notice, order, or other document required or authorized to be served under that Act, the service of which is not provided for by the Summary Jurisdiction Acts, the Lands Clauses Acts, or the Companies Clauses Consolidation Act, 1845, may be served, among other ways, by delivering the same to some person on the premises to which it relates, or, if the premises are unoccupied, then by affixing a copy of the summons on some conspicuous part of the building.

The magistrate before whom a summons, addressed only "To the Owner" of certain premises, was returnable, refused to hear the summons in the absence of the defendant because the complainant failed to offer evidence either that he had made all reasonable inquiries to ascertain, before serving the summons in this way, who the owner of the premises was, or that, if such inquiries had been made, in all probability the owner would not have been found, or that the premises were in fact unoccupied.

Held, that, in the absence of such evidence, the procedure under the Summary Jurisdiction Acts must be followed, and that the magistrate was right in refusing to hear the summons.—REG. *v.* MEAD, *Q.B.D.*, 61.

3. *Building—New street—"Direct communication"—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 9, *sub-section* 4.—Section 9 of the London Building Act, 1894, gives power to the county council to refuse their sanction to the formation of a new street where such street would not afford "direct communication" between two existing streets.

Held, that the question whether a proposed new street did or did not afford such direct communication was a question of fact, with the decision of which the court would not interfere.—WOODHAM *v.* LONDON COUNTY COUNCIL, *Q.B.D.*

4. *Building—Notice to set back — Forecourt — Boundary wall—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 14.—The London County Council are not empowered by section 14 of the London Building Act, 1894, to give notice requiring the owner or occupier of land, upon part of which he has erected a new building, to set back an old boundary wall forming the boundary of a forecourt left between the new building and a street, so that the wall shall not be at less than the prescribed distance from the centre of the street.—LONDON COUNTY COUNCIL *v.* AYLESBURY DAIRY CO., *Q.B.D.*

5. *Building—Rebuilding on old site — Certified plans of old building—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 41, 43.—A person intending to erect a domestic building on the site of a domestic building existing at the commencement of the London Building Act 1894, may by section 43 of that Act submit to the district surveyor for certification "plans showing the extent of the previously-existing domestic building in its several parts," and on getting a certificate of the accuracy of the plans may build, provided he does not deviate in any respect from the certified plans, without regard to the restrictions imposed by the Act upon the erection of new buildings.

Held, that the plans which he must get certified under that section are not confined to ground plans or basement plans, but include plans showing every part of the building in every direction in which it extends.—PAYNTER *v.* WATSON, *Q.B.D.*, 655.

6. *Building—Temporary structure—Erected without licence—Metropolis Management and Building Act*, 1882 (45 *Vict. c.* 14), *s.* 13—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 215.—Section 215 of the London Building Act, 1894, saves only rights and liabilities actually acquired, accrued, or incurred under the Acts repealed by it at the time the London Building Act, 1894, came into operation.

Section 13 of the Metropolis Management and Building Act, 1882 (45 Vict. c. 14), forbids the erection of temporary structures without the written licence of the London County Council. Section 215 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), which came into operation on the 1st of January, 1895, repeals the Metropolis Management and Building Act, 1882, but enacts that the repeal shall not affect any right or liability "acquired, accrued, or incurred under or in accordance with any enactment hereby repealed," or any legal proceeding or penalty in respect of any such liability "as aforesaid."

A., before the 1st of January, 1895, erected a temporary structure without the licence of the London County Council, and thereby made himself liable under the Metropolis Management and Building Act, 1882, to a penalty for erecting it, and also to a penalty for each day he continued it. A. continued this structure until less than six months immediately preceding the 17th of May, 1897, on which day the London County Council applied for a summons against him for an offence under section 13 of the Metropolis Management and Building Act, 1882.

The magistrate refused the summons on the ground that the only liabilities saved by section 215 of the London Building Act, 1894, were liabilities actually incurred on or before the 1st of January, 1895, and that proceedings for these were barred by section 11 of the Summary Jurisdiction Act, 1848. On appeal,

Held, that the magistrate's decision was right.—REG. *v.* CLUER, *Q.B.D.*

7. *Drain—Sewer—Liability to repair—Approval of vestry and Metropolitan Board of Works—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.*

120), *ss.* 68, 69, 74, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 47, 48, 61.—In 1866 the owners of a block of houses laid down a certain system of drainage, whereby the houses were drained into a pipe which was connected with a sewer belonging to the vestry. No order was made by the vestry for this purpose, nor had the approval of the Metropolitan Board of Works been obtained.

Held, that the pipe was a sewer vested in the vestry, and repairable by them.

Decision of the Court of Appeal ([1896] 2 Q. B. 319, 45 W. R. Dig. 99) affirmed.—ST. MATTHEW, BETHNAL GREEN, VESTRY *v.* LONDON SCHOOL BOARD, *H.L.*, 353.

8. *Nuisance—Defective sewer—Notice served on owner—Abatement of nuisance by owner—Right of owner to recover expenses incurred from sanitary authority—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4. 11.—The plaintiff was the owner of two adjoining houses at which a nuisance existed caused by defective drainage. The defendants, the sanitary authority of the district, served a notice in respect of each house, under sections 2 and 4 of the Public Health (London) Act, 1891, addressed to the owner or occupier of the premises, requiring the nuisance to be abated by the construction of a new drain. The ground was opened up by the plaintiff, and it was discovered that the pipe in question carried off the drainage of both houses; but the plaintiff, under the erroneous impression that the two houses were so drained under the authority of an order for a combined system of drainage, did the necessary work for the abatement of the nuisance. It was subsequently ascertained that the draining of the two houses into one drain was unauthorized, and consequently the pipe in question was a sewer, for the repair of which the defendants were responsible.

Held, that the plaintiff had been legally compelled to expend money in doing work which the defendants were liable to do, and was entitled to recover from the defendants, under section 11 of the Act, the amount expended by him in abating the nuisance.

Gebhardt v. *Saunders*, 40 W. R. 571, [1892] 2 Q. B. 452, followed.—ANDREW *v.* ST. OLAVE'S BOARD OF WORKS, *Q.B.D.*, 424.

9. *Sewer—Drain for drainage by combined operation—Evidence of order of vestry—Unauthorized connection between drains—Nuisance—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 74, 250. —A metropolitan vestry produced from their records a plan submitted in 1874 by the present appellant for drainage of a group of houses belonging to him by means of a single pipe, bearing on it an application by the owner of the houses to the vestry for their sanction to the proposed work, and evidence was given that the plan was carried out under the superintendence of the officers of the vestry. At a subsequent date the owner of adjoining premises, without authority and without the knowledge of the parties to this appeal, connected with this pipe for the draining by a combined operation the appellant's houses in question, a pipe to carry off sewage from his stables. The drainage became defective, and the question was whether the appellant or the vestry was to abate the nuisance.

Held, that there was evidence upon which it might be inferred that the houses had been drained by a combined operation by an order of the vestry within the meaning of section 74 of the Metropolis Management Act, 1855, and therefore if the drain had been used only for the purposes for which it was originally made the vestry would not have been responsible for the repairs now necessary. The connection, however, of a drain from other premises, although unauthorized, rendered the original "drain" a "sewer" within section 250 of that Act, and it was therefore now repairable by the vestry.

Holland v. *Lazarus*, 45 W. R. Dig. 99, considered and approved.—GREEN *v.* NEWINGTON VESTRY, *Q.B.D.*, 624.

10. *Street—Print distributed by way of advertisement—Metropolitan Streets Act*, 1867 (30 & 31 *Vict. c.* 134), *s.* 9.—A printed sheet, consisting of a publication of news, which was distributed gratuitously with the object of advertising a newspaper, is not for that reason a print "carried or distributed by way of advertisement" within the meaning of section 9 of the Metropolitan Streets Act, 1867.—GAGE *v.* BRAELEY, *Q.B.D.*, 415.

MIDDLESEX REGISTRY.—See Bankruptcy, 14.

MINES:—

Metalliferous mines — Abandoned — Obligation to fence — Person interested in minerals — Derbyshire Mining Customs and Mineral Courts Act, 1852 (15 & 16 *Vict. c. clxiii.*)—*Metalliferous Mines Regulations Act*, 1872 (35 & 36 *Vict. c.* 77), *s.* 13.—A. was the owner of certain land in which there was a lead mine, containing, besides lead ore, calk and calcspar, minerals having a marketable value. By the mining customs of the county—as recognized by 15 & 16 Vict. c. clxiii.—any member of the public was entitled to work this mine for the lead ore, subject to his paying to the Crown (as Duchy of Cornwall) a certain royalty on all lead ore brought to the surface. The lead ore could not be got without raising the calk and calcspar, which were intermixed with it, and by the custom of the county A. was entitled to such calk and calcspar on its being separated from the lead ore. The mine having become abandoned, though both lead ore and calk and calcspar were still in it, the question arose who was liable to fence the mine under section 13 of the Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77).

Held, that A. was liable to fence it, as he was a person interested in the minerals of the mine within that section, inasmuch as (1) the calk and calcspar while in the mine were his property as part of his freehold; and (2) on being taken from the mine by one entitled to take them they were his property by the custom of the county.—STOKES *v.* ARKWRIGHT, *Q.B.D.*

MORTGAGE:—

1. *Assignment of fund—Notice—Purchase of mortgaged property—Payment off of incumbrance—Intention to keep alive.*—Where a person in possession of a fund on which others have charges has received notice of an assignment of his rights by one of the persons entitled to a charge, and nevertheless makes payments to the assignor, the rights of the several persons entitled to the charge, to what remains of the fund, cannot in any way be affected by such payments.

Where neither the deed nor the circumstances under which an assignment is executed show an intention to extinguish an incumbrance paid off, such incumbrance will not merge, but be considered as still existing.

Decision of the Court of Appeal (44 W. R. 612, [1896] 1 Ch. 726) reversed.—LIQUIDATION ESTATES PURCHASE CO. *v.* WILLOUGHBY, *H.L.*, 589.

2. *Equitable interest—Duty of trustee to pay to mortgagee—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 22, *sub-section* 1.—Though, by virtue of section 22, sub-section 1, of the Conveyancing Act, 1881, the trustees of a mortgaged equitable interest can, by paying to the mortgagee, obtain a good discharge, yet the trustees are not, as between themselves and the mortgagee, under any duty to pay to him. Where there are circumstances to cause reasonable doubt as to the mortgagee's right, the trustees are entitled to pay the money into court.

Order to pay to the mortgagee refused, on the trustees' undertaking to pay into court.

Decision of Kekewich, J., affirmed.

In re Bell, Jeffery v. *Sayles*, 44 W. R. 99, [1896] 1 Ch. 1, approved.—HOCKEY *v.* WESTERN, *C.A.*, 312.

3. *Equitable interest—Subsequent mortgage and settlement of equity of redemption—Notice—Priority.*—Although an assignment of an equitable interest is, as between assignor and assignee, perfect without notice to the trustees holding the trust property under a will or settlement, yet as between assignees notice is necessary to confer priority, and so long as the first assignee in point of date omits to give notice, it is competent to the assignor to make a title to a more diligent stranger. Accordingly, where the first mortgagee of an equitable interest does not give notice of his mortgage to the trustees of the fund, his security will be postponed in favour of a subsequent mortgage by the mortgagor and a settlement subject thereto of his equitable interest, notice whereof has been duly given to the trustees of the fund by the respective assignees.

The first mortgage, moreover, will operate to effect a forfeiture under the trusts of the settlement of the mortgagor's life interest thereunder, determinable on his charging or assigning the same.

Semble, that, if the subsequent mortgage and settlement formed in effect one transaction, and the trustees of the settlement had thereby covenanted to make further advances as part of the consideration for the mortgage, the element of obligation to make further advances so introduced would render inapplicable the doctrine of *Hopkinson* v. *Rolt*, 9 W. R. 900, 9 H. L. Cas. 514.

Manning v. *Chambers*, 1 De G. & Sma. 282, and *Seymour* v. *Lucas*, 8 W. R. 599, 1 Dr. & S. 177, followed.—WEST *v.* WILLIAMS, *Ch.D. Kekewich, J.*, 362.

4. *Principal not to be called in for three years if interest paid "punctually"—Payment within reasonable time after due date, whether "punctual"—Injunction to restrain sale by mortgagee.*—When a mortgage contains a proviso that the principal money shall not be called in for a specified period, if in the meantime the interest is "punctually" paid, the mortgagor, to entitle himself to the benefit of the proviso, must make each payment of interest on the day on which it becomes due.—LEEDS THEATRE OF VARIETIES *v.* BROADBENT, *C.A.*, 230.

4A. *Priorities—Notice—Equitable sub-mortgagees of mortgage of land.*—Where there were successive equitable sub-mortgagees of a mortgage of land, and the second sub-mortgagee in point of time gave notice to the original mortgagor,

Held, that the second sub-mortgagee did not obtain priority by means of being the first to give notice to the mortgagor.

In re Richards, Humber v. *Richards*, 63 L. T. Rep. 451, 45 Ch. D. 489, followed.—HOPKINS *v.* HEMSWORTH, *Ch.D. Kekewich, J.*

5. *Receiver—Arrears of interest due at date of appointment—Conveyancing Act*, 1881, *s.* 24 (8) (*iv.*).—A receiver appointed by a mortgagee under section 19 of the Conveyancing Act, 1881, is bound under section 24, sub-section 8, of that Act to pay arrears of interest due to the mortgage at the date of the receiver's appointment, and not merely interest accruing after that date.—NATIONAL BANK *v.* KENNEY, *V.C.* (*Ir.*).

6. *Right to redeem—Second mortgagee—Order* nisi *for foreclosure, with liberty to redeem—Chief clerk's certificate finding six months' interest due to first mortgagee—Second mortgagee seeking to redeem on payment only of interest to date.*—Where an order for foreclosure directed (in the usual form) that the second mortgagee should be at liberty to redeem on payment to the first mortgagee within six calendar months after the date of the chief clerk's certificate of what should be certified to be due, and the chief clerk's certificate included (in the usual way) interest to the end of the six calendar months so allowed for redemption,

Held, that the second mortgagee was not entitled to have the premises reconveyed to him on payment of the principal and costs, together with interest merely to the date of payment, but that payment of interest for the full period of six months was necessary.—HILL *v.* ROWLANDS, *C.A.*, 26.

7. *Tender—Cheque—Authority of solicitor of mortgagee—Payment under protest.*—A mortgagee's solicitor is not authorized to accept a cheque in payment of the debt due in respect of the mortgage unless he is expressly empowered to do so. The tender, therefore, of a cheque to a mortgagee's solicitor not having such express authority is not a good tender even though he consent to accept the cheque.

Decision of Kekewich, J. (45 W. R. 246), affirmed.—BLUMBERG *v.* LIFE INTERESTS SECURITIES CORPORATION, *C.A.*

See also Assignment, 1; Company, 7, 12, 31; Fixture, 1; Insurance, 3; Limitations, Statutes of, 3, 4; Married Woman, 8; Partition, 1; Practice, 39; Settled Land, 6; Solicitor, 8; Trustee, 5; Vendor and Purchaser, 8.

MORTMAIN.—See Will, 6.

NATAL, LAW of:—

Practice—Verdict—Jurisdiction of court as to setting it aside.—The law of Natal does not authorize judges to set aside a verdict as if they were a court of appeal upon questions of fact.

Where a jury had found that a binding agreement had been entered into between appellant and respondents, and had given a verdict for damages for its breach,

Held, that by the law of Natal the verdict could not be set aside unless it were one which the jury could not reasonably find.—PEARSE *v.* SCHWEDER, *P.C.*

NEGLIGENCE.—See County Court, 3; Fixture, 2; Insurance, 5; Principal and Agent, 4; Railway, 4; Ship, 3.

NEWFOUNDLAND, LAW of:—

Insolvency—Consolidated Statutes of Newfoundland, *c.* 90, *s.* 34—*Debts due to Government—Education Act*, 1892 (55 *Vict. c.* 5)—*Higher Education Act*, 1893 (56 *Vict. c.* 7).—Payments made by the

Colonial Treasury to a bank to the credit of the several boards of education established under the "Education Act, 1892," or the "Higher Education Act, 1893," do not constitute debts due to the Government within the meaning of the Colonial Insolvency Act.—FOX *v.* NEWFOUNDLAND GOVERNMENT, *P.C.*

NEW SOUTH WALES, LAW of:—

1. *Crown—Civil servant—Abolition of office—Civil Service Act*, 1884 (48 *Vict. No.* 24).—There is nothing in the Civil Service Act, 1884, of New South Wales to affect the right of the Crown to abolish a civil office; or to oblige the Crown to make compensation to a civil servant, whose office is abolished from no fault on his part, by giving him employment in some other public department.—WALLER *v.* YOUNG, *P.C.*

2. *Crown—Dismissal of civil servant—New South Wales Act* (59 *Vict. c.* 25), *s.* 58.—Section 58 of the New South Wales Act (59 Vict. c. 25) is not retrospective.

Held, therefore, that the respondent, who had been dismissed from the public service before the said Act came into operation, but not in the manner prescribed by the Civil Service Act, 1884, was not affected by the provisions of the later Act. —YOUNG *v.* ADAMS, *P.C.*

3. *Crown lands—Adverse possession—"Nullum Tempus" Act* (9 *Geo.* 3, *c.* 16).—The English "Nullum Tempus" Act (9 Geo. 3, c. 16) is in force in the Colony of New South Wales, and applies to land which has never been granted out or dealt with by the Crown.—ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* LOVE, *P.C.*

4. *Crown Lands Act*, 1884, *s.* 13 (2), 14, 18, 19, 20, 39—*Forfeiture.*—Any reference to the Land Board on an issue of fact which, if found against the conditional purchaser, involves the forfeiture of his purchase, must, even if framed under section 13, sub-section (2), of the Crown Lands Act, 1884, be tried in the manner prescribed by section 14; and the finding thereon is final under section 20. If the finding is that the statutory requirements have not been complied with, section 39 gives a discretionary power to the Minister to declare a forfeiture. That power is not abolished by the Act of 1889, which established a Land Court to hear appeals from the Land Board in lieu of the Minister to whom such appeals lay under sections 18 and 19 of the Act of 1884.—ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* WALTERS, *P.C.*

5. *Crown Lands Act*, 1894 (45 *Vict. No.* 18)—*Conditional purchase—Forfeiture—Provisional reversal—Crown Lands Act*, 1889 (53 *Vict. No.* 21), *s.* 8, *sub-section* 6—*Appeal—Special case—Crown Lands Amendment Act*, 1891, *s.* 3.—The provisional reversal under section 3 of the Crown Lands Amendment Act, 1891, of a forfeiture of a conditional purchase of lands under the Crown Lands Act, 1884 (though itself subsequently revoked), prevents the lands from being dealt with as Crown lands after the date of such provisional reversal till its revocation.

A decision of the Supreme Court upon a special case stated by the local court, on an appeal from a local land board, under the Crown Lands Act, 1889, is final and conclusive, and the question cannot be re-opened in any subsequent proceedings between the parties.—GARNSEY *v.* FLOOD, *P.C.*

6. *Crown Lands Act*, 1889 (53 *Vict. No.* 21), *s.* 8, *sub-section* 6—*Special case stated by Land Court—Duty of Supreme Court—Law of New South Wales.*

Held, that under the Crown Lands Act of 1889, s. 8, sub-section 6, it is the duty of the Supreme Court to hear a case stated by the Land Court in pursuance of that sub-section and to return it to the Land Court with a decision on the question submitted. The Land Court has jurisdiction to state it; and if stated without due precision the Supreme Court can return it for amendment.—HILL *v.* DALGETY, *P.C.*

NEWSPAPER.—See Corporation, 6.

NEW ZEALAND, LAW of:—

1. *Contract—Construction—Use.*—The respondents contracted with the appellants not to "erect or assist, or be in any way concerned or interested in the erection of or use of freezing works at Bluff," and thereafter contracted with W. first to purchase all frozen meat produced at his works at Bluff, and secondly to purchase his works at the expiration of their contract with the appellants, together with additional works to be completed by that date.

Held, that neither of these contracts with W. was a breach of the contract with the appellants, by the true construction whereof use means the manufacturing use, and does not include the uses contemplated by the respondents in either of their purchases.—SOUTHLAND FROZEN MEAT CO. *v.* NELSON, *P.C.*

2. *Husband and wife—Marital coercion—Leave to appeal granted under a misapprehension of fact—Practice—New Zealand Criminal Code*, 1893 (57 *Vict. No.* 56), *s.* 24.—Where the jury found that the prisoner, a married woman, had acted under her husband's control in the commission of an offence, for which they were jointly charged but separately tried, but it appeared that there was no evidence to that effect, and that the question should not have been left to the jury,

Held, that whatever the true effect of section 24 of the New Zealand Criminal Code as to marital compulsion, leave to appeal from an order affirming the conviction had been granted under a misapprehension of fact, and that the appeal must be dismissed.—BROWN *v.* ATTORNEY-GENERAL FOR NEW ZEALAND, *P.C.*

NUISANCE:—

Black smoke—Notice—Public Health Act, 1875, *s.* 94.—A notice under section 94 of the Public Health Act, 1875, requiring a person to abate a nuisance of black smoke, is good notwithstanding it omits to state what works and things are required to be executed and done in order to abate the nuisance. —MILLARD *v.* WASTELL, *Q.B.D.*, 258.

See also Highway, 6; Local Government, 19; Metropolis, 8, 9.

OPTION.—See Company, 3, 19; Landlord and Tenant, 15.

PARTITION:—

1. *Occupying co-owner—Mortgage of share—Occupation rent—Set-off as against mortgagee.*—Where one of several co-owners was in occupation of premises and mortgaged his share, and, on a partition action being subsequently brought, an inquiry was directed as to what was due from him in respect of such occupation,

Held, that the sum found to be due could only be set off against what the occupying co-owner was personally entitled to receive, and could not be set off to the detriment of his mortgagee.—HILL *v.* HICKEN, *Ch.D. Stirling, J.*, 137.

2. *Parties—Sole defendant—Tenant of undivided*

moiety—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *ss.* 4 *and* 9.—An order for sale in lieu of partition can be made under the Partition Acts where the plaintiffs are the owners of one undivided moiety of the premises and the sole defendant is the lessee of the other undivided moiety under a lease for seven years granted by the owner of that moiety.—MASON *v.* KEAYS, *Ch.D. North, J.*

PARTNERSHIP :—

1. *Arbitration—Notice of expulsion*—Quasi-*judicial position of co-partners.*—Partners, in exercising the power of giving notice of expulsion to a co-partner for a breach of partnership articles, must do so in a *quasi*-judicial manner, and give the person complained of a hearing. Disputes between partners involving questions of law, or where a *primâ facie* case of fraud is set up, should not as a rule be referred to arbitration.—BARNES *v.* YOUNGS, *Ch.D. Romer, J.*, 332.

2. *Deposit of title-deeds by a partner to secure overdraft of firm—Specific devise of real estate charged—Partnership assets sufficient—Locke-King's Act*, (17 & 18 *Vict. c.* 113).—A testator who was a partner in a shipbuilding firm had deposited at a bank the title-deeds of certain parts of his private real estate and signed a memorandum of charge of the said real estate, to secure the partnership overdraft. By his will he specifically devised the said real estate. The partnership assets were, at the testator's death, sufficient to pay the firm's debts.

Held, that the charge only extended to the debts of the partnership, and that, as the partnership assets were sufficient to pay these, the specific devisee of the real estate charged could not be called upon to pay the charge.—RITSON *v.* RITSON, *Ch.D. Romer, J.*, 478.

3. *Dissolution—Retainer of solicitor to conduct action—Retirement of dormant partner—Costs incurred subsequent to dissolution—Liability of dormant partner—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 17 (2), 36 (3).—A solicitor was retained by the managing partner in a firm to bring an action to recover a debt due to the firm. The firm consisted of the managing partner and two dormant partners. While the action was proceeding the partnership was dissolved, the dormant partners retiring from the firm. The solicitor, who did not know that the dormant partners were members of the firm, nor of the dissolution of partnership, continued the action, and judgment was recovered. In an action by the solicitor against the three partners upon his bill of costs,

Held, that the dormant partners were liable for the costs incurred subsequently to the dissolution of partnership.—COURT *v.* BERLIN, *C.A.*, 55.

4. *Dissolution—Sale of assets by one partner to the other—"Assets"—Goodwill—Right of vendor to canvass old customers.*—After a sale by one of two partners of all his interest in the partnership assets to the other partner, the goodwill not being expressly mentioned, the vendor may not canvass the customers of the old firm.

Trego v. *Hunt*, 44 W. R. 225, [1896] A. C. 7, considered.

Gray v. *Smith*, 38 W. R. 310, 43 Ch. D. 208, and *Pearson* v. *Pearson*, 32 W. R. 1006, 27 Ch. D. 145, distinguished.—JENNINGS *v.* JENNINGS, *Ch.D. Stirling, J.*, 344.

5. *Liability of estate of deceased partner for goods ordered before, but delivered after, his death—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 9—*Statute of Limitations—Merchant and factor—Fiduciary relation—Acknowledgment by debtor—Appropriation by creditor.*—E. & Co. employed F. & Co. as commission agents. The course of business was for E. & Co. to send goods to F. & Co. to be forwarded to the purchasers. F. & Co. received the purchase-money and accounted for the same to E. & Co. after deducting their commission.

After the death of one of the partners in F. & Co., E. & Co. recovered judgment for sums due to them in respect of several business transactions with the firm of F. & Co. against the surviving partner, who became bankrupt, and nothing was obtained from his estate under the judgment. E. & Co. now claimed to prove for the balance against the estate of the deceased partner.

As to certain items which were for goods delivered to the firm of F. & Co. after, but under an order given before, the death of the partner,

Held, that the contract was really one of agency, and that the death of the partner terminated the partnership before the agency began, and terminated the contract too; and that, accordingly, no obligation was incurred by his estate.

As to certain other items with regard to which the defence of the Statute of Limitations was set up,

Held, that there was no fiduciary relationship between the parties so as to prevent the statute being set up; but that a payment had been made by F. & Co. which constituted an acknowledgment of the debt, and accordingly took the case out of the statute, though the fact that E. & Co. had appropriated the payment to the account of which these items formed part would not in itself have been sufficient to take the case out of the statute.—FRIEND, RE, FRIEND *v.* YOUNG, *Ch.D. Stirling, J.*, 139.

See also Arbitration, 2; Bankruptcy, 22; Inland Revenue, 24.

PATENT :—

1. *Agreement to assign—Subsequent licence—Notice—Priority—Equitable rights—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 87.—The proprietor of letters patent agreed to assign them to a company. He subsequently granted a licence to work the patent to certain persons, who had, however, express notice of the agreement. The licence was registered before the agreement.

Held, that the licence, though on the register prior to the registration of the agreement, was void as against the company.—NEW IXION TYRE CO. *v.* SPILSBURY, *Ch.D. Kekewich, J.*, 567.

2. *Infringement—Anticipation—Revocation of infringing patent—Amendment by way of disclaimer—Patents, &c., Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 19, 26, *sub-section* 4 (*e*)—*Appeal—Stay of proceedings—Practice—Patent Rules*, 1890, *r.* 74.—The discretion reposed in the court or a judge, by section 19 of the Patents, &c., Act, 1883, to grant liberty to a patentee to apply at the Patent Office for leave to amend his specification by way of disclaimer, will not be interfered with by the Court of Appeal, unless that court be clearly of opinion that such discretion has been exercised upon a wrong principle.

Rule 74 of the Patent Rules, 1890, does not deprive the court of its jurisdiction to stay execution and cancellation, pending an appeal from an order on a petition for the revocation of a patent.—YATES *v.* ARMSTRONG, *C.A.*

3. *Infringement—Patent applicable to United Kingdom only—Infringing goods sent to England—Order from English purchaser.*—A manufacturer of

goods abroad which are an infringement of a patent applicable to the United Kingdom alone, who sends these goods by post to an English customer in compliance with his order to so send them, does not infringe the patent for the United Kingdom, for in such a case the sale and delivery take place o utside this country.

Decision of the Court of Appeal (45 W. R. 481, [1897] 2 Ch. 322) affirmed.—BADISCHE ANILIN FABRIK *v.* BASLE CHEMICAL WORKS (BINDSCHEDLER), *H.L.*, 255.

4. *Invention—Monopoly—Monopoly Act*, 1623 (21 *Jac.* 1, *c.* 3), *ss.* 4, 6.—The proviso in section 6 of the Monopoly Act, 1623, which exempts letters patent for new inventions from the operation of the Act, must be construed as including in the exemption letters patent for new inventions which by reason of some defect in the specification capable of amendment by disclaimer, cannot for the time being and until the disclaimer has been filed be enforced.—PECK *v.* HINDES, *Q.B.D.*

5. *Prolongation of term for ten years—New patent.*—Where it appeared that an invention was of considerable merit, that there were great difficulties in introducing it, and that the petitioner had incurred loss in his endeavours so to do, their lordships recommended a new patent for the term of ten years.—CURRIE AND TIMMIS' PATENT, RE, *P.C.*

6. *Revocation—Evidence of prior user—Admissibility.*—Where an action for infringement of a patent had been dismissed on the ground that there had been a prior use of the invention at a specified place, and a petition was then presented to have the patent declared void, the petitioner relying solely on the instance of prior user which had been proved in the infringement action,

Held, that evidence sought to be adduced by the respondent to the petition as to alleged prior user at other places was not admissible.—HAGGENMACHER'S PATENT RE, *Ch.D. Romer, J.*

PERPETUITY.—See Appointment, 2; Will, 7, 13.

POOR LAW:—

1. *Loan for term of years—Redemption without consent of lender—Poor law Loans Act*, 1871 (34 & 35 *Vict. c.* 11), *s.* 2.—Guardians of the poor who have since the 24th of April, 1871 (the date of the passing of the Poor Law Loans Act, 1871) borrowed moneys, to be repaid at stipulated times, cannot even with the authority of an order of the Local Government Board under section 2 of the Act compel the lender to accept against his will repayment otherwise than in accordance with the contract.

The decision of the Court of Appeal ([1897] 1 Ch. 335), affirmed.—WEST DERBY UNION *v.* METROPOLITAN LIFE ASSURANCE SOCIETY, *H.L.*

2. *Rating—Beneficial occupation—London County Council—Assessment of public park—Rateable Value—London Council (General Powers) Act* (53 & 54 *Vict. c. ccxliii.*), *ss.* 4, 5.—Where lands are held by a county council, and every part thereof must by statute be retained by the county council in perpetuity for the use of the public, and the expenses of management exceed the incomings, the county council is not rateable in respect of such lands.

Hare v. *Overseers of Putney*, 29 W. R. 721, 7 Q. B. D. 223, approved.

Decision of the Court of Appeal (44 W. R. 621, [1896] 2 Q. B. 25) affirmed.—LAMBETH OVERSEERS *v.* LONDON COUNTY COUNCIL, *H.L.*, 79.

3. *Rating — Coal mines — Evidence — Profits or annual value—Gross and rateable.*—At the hearing of an appeal against a rate on a colliery, the colliery company put forward evidence that the best and only fair method of arriving at the net annual value was that of ascertaining the receipts in the year, and then deducting therefrom the proper deductions; in fact, rating it like a railway. If this was admissible, it worked out substantially correct. It was contended that this evidence was not admissible, but that it should be rated on the annual rent obtainable.

Held, that the evidence was admissible.

Held, further, that where in a rate the gross and rateable value are entered at the same figure, the gross is to be treated as an ascertained figure, and such deductions as can be properly made may be made therefrom.—DENABY COLLIERY CO. *v.* DONCASTER UNION, *Q.B.D.*

4. *Rating — Exemption — Buildings occupied for police purposes—Chief constable's residence*—43 *Eliz. c.* 2, *s.* 1.—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 64.—By section 64 of the Local Government Act, 1888, the buildings used by the police at Leicester, then vested in the justices, became the property of the county council.

The chief constable for the county, on his appointment to that office, had to reside in a certain part of the police premises, and the assessment committee assessed that portion of the police buildings to the poor rate.

Held, that such rate should be quashed, because that part of the police premises occupied by the chief constable was occupied by him for the purposes of the police, and the fact that he was permitted to keep his wife and family there also rendered his occupation thereof none the less an exclusive occupation of that part of the building for the purpose of the county police.—LEICESTER COUNTY COUNCIL *v.* LEICESTER ASSESSMENT COMMITTEE, *Q.B.D.*, 585.

5. *Rating—Exemption by private Act—Construction*—20 *Geo.* 3, *c. lv.*—38 & 39 *Vict. c. lxxxii.*—A private Act of 1780 vested a piece of land in trustees for certain purposes therein mentioned for the benefit of the inhabitants of a borough and provided that for ever thereafter the land should be deemed and taken as within and parcel of the borough, but should in no wise be assessed to poor's rate.

Held, that the land was exempt for ever from being assessable to poor's rate and therefore a race committee, to whom the trustees had leased a portion of the land for a racecourse, were not liable to poor's rate by reason of their occupation.—PONTEFRACT ASSESSMENT COMMITTEE *v.* PONTEFRACT PARK TRUSTEES, *C.A.*

6. *Rating — Exemption — Society instituted for purposes of the fine arts—Royal College of Music—Society not making "any dividend, gift, division, or bonus in money unto or between any of its members"—Scientific Societies Act*, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.—The Royal College of Music was a society created and incorporated by royal charter, for the advancement of the art of music by means of a teaching and examining body charged with the duty of providing musical instruction of the highest class, and of rewarding with academical degrees and certificates of proficiency, and otherwise, persons, whether educated or not at the college, who on examination might prove themselves worthy of such distinctions, for the promotion and supervision of musical instruction in schools and elsewhere conducive to the cultivation and dissemination of the art of music, and for the encouragement

and promotion of the cultivation of music as an art. The college erected a building on land demised to them by a lease containing a stipulation that the building should be used for the purposes of their charter only, and it was so occupied and used by them. The charter prohibited any "dividend, gift, division, or bonus in money" to the members. The college paid out of its funds remuneration to certain members of its teaching staff who were also members of the society.

Held (affirming the judgment of Hawkins and Channell, JJ., [1898] 1 Q. B. 304), that the college was a society instituted for purposes of the fine arts exclusively, within the meaning of the Scientific Societies Act, 1843, s. 1, and did not, in making the above-mentioned payments to members of the teaching staff "make any dividend, gift, division or bonus in money" to its members within the meaning of the section; and therefore that the society was entitled to exemption from parochial rates in respect of the building occupied by them as aforesaid.—ROYAL COLLEGE OF MUSIC *v.* WESTMINSTER VESTRY, *C.A.*

7. *Rating—Gross estimated rental—Rateable value—Appeal against rateable value—Right of rating authority to adduce evidence to increase gross value in rate-book—Parochial Assessments Act*, 1836 (6 & 7 *Will.* 4, *c.* 96). *s.* 1.—On a ratepayer's appeal to quarter sessions against a poor rate on the ground that, though the estimated gross rental in the rate-book is correct, the rateable value is too high in consequence of a sufficient sum not having been allowed for deductions, the rating authority are bound to accept the gross value as appearing in the rate-book, and cannot, in order to show that the rateable value is not too high, give any evidence to show that in fact the gross estimated rental as appearing in the rate-book is too low.—HORTON *v.* WALSALL GUARDIANS, *Q.B.D.*, 607.

8. *Rating—Market garden—Land covered with greenhouses—"Agricultural land"—"Buildings or other hereditaments"—Liability of land covered with glass, being part of a market garden—Agricultural Rates Act*, 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 5, 6, 9.—Land covered with glasshouses erected for the purpose of its cultivation is, though used solely as a market garden, a "building or other hereditament," and not "agricultural land," within the meaning of section 1, sub-section 1, of the Agricultural Rates Act, 1896; and is, therefore, not entitled to the partial exemption from rates granted by that Act to "agricultural land."

Decision of the Queen's Bench Division reversed (Vaughan Williams, L.J., dissenting).—SMITH *v.* RICHMOND, *C.A.*, 401.

9. *Rating—Railway—Railway lines at station—Station appurtenances—Running lines or sidings.*—In addition to the four main lines passing through a railway-station, certain other lines were made at the station and used, some for the purposes of through traffic when the main lines were occupied, or likely to be occupied, and others for the purposes of carrying goods into the railway company's warehouse and into a private coal yard adjoining the station, and for the making up and departure of local passenger trains. These lines were also used for the standing of empty trains without engines.

Upon a case stated by a court of quarter sessions for the opinion of the High Court, the question being whether these lines were to be rated as running lines or sidings,

Held, that the primary and principal purpose for which the lines in question were made and used was the carrying of passenger and goods traffic, and that they were running lines and should be rated accordingly.—STOCKPORT UNION *v.* LONDON AND NORTH-WESTERN RAILWAY CO., *C.A.*

10. *Rating—Reservoir of water company—Assessment of—"Land covered with water"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-section* 1 (b).—A reservoir of water covering an area of some ten acres was constructed by a water company for the purpose of storing water. The bed of the reservoir consisted of a thick lining of concrete laid on the earth, which had been excavated for the purpose, and was permanently covered with water; and the reservoir was surrounded by an embankment lined with concrete, which embankment was used solely for the purpose of keeping the water in the reservoir and rose above the surface of the ground.

Held, that the reservoir was "land covered with water" within the meaning of section 211, sub-section 1 (*b*), of the Public Health Act, 1875, and was consequently rateable at one-fourth part only of the net annual value.—SOUTHWARK WATER CO. *v.* HAMPTON COUNCIL, *Q.B.D.*

10A. *Rating—Reservoir and waterworks—Basis of rateable value—Effective capital value, how arrived at—Rateable value, how arrived at—Costs of construction.*—When arriving at the rateable value of a reservoir and waterworks, when part of the works lie outside the parish for which the assessment is made, the reservoir and waterworks must be taken as integral portions of the undertaking, and, although rateable separately, they must not for the purpose of such assessment be valued apart from the rest of the undertaking.

The effective capital value of such reservoir and works should be arrived at from their cost as a basis, and so from that by a percentage of interest, the gross rental and rateable value can be arrived at.

By the Acts which empowered the waterworks to be carried out the corporation had made roads and bridges around the lake, and substituted a church, schools, and vicarage for those submerged by the lake.

Held, that the expense incurred in carrying out these operations ought not to be included in arriving at the total costs of the works to ascertain the effective capital value.

The reservoir was at present capable of delivering 52½ million gallons per day, but the catchment area at present connected with the reservoir was only sufficient to provide 41 million gallons. Catchment areas capable of providing the remaining 11½ million gallons would ultimately be connected. Of the 52½ million gallons 39 would be delivered by means of three pipes at Liverpool, and the remaining 13½ million gallons would be passed down the River Vyrnwy as compensation water in accordance with the provisions of the Act of 1889. At present only one of the lines of pipes, capable of carrying 13 million gallons a day, had been laid.

Held, that the effective capital value of the undertaking ought to be taken at 26½–52½ of the total capital expenditure.

The rate per cent. on the effective value of the undertaking to be taken to make the rateable value is a question of fact, and the court will not interfere unless it is shown that the percentage is arrived at on a wrong basis.—LIVERPOOL (MAYOR) *v.* LLANFYLLYN UNION, *Q.B.D.*

11. *Rating—"Tied" public-house—Market value above rent actually paid—Brewers as hypothetical tenants—Exclusion of personal contracts between*

publican and brewers—Parochial Assessment Act, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.—The occupier of a tied public-house appealed to quarter sessions against an increased assessment on his licensed premises.

The quarter sessions reduced the assessment subject to a case being stated, and the question raised was on what basis the tied house—the rent paid for which by the occupier to his brewers being admittedly less than the market value of the house—ought to be estimated at for the purposes of the poor rate.

Held, that the statute required the assessment to be based on the value of the hereditament itself, but that in estimating that value the quarter sessions were right in taking into consideration the fact that rival brewers would give a price in the market for the house above that which would support a rent given by a publican who merely took the premises for the purposes of his own retail trade as a yearly tenant; but that any special value which brewers might for reasons connected with their own brewery be willing to give for the premises ought to be excluded, since a publican had a right, like an ordinary tenant, to have his premises rated apart from any personal contract existing between himself and his landlord.—WHITE *v.* BRADFORD-ON-AVON ASSESSMENT COMMITTEE, *Q.B.D.*, 603.

12. *Settlement—Divided parish—Local Government Act*, 1894 (56 & 57 *Vict.* c. 73), *ss.* 1 (3), 67, 68.—A poor-law settlement gained by birth is a settlement in a particular parish. Consequently the settlement is destroyed on the division of the original parish under section 1, sub-section 3, of the Local Government Act, 1894, as the parish in which it was acquired thereby ceased to exist.—DORKING UNION *v.* ST. SAVIOUR'S UNION, *C.A.*, 309.

POST OFFICE:—

Telegraphs and telephones—Underground wires—Postmaster-General—Road authority—Power of, to impose conditions on Postmaster-General—What conditions may be imposed—Telegraph Act, 1863 (26 & 27 *Vict.* c. 112), *s.* 5, *sub-section* 3; *s.* 9.—Section 9 of the Telegraph Act, 1863, provides that the company—which by a later Act includes the Postmaster-General—shall not place any telegraph under any street except with the consent of the bodies having the control of the streets; and section 5, sub-section 3, provides that any consent may be given "on such pecuniary or other terms or conditions as the person or body giving consent thinks fit."

Held, that the objections which the road authority are entitled to raise under section 5, sub-section 3, are objections as to matters only which concern them as a road authority, and that they cannot raise objections as to the modes or conditions of carrying on the service or the reasonableness of the charges for such service; and that they cannot, therefore, when giving consent to the Postmaster-General to lay an underground telephone wire, impose the condition that the wire should not be laid for the use of a particular telephone company unless such company were prepared to provide an improved service at a reduced cost, as such condition would be not only outside the scope of their duties as a road authority, but also unreasonable.—POSTMASTER-GENERAL *v.* LONDON CORPORATION, *Q.B.D.*

POWER.—See Appointment, 1-4; Will, 25.

PRACTICE:—

1. *Appeal—Appeal from judge without jury—Appeal raising questions of fact.*—The rehearing on appeal of a case tried by a judge without a jury is not governed by the rules applicable where there has been a trial and verdict by a jury. The Court of Appeal must act on its own considered conclusion on questions of fact as well as law.—COGHLAN *v.* CUMBERLAND, *C.A.*

2. *Appeal—Case stated for opinion of Queen's Bench Division*—12 & 13 *Vict.* c. 45, *s.* 11—*Judicature Act*, 1873, *s.* 19.—An appeal lies from a decision of the Queen's Bench Division on a special case stated with respect to an appeal to a court of quarter sessions under section 11 of 12 & 13 Vict. c. 45, although judgment has been entered in the court of quarter sessions in conformity with that decision.—LODGE *v.* HUDDERSFIELD (MAYOR) (No. 2), *C.A.*, 482.

3. *Appeal—School board election—Petition—Interlocutory order—Appeal to Court of Appeal—Municipal Corporations Act*, 1882 (45 & 46 *Vict.* c. 50), *Part IV.*, *s.* 93, *sub-section* 7—*Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict.* c. 70), *s.* 36—*General Rules*, 1883, *for the execution of Part IV. of the Municipal Corporations Act*, 1882, *rr.* 48, 57.—From an order of a judge at chambers in an interlocutory application arising in a school board election petition an appeal lies to the Court of Appeal.—MONKSWELL (LORD) *v.* THOMPSON (No. 2), *C.A.*

4. *Costs—Action against public authority—Public Authorities Protection Act*, 1893 (56 & 57 *Vict.* c. 61), *s.* 1 (b).—When in substance "judgment has been obtained" by a public authority as defendant within the meaning of sub-section (*b*) of section 1 of the Public Authorities Protection Act, 1893, and costs have been given in its favour, such judgment carries the right to have taxation as between solicitor and client, although no direction as to the mode of taxation is given in the judgment.—NORTH METROPOLITAN TRAMWAYS CO. *v.* LONDON COUNTY COUNCIL, *Ch.D. Romer, J.*, 554.

5. *Costs—Application for judgment under order* 14—*Leave to defend—Case remitted to county court—Costs of application under order* 14 *to be costs in the cause—County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *ss.* 65, 116—*Rules of the Supreme Court, ord.* 14, *r.* 9 (a).—In an action to recover under a contract a sum above £20, but less than £50, the plaintiff applied for judgment under order 14. The defendant obtained leave to defend on payment of the amount claimed into court, and the money was paid in. An order was subsequently made on the application of the plaintiff, and affirmed by a judge at chambers, remitting the action to the county court, and directing that the costs of the application under order 14 should be costs in the cause. On appeal,

Held, that as the case was not brought within section 116 of the County Courts Act, 1888, or ord. 14, r. 9 (*a*), there was no jurisdiction to make the order as to the costs of the application under order 14.

Quære, whether an order purporting to make costs under order 14 costs in a county court action could be made at the hearing under ord. 14, r. 9 (*a*).—DUNN *v.* APPLETON, *C.A.*

6. *Costs—Interlocutory proceedings—Costs reserved—New regulation.*—Where interlocutory applications have been ordered to stand to the trial and are not then mentioned to the judge, the costs of such applications are to be treated as costs in the action, and taxed accordingly, and need not be mentioned in the judgment. Where such appli-

cations have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment nor allowed on taxation without the special direction of the judge.—BRITISH NATURAL PREMIUM ASSOCIATION *v.* BYWATER, *Ch.D. Byrne, J.*, 28.

7. *Costs—Security for costs—Limited company—Plaintiffs in action—"Sufficient security"—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 69.—The security for costs required to be given by a plaintiff company, under section 69 of the Companies Act, 1862, must, as that section provides, be "sufficient"—neither illusory nor oppressive—having regard to the probable costs likely to be incurred by the defendant.—DOMINION BREWERY CO. *v.* FOSTER, *C.A.*

8. *Costs—Set-off—House of Lords—R. S. C., ord.* 65, *r.* 14.—The Appeal Committee after final judgment has been given in the appeal will not set off costs due by an appellant in the House of Lords against balance costs due to the appellant as the result of a decision in the Court of Appeal. If there is a probability of any question of costs or any other matter arising after and as incident to the appeal, the matter ought to be mentioned at the hearing.—RUSSELL *v.* RUSSELL (No. 2), *H.L.*

9. *Costs—Taxation—General costs of action—Costs of counter-claim.*—Where the plaintiff is ordered to pay the costs of the action, and the defendant to pay the costs of the counter-claim, only costs actually occasioned by the counter-claim can be charged to the defendant, and the general costs of the action must not be apportioned between the plaintiff and the defendant, but must all be paid by the plaintiff.—ATLAS METAL CO. *v.* MILLER, *C.A.*, 657.

10. *Declaratory judgment—Injunction—Jurisdiction—Local Government—Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3—*Ord.* 25, *r.* 5.—Where the Legislature has pointed out proceedings before magistrates as the proper course for a local authority to take with regard to offences under a particular statute the Court of Chancery will be very slow to exercise its jurisdiction to restrain such proceedings by injunction where there is no evidence that the local authority intend to commit any illegal act.

A fortiori it will be still less likely to make a declaration of rights where no relief, by way of injunction or damages, is asked.

Whether the court has, under ord. 25, r. 5, jurisdiction to make such a declaration under such circumstances, *quære.*—GRAND JUNCTION WATERWORKS CO. *v.* HAMPTON DISTRICT COUNCIL, *Ch.D. Stirling, J.*, 644.

11. *Discovery—Interrogatories—Criminal or penal proceedings—Pollution of river—Proceedings to restrain—Penalty—Rivers Pollution Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10.—Proceedings instituted in a county court for an order under section 10 of the Rivers Pollution Prevention Act, 1876, requiring a person to abstain from polluting a river, which is constituted an offence against the Act, are not proceedings of a criminal or penal nature, although disobedience by the person against whom the order to abstain is made renders him liable to a penalty. An order for discovery by the person against whom proceedings for the abstention of pollution of a river are pending may accordingly be made.

Decision of the Court of Appeal (45 W. R. 3, [1896] 2 Q. B. 297) affirmed.—DERBY CORPORATION *v.* DERBYSHIRE COUNTY COUNCIL, *H.L.*, 48.

12. *Discovery—Production of documents—Insurance, marine—Ship's papers—Re-insurance.*—In an action by the original underwriter against the re-insurers upon a policy of marine insurance, the defendants are entitled to an order for production of ship's papers.—CHINA TRADERS' INSURANCE CO. *v.* ROYAL EXCHANGE ASSURANCE ASSOCIATION, *C.A.*, 497.

13. *Discovery—Production of documents—Privilege—Copies—Secondary evidence.*—A document once privileged is always privileged.

After the trial of an action certain documents relating to the same subject-matter in a previous action were discovered at the office of a solicitor, who had obtained them from the representatives of the solicitor of the plaintiffs' predecessor in title. The defendant, having appealed from the judgment, sought production of the documents on the hearing of the appeal.

Held, that the documents were privileged from production.

Minet v. *Morgan*, 21 W. R. 467, L. R. 8 Ch. App. 361, followed.

Wheeler v. *Le Marchant*, 30 W. R. 235, 17 Ch. D. 675, explained.

But, held, further, that the defendant, having had an opportunity of taking copies of some of the documents, was entitled to give secondary evidence of such as he had copies of.

Lloyd v. *Mostyn*, 10 M. & W. 478, followed.—CALCRAFT *v.* GUEST, *C.A.*, 428.

14. *District registrar—Jurisdiction—Power to set aside judgment—Ord.* 35, *rr.* 1, 5, 6.—Where in an action proceeding in a district registry the plaintiff has signed judgment in default of appearance, the district registrar has jurisdiction to set the judgment aside on the ground that it has been entered for a larger sum than was in fact due.

The effect of rule 6 of order 35 is that in all matters other than those in which the district registrar has exclusive jurisdiction under rules 1-5, proceedings may be taken either before the district registrar or a master.—TOWNEND *v.* KIRKHAM, *C.A.*, 65.

16. *Evidence—Inspection—Examination of witnesses on commission—Order to send abroad property in dispute—Jurisdiction—R. S. C.*, 1883, *ord.* 37, *r.* 5; *ord.* 50, *r.* 3.—In interpleader proceedings as to the right to the possession of a stamp album, one of the claimants applied for an order that the album might be sent abroad for inspection by witnesses who were to be examined there on commission.

Held, that the court had jurisdiction to make such order under ord. 37, r. 5, and ord. 50, r. 3.

Leader v. *Smyth*, 8 Times L. R. 612, overruled.—CHAPLIN *v.* PUTTICK, *C.A.*, 481.

17. *Foreign Jurisdiction Act*, 1843 (6 & 7 *Vict. c.* 94)—*Japan Consular Court—Criminal case—Appeal—Special leave.*—Under the Foreign Jurisdiction Act, 1843 (6 & 7 Vict. c. 94), her Majesty has power to constitute for Japan a court, by Order in Council, with a jury of five, with jurisdiction over her Majesty's subjects.

The rule as to special leave to appeal in criminal cases laid down in *In re Dillet*, 12 App. Cas., affirmed.—CAREW, EX PARTE, *H.L.*

18. *Foreign state plaintiff—Action for appointment of new trustee—Counter-claim for damages for libel—Order excluding counter-claim—R. S. C.*, 1883, *ord.* 19, *r.* 27; *ord.* 21, *r.* 15.—The fact that the plaintiff is a foreign state is not a sufficient reason for allowing the defendant to set up by

way of counter-claim a claim which he could not set up against an ordinary plaintiff. An order will therefore be made excluding a counter-claim for damages for a libel alleged to have been published by a foreign state which is plaintiff in an action seeking the appointment of new trustees of a fund in court.—SOUTH AFRICAN REPUBLIC *v.* COMPAGNIE FRANCO-BELGE DU CHEMIN DE FER DU NOR DE LA REPUBLIQUE SUD AFRICANE, *C.A.*, 67.

19. *Foreign state—International law—Cross-action.*—Where a foreign state sues in this country, a counter-claim cannot be made against it except for matters arising out of the original action, and claims for damages for breach of agreement by the plaintiff state which would, if a subject were suing, form the subject-matter of a separate action will be struck out.—SOUTH AFRICAN REPUBLIC *v.* LA COMPAGNIE FRANCO-BELGE DU CHEMIN DU FER DU NORD.—*Ch.D. North, J.*, 151.

19A. *Garnishee—Rent—Apportionment Act*, 1870, *s.* 2.—Notwithstanding the Apportionment Act, 1870, rent cannot, before it is payable, be attached under a garnishee order as a debt owing or accruing due.—BARNETT *v.* EASTMAN, *Q.B.D.*

20. *House of Lords—Decision on question of law final.*—A decision of the House of Lords once given upon a question of law is conclusive upon the House afterwards.—LONDON TRAMWAYS CO. *v.* LONDON COUNTY COUNCIL, *H.L.*, 609.

21. *Interpleader—Sheriff's interpleader—Claim to goods seized in execution—Claimant ordered to pay value of goods into court—Withdrawal of sheriff—Second execution—Liability of claimant to make further payment into court.*—Where a claimant of goods seized by the sheriff in execution has paid into court the value of the goods and the amount of the sheriff's charges as a security for the execution pending the hearing of an interpleader issue, and before the hearing a second execution has been levied on the same goods, and the claimant has claimed the goods again, he may be ordered, as a condition to the sheriff being directed to withdraw, to pay into court again the value of the goods and the sheriff's charges as a security for the second execution creditor.—KOTCHIE *v.* GOLDEN SOVEREIGNS, *C.A.*, 616.

22. *Judgment—Joint debtors—Effect of judgment against one—Pleading—Costs.*—The rule in *King* v. *Hoare*, 13 M. & W. 494, that a judgment against one of two joint debtors is a bar to proceedings against the other, applies where both joint debtors are originally made defendants to, and enter an appearance in, the same action, and judgment by consent has been obtained against one of them in that action.

Where one joint debtor has consented to judgment, the other, if he wishes to avail himself of the judgment as a defence, should plead it; and where he did not plead it, he was ordered to pay the costs of the action up to the time of the consent judgment.—MCLEOD *v.* POWER, *Ch.D. Byrne, J.*

23. *Judgment—Setting aside—Judgment obtained by fraud—Fresh action to set aside judgment—Jurisdiction.*—Where a judgment has been obtained by fraud, the court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside.—COLE *v.* LANGFORD, *Q.B.D.*

23A.—*Judgment—Setting aside judgment—Jurisdiction—Perjury.*—A judgment obtained in an action will not be set aside in a subsequent action upon proof merely that the judgment was obtained by perjury.—BAKER *v.* WADSWORTH, *Q.B.D.*

24. Lis pendens—*Dismissal of action for specific performance — Order vacating registration — Lis Pendens Act*, 1867 (30 & 31 *Vict. c.* 47), *s.* 2.—Upon the dismissal of an action for specific performance, which has been registered as a *lis pendens*, the successful party may, in addition to the usual judgment, have an order to the effect that the registration shall be vacated unless an appeal is set down within a certain specified time.—BAXTER *v.* MIDDLETON, *Ch.D. Kekewich, J.*, 350.

25. *Mayor's Court—Costs—Libel—Less than £5 recovered—Mayor's Court of London Act*, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 11—*Rules of* 1890 *and* 1892.—The fact that in a particular case no scale of costs is provided by the Mayor's Court of London Rules, 1890, is not in itself sufficient to show that that court has no inherent jurisdiction to order costs in the cases not specifically provided for.

Semble, that in actions for libel tried in the Mayor's Court of London, in which less than £5 is recovered, the court has jurisdiction to order costs to be paid to the plaintiff, beyond court fees and allowances to witnesses, although no scale is provided by the rules for such a case.—HALL *v.* LAUNSPACH, *C.A.*

26. *Nonsuit—Discontinuance—Ord.* 26, *r.* 1.—A plaintiff can no longer claim as of right to be nonsuited so as to be at liberty to bring a second action. The right to discontinue an action is now entirely regulated by order 26, and the plaintiff cannot discontinue at the trial without an order of the judge, who may make such terms as he thinks just with regard to the plaintiff's right to bring another action.—FOX *v.* STAR NEWSPAPER CO., *C.A.*, 340.

27. *Palatine Court—Order for attachment—Defendant out of jurisdiction—Court of Chancery of Lancaster Act*, 1850, *s.* 15—*Court of Chancery of Lancaster Act*, 1854, *s.* 7—*Order made order of High Court.*—Where a defendant in an action in the Chancery Court of Lancaster appears to the action, but resides out of the jurisdiction, and after judgment an order is made in the Palatine Court for leave to issue a writ of attachment against him, that order will be made an order of the High Court under section 15 of the Court of Chancery of Lancaster Act, 1850.—DUNMORE *v.* WHARAM, *Ch.D. Byrne, J.*, 366.

28. *Parties—Joinder of defendants—Joinder of separate causes of action against several defendants—Ord.* 16, *rr.* 4, 5; *ord.* 18, *r.* 1.—A claim to recover damages from three defendants on the ground of deceit cannot rightly be joined in the same action with a claim to recover damages from two of such defendants on the ground of conspiracy.

Sadler v. *Great Western Railway Co.*, 45 W. R. 51, [1896] A. C. 450, followed.—GOWER *v.* COULDRIDGE, *C.A.*, 214.

29. *Parties—Joinder of plaintiffs—Separate causes of action—Right to relief arising out of same transaction—Ord.* 16, *r.* 1.—In an action by a shareholder in a limited company against the directors, the company being joined as a defendant, the plaintiff claimed damages from the directors for having induced him by deceit and fraud to buy shares in the company, one of the particulars of deceit and fraud being the payment of a dividend out of capital. The plaintiff also claimed on behalf of himself and all the other shareholders a declaration that the payment of the said dividend was *ultra vires* and illegal, and that the directors were liable to repay to the company the money so paid by them.

Held, that the plaintiff, suing in two different capacities, could not join the two separate causes of action in one action, inasmuch as they did not arise out of the same transaction, or series of transactions, within the meaning of ord. 16, r. 1.—STROUD *v.* LAWSON, *C.A.*, 626.

30. *Payment into court — Acceptance — Costs — Jurisdiction—R. S. C., ord.* 22, *r.* 7.—Where money has been paid into court before delivery of defence and accepted by the plaintiff in satisfaction within the time limited by ord. 22, r. 7, there is no jurisdiction to order the plaintiff to pay the costs of the defendant incurred between the dates of payment into court and the acceptance in satisfaction.

Ord. 22, r. 7, is applicable to cases in which there are no pleadings.—LOMER *v.* WATERS, *C.A.*

31. *Pleading—Action by one of two joint promisees —Refusal of other to join as co-plaintiff—Power to add him as co-defendant.*—One of two joint promisees can maintain an action on the contract, making the other joint promisee a co-defendant if the latter, after being tendered an indemnity against costs, refuses to be joined as co-plaintiff.—CULLEN *v.* KNOWLES, *Q.B.D.*

32. *Pleading—Counter-claim—Parties—Claim by defendant and other person against plaintiff—Ord.* 21, *r.* 11.—The defendant and a third person had a joint cause of action against the plaintiff arising out of the same circumstances as the plaintiff's cause of action. The defendant delivered a counter-claim in respect of such joint cause of action, making the third person a defendant to the counter-claim.

Held, that such counter-claim could not be set up in the action.—PENDER *v.* TADDEI, *C.A.*, 452.

33. *Staying proceedings—Frivolous and vexatious action—Action raising question decided in an interlocutory application in county court.*—The defendant recovered judgment against the plaintiff in a county court for a sum of money. Before the costs were taxed the defendant, upon representations as to the plaintiff's poverty, agreed to accept a smaller sum, and executed a deed releasing the plaintiff from the judgment debt and costs. The defendant subsequently applied to the county court judge for an order to tax the costs upon the ground that the release had been obtained by misrepresentation. The county court judge came to the conclusion that the release had been obtained by misrepresentation, and directed the costs to be taxed, and ordered the balance of the judgment debt and the taxed costs to be paid by the plaintiff. The plaintiff thereupon commenced an action in the High Court claiming a declaration that the defendant had released him from the judgment debt and costs, and an injunction to restrain the defendant from enforcing payment thereof. Upon an application by the defendant to stay the action,

Held, that, as the identical question sought to be raised in the action had been determined by the county court judge on the application to tax the costs, the court would stay the action as frivolous and vexatious and an abuse of the process of the court.—STEPHENSON *v.* GARNETT, *C.A.*, 410.

34. *Stay of proceedings—Matrimonial suits between same parties in England and Scotland—Motion to restrain Scotch proceedings — Order.* — The wife instituted proceedings in England, claiming a judicial separation on the grounds of the husband's alleged cruelty, desertion, and adultery. The husband appeared under protest, and filed an act on petition, disputing the jurisdiction. Negotiations were afterwards entered into for a separation to be effected by deed, and after these had been pending for some time the husband commenced proceedings in the Scotch court praying for a dissolution of marriage on the ground of alleged malicious desertion for a period of four years.

The court, upon the application of the wife, granted an injunction restraining the husband from prosecuting the proceedings in Scotland until the act on petition should be heard and determined in this court, or until further order.—CHRISTIAN *v.* CHRISTIAN, *P.D. & Ad.D.*

35. *Staying proceedings—Unpaid costs.*—Although mere non-payment of the costs of an interlocutory application which the plaintiff has been ordered to pay, and his inability to pay, furnish no sufficient ground for ordering proceedings in the action to be stayed until payment, the court has jurisdiction to order such stay if the action is vexatious, or has been vexatiously conducted by him.—GRAHAM *v.* SUTTON & Co., *C.A.*

36. *Trial—New trial—Misdirection—Ejectment Possession of plaintiffs.*—Where in an action the plaintiffs' title was admitted, it is a misdirection to withdraw the facts from the jury and direct a verdict for the defendants on the ground that the plaintiffs had not proved possession during any part of the statutory period. Evidence having been submitted which, if believed, proved their possession of part of the lands sued for, a new trial was rightly ordered.—KINGSTON RACE STAND *v.* KINGSTON (MAYOR), *P.C.*

37. *Trial—New trial—Verdict against evidence.*—Where a question of fact is left to the jury, and they have answered it reasonably, their verdict cannot be disturbed. But where the verdict is one that could not reasonably have been found if the attention of the jury had been directed to the whole of the facts of the case, or if the court is not satisfied that the real question to be determined was so left to them that their verdict was given upon the determination of that question, the court may set aside the verdict and order a new trial.—JONES *v.* SPENCER, *H.L.*

38. *Writ—Service—Scotch defendant—Agreement for service within the jurisdiction—Ord.* 9, *r.* 2; *ord.* 11, *r.* 1 (e).—The defendant, who was a domiciled Scotchman, entered into a contract of sale with the plaintiffs. The contract contained an agreement that in case of disputes between the parties proceedings might be served on the defendant by leaving the same at a certain office in London and posting a copy thereof to the defendant's address in Scotland.

Held, that such agreement was valid, and that service of a writ in the way specified could not be set aside.

Tharsis Sulphur and Copper Co. v. *Société Industrielle et Commerciale des Metaux*, 38 W. R. 78, followed.

British Wagon Co. v. *Gray*, 44 W. R. 113, [1896] 1 Q. B. 35, distinguished.—MONTGOMERY *v.* LIEBENTHAL, *C.A.*, 292.

39. *Writ—Service out of jurisdiction—Foreclosure action—Ord.* 11, *r.* 1 (e) (g).—Mortgagees purchased an equity of redemption and had it conveyed to trustees for themselves. They then brought a foreclosure action against the trustees and a second mortgagee who was resident out of the jurisdiction. On a motion to discharge an order for service of the writ out of the jurisdiction,

Held, (1) that the action was not founded on a breach of contract so as to fall within ord. 11, r. 1 (e); and (2) that the trustees, though necessary

parties to a foreclosure action, were not necessary defendants so as to bring the action within ord. 11, r. 1 (*g*), and that the order for service out of the jurisdiction must, therefore, be discharged.—DEUTSCHE NATIONAL BANK *v.* PAUL, *Ch.D. Stirling, J.*, 243.

40. *Writ—Substituted service—Defendant out of jurisdiction—Ord.* 9, *r.* 2.—A person who was in England at the time when a writ for service within the jurisdiction was issued against him went out of the jurisdiction before the writ was served upon him, but not in order to evade service.

Held, by Lord Halsbury, L.C., and Collins, L.J. (Rigby, L.J., dissenting), that an order for substituted service of the writ could be made.—JAY *v.* BUDD, *C.A.*, 34.

See also Arbitration, 2; Assignment, 1; Banker; Bankruptcy, 18, 23; Bill of Sale, 2; Charity, 5; Company, 35; County Court, 7, 9; Divorce, 19, 23, 25; Harbour; Libel, 1; Patent, 2; Probate, 15-19; Solicitor, 1, 2; Will, 8.

PRESCRIPTION ACT.—See Easement.

PRINCIPAL and AGENT:—

1. *Authority of agent—Stockbroker's clerk—Agent to accept orders—Evidence of holding out—Liability of principal.*—The defendants, a firm of stockbrokers, allowed one of their clerks a commission upon business introduced by him. On three separate occasions the plaintiff gave the clerk orders to take to the defendants for the purchase of shares, and the plaintiff received through the clerk bought-notes signed by the defendants in respect of these shares. No notice of assent to the orders was given by the defendants before executing them. In the first two transactions the plaintiff paid for the shares by cheque drawn in favour of the defendants, which he handed to the clerk to take to them. In the third transaction he paid for the shares by cheque drawn in favour of the clerk, which the clerk handed to the defendants. Subsequently the plaintiff gave the clerk further orders for the purchase of shares, but the clerk, instead of taking these orders to the defendants, forged the defendants' signature to bought-notes and handed them to the plaintiff, and in return received cheques in payment, which he appropriated to his own use.

In an action against the defendants to recover the money so paid, the jury found that the clerk had no express authority to enter into the contracts; but that the defendants held him out, or permitted him to represent himself, as possessed of such authority.

Held, by A. L. Smith and Chitty, L.JJ., that the course of business in the first three transactions did not afford any evidence upon which the jury could reasonably find that the defendants held out the clerk as having authority to bind them by contracts, or as representing that the defendants would execute the orders given to the clerk.

Held, by Collins, L.J. (dissenting), that, as no notice of assent was given by the defendants before executing the first three orders, there was evidence for the jury, arising out of the mode of doing business, that the defendants by conduct represented, or permitted their clerk to represent, that orders received by him would be executed by the defendants unless they gave notice to the contrary.—SPOONER *v.* BROWNING, *C.A.*, 369.

2. *Broker—Stock Exchange—Wrongful sale by broker—Indemnity.*—A stockbroker who on behalf of a principal buys stock upon the Stock Exchange for the next settling day, and without authority from his principal, and contrary to the agreement between them, sells the stock before that day at a loss, cannot claim indemnity from his principal.

The plaintiff, a stockbroker, having prior to the 10th of November bought stock of a railway company for the defendant on the London Stock Exchange, it was agreed between them that the plaintiff should take part of the stock so purchased off the market by paying for it with money advanced by him for the purpose, which he accordingly did, and that he should hold that stock as security for his advance with interest, and should not sell the same before the account of the 26th of November. On the 10th of November the plaintiff by the defendant's instructions carried over the residue of the stock till the 26th of November, and bought a further amount of stock for that day. On the 19th of November the plaintiff, without the defendant's authority, and contrary to his agreement, sold the whole amount of stock purchased at a loss in order to close the account between them. If the stock had been sold on the 26th of November it would have realized a price higher than that at which the plaintiff sold, but lower than that at which he had bought it for the defendant. In an action by the plaintiff against the defendant for indemnity in respect of the difference between the prices at which he had bought and sold the stock,

Held, first, as to the plaintiff's claim in respect of the stock paid for and taken off the market by the plaintiff as before mentioned, that the plaintiff was entitled to recover as for money paid for the defendant at his request, subject to the defendant's right to counter-claim damages for the loss occasioned by the plaintiff's wrongfully selling the stock before the 26th of November;

Held, secondly, as to the plaintiff's claim in respect of the stock carried over and that which was purchased on the 10th of November as before mentioned (by A. L. Smith, L.J., and Collins, L.J., Rigby, L.J., dissenting), that no action for indemnity was maintainable, the loss having arisen, not through any breach of contract by the defendant, but through the wrongful sale by the plaintiff.

By Rigby, L.J., in affirmance of Mathew, J., that the plaintiff was entitled to be credited in account with the price at which he purchased for the defendant, being charged by way of damages with the loss arising from the wrongful sale.

Duncan v. *Hill*, [1873] L. R. 8 Ex. 242, and *Lacey* v. *Hill, Scrimgeour's Claim*, [1873] L. R. 8 Ch. 921, discussed.—ELLIS *v.* POND, *C.A.*

3. *Commission on "hire earned"—Time charter-party—Cancellation.*—The plaintiff, acting as broker for the defendants, obtained a time charter-party for their ship upon terms of being paid a commission on all hire earned. During the currency of the charter-party litigation arose between the defendants and the charterers as to the fitness of the ship for the purpose for which she was chartered, which resulted in the cancellation of the charter-party, there being no wilful act or default on the part of the defendants in bringing about this result.

Held, that, upon the true construction of the contract, the intention of the parties was that the plaintiff should not be entitled to commission if the earning of hire was prevented by reason of causes such as had in fact put an end to the charter-party.—WHITE *v.* TURNBULL, *C.A.*

4. *Negligence—Public body—Contractor—Payment into court by one joint tortfeasor—Separate*

defences.—The Wimbledon District Council had given notice to the owner of a certain road to repair, and the requirements of such notice not having been complied with, they proceeded to have the works carried out themselves.

They thereupon entered into a contract with the defendant Iles to do the works, and by his contract he was to supply all materials and labour, and the work was to be in accordance with the specifications and plans prepared by the surveyor, who was to have the power to require improper materials to be removed, and other and proper material substituted, and under certain circumstances could require workmen to be discharged. Iles left a heap of soil in the road at night, over which the plaintiff fell and was injured, and after this accident, by order of the district council, lights were placed.

Separate defences were delivered by the defendants. Iles denied liability, and paid £75 into court. The district council paid nothing into court, but pleaded that, "the defendant Iles, while denying liability, has paid into court £75, and these defendants say that sum is sufficient to satisfy the plaintiff's claim."

The jury returned a verdict for £50.

Held, that the duty of affording protection to the public was in the circumstances also incurred by the district council, and that by entering into a contract such as this with Iles they could not avoid the obligation of the duty.

Further, that, although the two defendants might have joined in a defence of payment into court which would have availed them both, yet as they did not do so, but had put in a separate defence, they could not avail themselves of the payment into court by Iles, and that judgment must therefore be entered against them.—PENNY *v.* WIMBLEDON DISTRICT COUNCIL, *Q.B.D.*

PROBATE:—

1. *Administration — Attorney of an attorney — Egyptian Law.*—Where a power is given by an heir-at-law to an attorney to appoint another attorney for the purpose of administration of the estate of a deceased foreigner, and such power is allowable by the law of the deceased's domicil, letters of administration will be granted to the attorney duly appointed by the first attorney.

Quebec and Richmond Railway v. *Quinn*, 12 Moo. P. C. C. 232, affirmed and followed.

Semble, where a power of attorney expressly authorizes the appointment of an attorney by an attorney, the maxim *Delegatus non potest delegare* does not apply.—ABDUL HAMID BEY, IN GOODS OF, *P.D. & Ad.D.*

2. *Administration* de bonis non—*Grant to attorney —Necessity for notice.*—Where administration had been granted to the attorney of one of two next-of-kin, both of whom resided out of the jurisdiction, and the administrator died leaving the estate partly unadministered, the court, upon proof of notice to the next-of-kin for whose benefit the administration had been granted, granted administration *de bonis non* to the attorney of the other next-of-kin. —BARTON, IN GOODS OF, *P.D. & Ad.D.*

3. *Administration—Creditor—Right of retainer by next-of-kin.*—A creditor will not be granted administration to defeat the right of retainer of the next-of-kin, unless he can show the existence of assets within the jurisdiction. A general allegation of information and belief as to the existence of assets is useless.—FOY, IN GOODS OF, *P.D. & Ad.D.*

4. *Administration—Grant to administratrix of widow who had not taken out administration—Intestates Estates Act*, 1890, *s.* 1.—A widow died without taking out administration to her husband's estate of which she had taken possession, he having died intestate and without issue. The widow, by her will, disposed of all her property (including her husband's assets) but appointed no executor. The husband's assets were of small amount but there was a possibility that they might prove of greater value than £500.

The court granted administration of the personal estate of the husband to the administratrix of the widow. — MCDONAGH, IN GOODS OF, *P.D. & Ad.D.* (*Ir*).

5. *Administration — Grant to creditor.* — The deceased in 1871 charged a reversionary interest in personalty in favour of a creditor. He died intestate in 1878 leaving his father his next-of-kin. His father died in 1888 having appointed A. his executrix. A. died in 1896 having appointed L. her executrix. No letters of administration had been taken out to the estate of the deceased. The reversionary interest fell into possession in 1897. The charge had been assigned to the applicants and the sum due on it exceeded the property charged. L. consented to the application.

Held, that a grant ought to be made to the applicants.

In the Goods of Elizabeth Godfrey, 2 Sw. & Tr. 133, approved.—LOWE, IN GOODS OF, *P.D. & Ad.D.*

6. *Administration—Limited grant to husband—Wife's property not for her separate use—Probate Rules* 15 *and* 18 *of March*, 1887.—The deceased was at the time of her marriage in 1872 entitled to a mortgage debt not settled for her separate use. This debt was never reduced into possession. The deceased made a will purporting to dispose of the whole of her property, under which the husband was appointed executor.

The court gave the husband a grant of administration limited to such property as the wife could not dispose of by will.—LEMAN, IN GOODS OF, *P.D. & Ad.D.*

7. *Administration—Limited grant to husband—Wife's property not for her separate use—Probate Rules* 15 *and* 18 *of March*, 1887.—Under certain circumstances a grant of letters of administration limited to such property as the wife could not dispose of by will may still be made to a husband though the wife has made a will.

In 1875 the deceased, a married woman domiciled in New Zealand, the law of which colony in respect of married women's property was at that time identical with English law before the passing of the Married Women's Property Acts, made a will purporting to dispose of all her property, and after her death in 1875 the will was proved in New Zealand. She had been at the time of her marriage entitled to certain sums under English settlements. These were not limited to her separate use and had never been reduced into possession during her lifetime.

Held, that letters of administration to these sums might be granted to the husband.—DONOVAN, IN GOODS OF, *P.D. & Ad.D.*

8. *Administration—Lunacy of administratrix—Foreign administrator.*—Where the wife of a domiciled foreign subject obtained letters of administration with the will annexed to his assets in England, and became insane abroad, the court granted administration to an *administrateur provisoire* appointed by a foreign court, for the use and benefit of the lunatic so long as the applicant

remained *administrateur provisoire.*—GOLDSCHMIDT, IN GOODS OF, *P.D. & Ad.D.*

9. *Administration—Married woman—Grant to heir-at-law of intestate wife passing over husband—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *Part I., s.* 2, *sub-section* 4—*Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I., s. 2, sub-section 4, "Where a person dies possessed of real estate, the court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin, and provision shall be made by rules of court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

A wife died intestate. Her husband survived her, and she left a son by a former marriage, a minor, who was her heir-at-law.

On it appearing that the husband was a dissipated man, who was mismanaging a public-house which was part of the estate, and of which he refused to give up possession, the court, acting under the sub-section and s. 73 of the Court of Probate Act, 1857, granted administration of the estate to the guardian *ad litem* of the infant heir-at-law.—ARDERN, IN GOODS OF, *P.D. & Ad.D.*

10. *Administration—Married woman—Practice—Real estate—Heir-at-law—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *Part I., s.* 2, *sub-section* 4.—Where the title of the person applying for administration as heir-at-law under sub-section 4 of section 2 of the Land Transfer Act, 1897, is clear, and there is no personalty, a grant may be made to the applicant without notice to the next-of-kin; but where the title of the applicant is doubtful, or the amount of the personalty is large as compared with the realty, notice should be given to the next-of-kin.—BARNETT, IN GOODS OF, *P.D. & Ad.D.*

11. *Administration — Married woman — Will annexed—Practice—Heir-at-law — Citation — Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 2. *sub-section* 4—*Rules of* 20*th of November*, 1897.—A married woman who owned certain farms made a will, by which she left her real estate to her husband for life, with remainder to her natural daughter absolutely, and all her personal estate to her husband, whom she appointed executor. Her natural daughter died in her lifetime. Her husband died without proving the will, and administration of his personal estate was granted to his sister as next-of-kin. It was not known who was the heir-at-law of the testatrix. The value of the real estate was £7,688, and that of the personal estate £45.

Held, on an application by the administratrix of the husband for a grant of administration of the real and personal estate of the testatrix, that having regard to the provisions of sub-section 4 of section 2 of the Land Transfer Act, 1897, as the heir-at-law had not been cited, a general grant of administration ought not to be made, but that the applicant might take a grant *ad colligendum*, which would enable her to let and manage the lands until the heir-at-law could be cited.—ROBERTS, IN GOODS OF, *P.D. & Ad.D.*

12. *Administration—Widow—Misconduct—Grant to son of intestate.*—Where the widow of an intestate, whose estate was small, was shown to have been a woman of dissipated habits, who had eloped with another man sixteen years before the application, and had not since been heard of, the court made a grant of administration to the only son of the intestate, without the citation of the widow.

In the Goods of Anderson, [1864] 3 Sw. & Tr. 489, followed.—STEVENS, IN GOODS OF, *P.D. & Ad.D.*

13. *Executor renouncing—Application to retract—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 79.—One of several executors, who has renounced, will, under proper circumstances—*e.g.*, where, as in the present case, the other executor had absconded, and where administration has not been granted—be allowed to retract his renunciation and carry on the executorship.

Section 79 of the Probate Act of 1857 has not altered the practice in this respect.—STILES, IN GOODS OF, *P.D. & Ad.D.*, 444.

14. *Insolvency—Trust estate—Limited administration—Annexing will.*—The court, in granting administration, limited to certain leaseholds of which the deceased, who died insolvent, was trustee, directed his will to be annexed to the grant.—BUTLER, IN GOODS OF, *P.D. & Ad.D.*, 445.

15. *Practice—Presumption of death—Affidavit of applicant.*—On an application for leave to presume the death of a person who has disappeared, the affidavit of the applicant should contain a statement of belief that the death occurred at the alleged date.—HURLSTONE, IN GOODS OF, *P.D. & Ad.D.*

16. *Practice—Presumption of death*—Commorientes—*Brothers on board same vessel—Total loss—Leave to swear to death—Declaration of non-survivorship.*—Two brothers sailed in the same vessel in 1896, but nothing had been heard of them, or anyone else on board, from that time.

The court, in giving leave to swear that both the brothers died on or about the 14th of May, 1896, added a declaration, and permitted the same to be included in the oath in each case, to the effect that there was no reason to suppose that either died before the other.—JOHNSON, IN GOODS OF, *P.D. & Ad.D.*

17. *Practice—Presumption of death—Seven years' disappearance.*—On an application, made in 1898, for leave to presume the death of a person who had not been heard of since 1891, of whose death no evidence was offered beyond the fact of his disappearance, and who had been cited in a suit which was pending in the Chancery Division, the court, in giving leave to depose to the death, directed that the grant of administration should, except in so far as it might be required in the Chancery Division, remain in the registry till the expiration of seven years from the date of the disappearance.—WINSTONE, IN GOODS OF, *P.D. & Ad.D.*

18. *Practice—Presumption of death—Time of application.*—The court, on proof of sufficient inquiries, allowed the death of a testator to be sworn to three years after his disappearance.—MATTHEWS, IN GOODS OF, *P.D. & Ad.D.*

19. *Practice—Undue influence and other pleas—Right of plaintiffs to open whole case, and to reserve part of evidence in rebuttal of charge of undue influence.*—In a probate case, wherein the three plaintiffs propounded the will, which was opposed on various grounds, including a charge of undue influence against all three of the plaintiffs,

Held, that counsel for the plaintiffs was entitled to open the whole case, and, after calling one of

the plaintiffs only, to reserve the evidence of the other two plaintiffs.—FALDO *v.* LOVETT, *P.D. & Ad.D.*

20. *Will—Alteration in will—Appointment of executors.*—A reference in a marginal note to certain persons as executors, whose express appointment as executors has been cancelled, but who are left trustees of the will, may have the effect of appointing them executors, and not only according to the tenor.—NUSSEY, IN GOODS OF, *P.D. & Ad.D.*

21. *Will—Codicil not forthcoming at testator's death—Presumption of destruction* animo revocandi *—Probate of such parts only of will as not revoked by execution of codicil.*—A testator duly executed a will and afterwards a codicil revoking certain portions of the will. Both documents were handed to him by his solicitor. They were in separate envelopes which were sealed up. On the testator's death the will only was found, with the seal of the envelope containing it broken.

Held, that, although the presumption of law must prevail as to the destruction of the codicil, probate could only be granted of such parts of the will as the codicil by its execution had not revoked.—DEBAC, IN GOODS OF, *P.D. & Ad.D.*

21A. *Will—Erroneous description of executor.*—Where it is shown that a testator has misdescribed the name and residence of an executor, probate may be granted to the executor in his real name and as of his real residence, described in the will as of another name and another residence.—BASKETT, IN GOODS OF, *P.D. & Ad.D.*

21B. *Will—Execution—Part of will subsequent to signature.*—A testator executed a testamentary document, which consisted of two pages, and the whole of which was written before execution. The first page, which alone was signed by the testator and the witnesses, contained the major part of the will. It concluded with an unfinished sentence continued on the second page. The second page also contained bequests.

Held, that the first page only could be admitted to probate.—GEE, IN GOODS OF, *P.D. & Ad.D.*

22. *Will—Limited power of appointment—Will in exercise of power—Subsequent wills—No clause of revocation.*—A testatrix made a will in 1890, in which (*inter alia*) she exercised a limited power of appointment under her father's will. She made a second will in 1894, and a third will in 1895, neither of which contained words of revocation nor any execution of the limited power of appointment. Otherwise each of the later wills dealt with the whole of the testator's property, so that the 1894 will was revoked by the 1895.

Held, that the wills of 1890 and 1895 must be both admitted to probate.—CADELL *v.* WILCOCKS, *P.D. & Ad.D.*, 394.

23. *Will—Mutual and joint will—Death of one—Grant of probate of operative part.*—A husband and wife made a will which contained mutual dispositions in favour of the other on the death of one, followed by joint dispositions to take effect on the death of the survivor, but with full power to the survivor to alter the same.

On the death of the wife the court granted probate to the husband of so much of the will as then became operative.—SMYTH, IN GOODS OF, *P.D. & Ad.D.*, 426.

24. *Will—Personalty abroad—Certified copy.*—Where a later will confirms an earlier will dealing only with assets out of the jurisdiction, both wills must be proved.

Where a will has been filed in a court in the colonies for probate, but has not yet been proved, a certified copy issuing from that court will be admitted to probate.—WESTERN, IN GOODS OF, *P.D. & Ad.D.*

25. *Will made abroad—24 & 25 Vict. c. 114, s. 1 (Lord Kingsdown's Act)—Law of the Congo Free State—General principles of law and equity*—The testator, an English subject, residing in the Congo Free State, made a will in holograph unattested form in that state.

Held, that such a will was good as "made according to the forms required by the law of the place where the same was made" because in fact the courts of the Congo Free State would have upheld the will.

Semble, also, that where there is an absence of any specific provision in the law of a foreign country as to the forms of wills, and there is a general provision that where no specific provision exists cases are to be decided according to general principles of law and equity, any form is sufficient which carries out the necessary requirements of testamentary disposition.

Meaning of general principles of law and equity discussed.

If no particular form is prescribed by the *lex loci*, any form allowed by it is sufficient to satisfy 24 & 25 Vict. c. 114, s. 1.—STOKES *v.* STOKES, *P.D. & Ad.D.*

26. *Will—Incorporated document—Library catalogue—Custody.*—A testator made a bequest to a college of his books as enumerated in his library catalogue, a voluminous document, a copy of which would entail considerable expense. Probate was granted of the will without requiring the catalogue to be brought into the Probate Registry, the college undertaking to hold the catalogue for the registry, and a note to that effect being made upon the probate.—BALME, IN GOODS OF, *P.D. & Ad.D.*

27. *Will—Revival of revoked will—Non-disclosure of revocation to solicitor—Codicil—Express "words of reference"—Wills Act* (1 *Vict. c.* 26), *s.* 22.—In 1889 the testatrix made a will. In 1892 she obtained from the same solicitors a draft codicil, which she took away, as they believed, to execute it; but, instead of executing it, she, with the assistance of another person, executed a new will revoking the first. In 1893 she asked her solicitors to prepare another codicil, and they, thinking she had executed the first codicil, and in ignorance of the execution of the will of 1892, in drafting it described it as a second codicil to the will of 1889, and concluded it by confirming the said will and codicil. This codicil the testatrix duly executed.

The court, on motion to allow proof only of the will of 1892 and codicil of 1893, ordered proof of all three documents.—CHILCOTT, IN GOODS OF, *P.D. & Ad.D.*, 32.

28. *Will—Revocation—Destruction under mistaken belief as to effect of codicil—Wills Act* (1 *Vict. c.* 26), *s.* 20—*No revocation.*—A testator, who had made a will in December, 1891, leaving his property amongst his six children, executed a codicil in 1895, wherein, after reciting the bequest in the will, he cut out one of the children, and gave that child's share among the other five. He thereupon, having read over the codicil, put the will in the fire, saying it was "no good," and adding that there were now five to take the money. The codicil was admitted to be entitled to probate, apart from the will.

Held, that the Wills Act only expressed the old law, applied in analogous cases, as expounded in *Perrott* v. *Perrott*, 14 East 423; that this was a case of mistake, and not a case of dependent relative revocation; that the testator, when he destroyed the will, entertained a belief that the codicil would effect all that he wished in regard to the disposal of the whole of his property; and that, as this was a mistaken belief on his part, the *animus revocandi* did not accompany the physical act of destruction, and the contents of the will should be admitted to probate along with the codicil.—BEARDSLEY *v.* LACEY, *P.D. & Ad.D.*

29. *Witness—Order for examination of—Costs—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 26.—Where a witness attends in court for the purpose of being examined pursuant to an order made under section 26 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), he is not entitled to conduct-money before being examined.—WYATT, IN GOODS OF, *P.D. & Ad.D.*, 425.

PROHIBITION.—See County Court, 6.

PUBLIC AUTHORITIES PROTECTION ACT, 1893.—See Local Government, 20, 37; Practice, 4.

PUBLIC HEALTH.—See Landlord and Tenant, 6; Local Government, 1-4, 9-12, 17, 21, 23, 24, 32; Metropolis, 8; Nuisance; Poor Law, 10; Practice, 10.

RAILWAY:—

1. *Crossing of road—Penalty for not making substituted road—By whom recoverable—Road belonging to adjoining landowners—Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 53, 54.—By section 54 of the Railways Clauses Act, 1845, if a railway company cross a road so as to interfere with it, and do not make a substituted road, they shall forfeit £20 for every day during which such substituted road shall not be made, and such penalty shall, in the case of a private road, be paid to the owner thereof.

Held, that a part owner of that portion of the road interfered with can sue for and recover the penalty without joining the owners of the rest of that portion of the road.

Held, also, that the railway are only liable to one penalty for each day during which they fail to make a substituted road.—LLEWELLYN *v.* VALE OF GLAMORGAN RAILWAY CO., *C.A.*, 290.

2. *Footway—Railway across public footpath—Duty to build bridge—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 46.—Where the special Act (which incorporated the provisions of the Railways Clauses Act, 1845) of a railway company contains no provisions dealing with footways, the 46th section of the Railways Clauses Consolidation Act, 1845, imposes no obligation on the railway company to provide a bridge so as to carry the railway over the footway, or the footway over the railway.

Per Lord Herschell.—The Railways Clauses Consolidation Act, 1845, has not of itself any operation in respect of any road whatever, whether a carriage-way, a footpath, or a public road, unless brought into effect by some rights being given and corresponding obligations created by a special Act.

Decision of the Court of Appeal (44 W. R. 501, [1896] 2 Q. B. 74) affirmed.—DARTFORD COUNCIL *v.* BEXLEY HEATH RAILWAY CO., *H.L.*, 235.

3. *Master and servant—Station-master—Scope of authority.*—The plaintiff, a passenger on the defendant company's line, alighted at the station next before that for which his ticket was issued. He refused to give up his ticket alleging that he was breaking his journey, but offered his name and address. The station-master thereupon locked the only door leading out of the station and thereby detained the plaintiff for a considerable time until his ticket was given up. In an action against the company for false imprisonment,

Held, that the company were responsible for the act of the station-master, which was done in the course of his employment, and that the detention of the plaintiff was unjustifiable in the circumstances of the case.—FARRY *v.* GREAT NORTHERN RAILWAY CO., *Q.B.D.* (*Ir*).

4. *Negligence—One company using trucks of another.*—The C. Railway Co. brought coal in their own trucks to D. station where their obligations to the consignees ended. At D. the trucks were allowed by the C. Railway Co. to be hauled along a tramway by the G. and S.W. Railway Co. to the works of the consignees, during which transit one of the employees of the G. and S.W. Railway Co. was killed owing to a defective truck. The widow brought an action for damages against the C. Railway Co.

Held, that these facts disclosed no liability on the part of the C. Railway Co. towards the plaintiff.

Heaven v. *Pender*, 11 Q. B. D. 503, distinguished.

Decision of the Second Division of the Court of Session (34 Sco. L. R. 317) reversed.—CALEDONIAN RAILWAY CO. *v.* MULHOLLAND, *H.L.*, 236.

5. "*Part only of any house or other building*"—*Avenue—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 92.—Prior to 1890 a mansion-house and grounds, and a private road forming the approach thereto, formed part of the T. Estate. In 1890 the then owners conveyed to the plaintiff (*inter alia*) the mansion-house and grounds and the site of the private road, reserving to themselves a right of way over the road. The defendant railway company having served notice to treat for a portion of the road,

Held, that the said portion of the road did not form part of the plaintiff's "house" within the meaning of section 92 of the Lands Clauses Consolidation Act, 1845, and that the plaintiff could not require the defendants to take the whole of the house and grounds.

Decision of Stirling, J. (*ante*, p. 388), affirmed.—ALLHUSEN *v.* EALING AND SOUTH HARROW RAILWAY CO., *C.A.*, 483.

6. *Station—Right of railway company to exclude from the station persons other than travellers—Exclusion of hotel servant wearing hotel badge—Trespass—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31)—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48).—Apart from any facilities granted by the Railway Commissioners, a railway company have the right of excluding from their stations all persons except those using or desirous of using the railway; and may impose upon the rest of the public any terms they think proper as the condition of admittance. And it follows that a railway company who have an hotel of their own within the limits of the station may qualify their permission to other hotel proprietors and their servants to have free access to the platform with the condition that on those occasions no hotel servant shall wear a distinctive badge or livery.

So held (Lord Morris dissenting), reversing the decision of the Second Division of the Court of Session ([1896] 23 R. 885).

The jurisdiction to determine whether there is a statutory right to demand from a railway company a facility or privilege belongs exclusively to the

Railway Commissioners. — PERTH GENERAL STATION COMMITTEE *v.* ROSS, *H.L.*

7. *Superfluous lands—Land adjoining terminus—Negotiations by railway company to sell—Lease of portion—Lands Clauses Consolidation (Scotland) Act,* 1845 (8 & 9 *Vict. c.* 19), *s.* 120.—The directors of a railway company, before the expiration of ten years from the time limited by the special Act for the completion of their works, considered proposals for the purchase from the company of land adjoining one of their terminal stations, and after the ten years had expired they also considered proposals, and eventually leased a portion for the building of a district post-office. The adjoining landowner claimed the land as "superfluous land" within the meaning of section 120 of the Lands Clauses (Scotland) Act, 1845.

Held, affirming the decision of the First Division of the Court of Session ([1897] 34 S. L. R. 828), that whether the land had become superfluous or not was a question of mixed law and fact; and that on the evidence the land had not become superfluous.

London and South-Western Railway Co. v. *Blackmore,* L. R. 4. H. L. 610, distinguished.—MACFIE *v.* CALLANDER RAILWAY CO., *H.L.*

8. *Traffic—Regulation—Charge for use of sidings—Right of action—Arbitration—Railway and Canal Traffic Act,* 1888 (51 & 52 *Vict. c.* 25)—*Provisional Order.*—By a Provisional Order, made by the Board of Trade under the Railway and Canal Traffic Act, 1888, and confirmed by statute, a railway company were empowered to charge, in addition to the tonnage rate, a reasonable sum for the service, if rendered to a trader at his request or for his convenience, of allowing him "the use or occupation of any accommodation before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandize as carriers thereof, or the consignor or consignee to give or take delivery thereof, and services rendered in connection with such use and occupation," and "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party."

The company gave notice to the defendant, a trader, that they would allow him four days, free of charge, within which to unload goods consigned to him arriving at their station, and that after the expiration of the four days they would charge him 6d. per day siding rent for each wagon allowed to remain unloaded. In an action by the company to recover from the defendant siding rent at the rate of 6d. per day in respect of wagons which, after receiving that notice, he had allowed to remain unloaded after the four days, the defendant disputed his liability to pay the amount charged,

Held, that the jurisdiction of the court was ousted, because under section 5 of the statute an arbitrator appointed by the Board of Trade is the only tribunal for the settlement of any differences arising under that section.

Judgment of the Divisional Court ([1898] 1 Q. B. 748) reversed.—LONDON AND NORTH-WESTERN RAILWAY CO. *v.* DONELLAN, *C.A.*

9. *Traffic—Weights and measures—Inspector of—Police-constable—Constable travelling on railway as inspector—Right to travel at reduced fare—Cheap Trains Act,* 1883 (46 & 47 *Vict. c.* 34), *s.* 6.—A railway company is not bound, under section 6 of the Cheap Trains Act, 1883, to give a ticket at a reduced fare to an inspector of weights and measures who is travelling on the railway in the performance of his duties as such inspector, although he be at the time a police-constable—SPENCER *v.* LANCASHIRE AND YORKSHIRE RAILWAY CO., *Q.B.D.*, 443.

See also Landlord and Tenant, 7; Lands Clauses Acts, 2; Poor Law, 9.

RATING.—See Local Government, 25-28; Poor Law, 2-11; Practice, 11.

RECEIVER.—See Company, 6, 12; Lunacy, 2; Married Woman, 5; Mortgage, 5.

REGISTRATION.—See Election Law, 7.

RESTRAINT of TRADE.—See Contract, 7.

REVENUE.—See Inland Revenue.

RIVER:—

1. *Navigable river—Foreshore—Right to moor vessels—Public right.*—The owner of the foreshore of a navigable river holds possession of the soil subject to the right of all persons navigating the river to use the waters in all ordinary navigable ways, including the right to moor their vessels by means of fixed moorings.—ATTORNEY-GENERAL *v.* WRIGHT, *C.A.*, 85.

2. *Rights of riparian owners—Curtailment of by statute—Arching over stream—Girder—"Building, erection, or thing over the bed"—Burnley Borough Improvement Act,* 1871 (34 & 35 *Vict. c. cliv.*), *ss.* 134, 135—*Burnley Borough Improvement Act,* 1883 (46 & 47 *Vict. c. lxxvii.*), *s.* 46.—By section 135 of the Burnley Borough Improvement Act, 1871, "if any building, erection, or thing has been built, erected, or placed in or on the sides of either the Brun or Calder and within 15ft. from the centre thereof," the corporation can summon the owner or builder before the justices, who shall order the same to be removed and can inflict penalties. By section 135 "nothing in this Act contained shall prevent the owners of land adjoining the said streams from arching over the same, provided always that the span of such arch shall be not less than 30ft.," and a certain space was to be left under such arch.

By section 46 of the Burnley Borough Improvement Act, 1883, "notwithstanding anything in the Act of 1871 contained, every building, erection, or thing . . . built, erected, or placed above the bed . . . shall be so built, erected, or placed as to leave a clear space between such building, erection, or thing and any building, erection, or thing in or on the opposite side of such respective river of not less than 30ft.," and if this is not complied with the owner or person erecting can be summoned by the corporation.

The appellants, who were the owners of both sides of the river, placed across the river an iron girder, which was the first of several, on one half of which girders they proposed to make a carriageway. They were summoned for unlawfully erecting this girder and not leaving a space between such girder and a building on the side of the river of not less than 30ft.

The magistrates held that section 135 of the Act of 1871 was superseded, and that this was a building, erection, or thing placed above the head of the waterway.

Held (*dissentiente* Lawrance, J.), that the view of the magistrates was correct, and that this was in contravention of section 46 of the Act of 1883, section 135 not being applicable, but that so far as section 46 was inconsistent with section 135 it must be taken to override or limit the earlier section.

Also that the words "above the bed" meant "over the bed."

Per Wright, J.—It was very doubtful whether this was arching at all.—BURNLEY CO-OPERATIVE SOCIETY *v.* PICKLES, *Q.B.D.*

3. *Thames—Pollution — "Wilful suffering" — Thames Conservancy Act,* 1894 (57 & 58 *Vict. c. clxxxvii.*), *s.* 92.—By section 92 of the Thames Conservancy Act, 1894, "If any person without lawful excuse . . . wilfully causes or suffers any washing or other substance produced in making or supplying gas or any other offensive matter, whether solid or fluid, to flow or pass into the Thames or into any tributary . . . ," he shall for every such offence be liable to a penalty not exceeding £20, and to a daily penalty not exceeding £10.

Held, that persons were not guilty of wilfully suffering offensive matter to pass into the Thames by an omission to do something which might have mitigated the evil.

Smith v. *Barnham,* 34 L. T. Rep. 774, considered. —WYCOMBE (MAYOR) *v.* THAMES CONSERVATORS, *Q.B.D.*

See also Inclosure Acts, 1; Local Government, 30; Practice, 11.

SALE of GOODS:—

1. *Bill of exchange—Dishonour by buyer—Passing of property—Indorsement—Possession—Sale of Goods Act,* 1893 (56 & 57 *Vict. c.* 71), *ss.* 19 (3), 25 (2)—*Factors Act,* 1889 (52 & 53 *Vict. c.* 45), *s.* 2 (2).—Goods were sold and shipped to the buyer, to whom the seller forwarded the bill of lading, together with a bill of exchange for acceptance. The buyer did not accept the bill of exchange, but sold the goods, and indorsed the bill of lading to the plaintiff. The seller stopped the goods and indemnified the shipowner. In an action against the shipowner for non-delivery of the goods,

Held, that, as by the Sale of Goods Act, 1893, s. 19, sub-section 3, the buyer, not having accepted the bill of exchange, was bound to return the bill of lading, the property in the goods did not pass to him, and he could transfer no title to the plaintiff.

Held, also, that, as the consent of the seller to the possession of the goods by the buyer was conditional on the buyer's acceptance of the bill of exchange, the buyer had not obtained possession of the goods with the consent of the seller, within the meaning of the Sale of Goods Act, 1893, s. 25, sub-section 2, and could not transfer title under that clause and the Factors Act, 1889, s. 2, sub-section 2.

Held, therefore, that the plaintiff was not entitled to recover as indorsee of the bill of lading.—CAHN *v.* POCKETT'S BRISTOL CHANNEL STEAM PACKET CO., *Q.B.D.*

2. *Damages—Measure of—Breach of warranty—Difference in value—Sale of Goods Act,* 1893 (56 & 57 *Vict.* c. 71), *s.* 53, *sub-sections* 2, 3.—The plaintiff purchased at an auction for £21 an orchid described in the catalogue as "*Cattleya Acklandiæ alba,* only known plant." After cultivation for two years the plant flowered, and instead of being *alba* turned out purple, the value of such a plant being 7s. 6d.

In an action for breach of warranty the defendant admitted the breach, and paid into court the sum of £21, which the county court judge held to be sufficient.

The uncontradicted evidence of the plaintiff showed that the *alba* plant would be worth anything from 50 to 150 guineas, but such a plant would be unique.

The claim was reduced to £50, to give the county court jurisdiction.

Held, that the county court judge was wrong. *Per* Day, J.: That the plaintiff would certainly be entitled, in addition to what he paid, to the interest on the money, and what he had expended in rearing the flower. *Per* Lawrance, J.: That he would be entitled to the difference between the article with defect and without defect warranted against.—ASHWORTH *v.* WELLS, *Q.B.D.*

See also County Court, 8; Criminal Law, 10.

SCHOOL.—See Education; Endowed School.

SCOTLAND, LAW of:—

1. *Boundary wall—Mutual gable—Half cost of erection.*—The proprietor of two adjoining building plots erected a house upon one of them, building the whole gable half upon one plot and half upon the other plot. He afterwards conveyed the plot with the house upon it to A. The mutual gable, resting partly on the two plots, was described in the conveyance as a mutual gable. He subsequently sold the other plot, and the purchaser proceeded to erect a house upon it, making use of the mutual gable, In the letters of sale to A. the vendor said: "The unused half of the gable and boundary walls is not included in the offer." In an action by A.'s successor against the purchaser of the second plot for half the cost of the mutual gable wall, the defendant relied upon the words of the letters as showing that A. had not acquired the claim for recompense for the unused half of the gable.

Held, affirming the decision of the Second Division of the Court of Session, that A.'s successor was entitled to claim from the purchaser of the second plot one-half of the value of the mutual gable, and that there was no inconsistency between the letters of sale and the words of the conveyance. —BAIRD *v.* BELL, *H.L.*

2. *Sewers—Sewerage and drainage—Repair of drain—Substituting new drain—Glasgow Police Act,* 1866 (29 & 30 *Vict. c. cclxxiii.*), *ss.* 332, 335—*Glasgow Police* (*Amendment*) *Act,* 1890 (53 & 54 *Vict. c. ccxxi.*), *s.* 16—*Judicature* (*Scotland*) *Act,* 1825 (6 *Geo.* 4, *c.* 120), *s.* 40.—In cases arising in the Sheriff Court and appealed to the Court of Session the interlocutor of the Court of Session must contain all the findings of facts; for, if a fact is not found by the interlocutor appealed against, the House of Lords must, unless the parties agree to the fact not found, remit the cause to the Court of Session to find the fact in question.

Section 16 of the Glasgow Police (Amendment) Act, 1890, enacts that if the drains of any house, &c., are found to be defective, the owner of the premises shall be bound, immediately on an "order to that effect being given by the Police Commissioners, to carry out all necessary operations for removing defects of structure, or doing such acts as may be requisite to prevent risk to health, and, failing compliance with such order, the Police Commissioners may execute the work and recover the expense thereof as damages from the owner."

The commissioners having found that the drains of a block of houses were defective issued an order to the owners to repair the same, and, they having failed, the commissioners proceeded to execute the work themselves; but, instead of repairing the old drain, they constructed a new drain on a different site and outfall into the main sewer. In an action for the expenses, the Court of Session assoilzied the

owners upon the ground that section 16 of the Act of 1890 did not warrant the formation of a new system of drainage. This House having remitted the case to the Court of Session to find whether the commissioners had considered that the new drainage was necessary, that court found that part of the drainage had been considered necessary, but the rest had not.

Held, that the part considered necessary must be paid for by the owners, but not the rest.—GLASGOW CORPORATION *v.* MCOMISH, *H.L.*

SETTLED LAND:—

1. *Appointment of trustees—Compound settlement—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* 1; *s.* 50, *sub-section* 3—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 4, *sub-section* 1.—In order that a valid receipt for the purchase-moneys of land sold by tenants for life under the Settled Land Acts may be obtained, trustees for the purposes of the Acts may be appointed of all the deeds constituting a compound settlement.—TIBBITS' SETTLED ESTATES, RE, *Ch.D. North, J.*, 3.

2. *Capital money—Money in hands of trustees—No tenant for life—Investment as capital money under Settled Land Act—Married woman—Dispensing with examination—Settled Estates Act*, 1877, *s.* 50—*Settled Land Act*, 1882, *s.* 33.—T., by his will, devised real estate to trustees upon trust to apply the whole, or such part as they should think fit, for the benefit of his son C. E. T. or his wife or children in the usual form of a discretionary trust to protect the son's interest against bankruptcy, with remainders over. The trustees had no power of sale. They presented a petition under the Settled Estates Act, 1877, for approval of a conditional contract for sale, and payment of the purchase-money to them, with leave to invest it as capital money arising under the Settled Land Act. The testator's son was living, and consented. His wife was made a consenting party to the petition in respect of the interest which she might have under the discretionary trust. Section 50 of the Settled Estates Act, 1877, requires all married women who consent to any application to be separately examined.

Held, that section 33 of the Settted Land Act applied, and the money might be invested as capital money under that Act, though there was no tenant for life to exercise the option given by that section; and that, though the words of section 50 of the Settled Estates Act are imperative, the court can dispense with the examination of a married woman whose interest is remote and represented by trustees.

In re Halliday, 12 Eq. 199, followed.—TESSYMAN'S TRUSTS, RE, *Ch.D. North, J.*

3. *Compound settlement—Appointment of trustees of the compound settlement for the purposes of the Settled Land Acts—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (1), 20 (1) (2) (*i.*) (*ii.*) (*iii.*).—A vendor selling as tenant for life under the Settled Land Acts can convey the land free from any charges created by jointure deeds executed under a power contained in the deed creating the settlement. The purchaser will get a good title, and the trustees of the deed creating the settlement can give a good discharge to him for the purchase-money without being appointed in addition trustees of the jointure deeds for the purposes of the Settled Land Acts.—KECK AND HART'S CONTRACT, RE, *Ch.D. Stirling, J.*, 389.

4. *Compound settlement—Charges—Sale—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 *and* 20.—By a deed of resettlement, made in exercise of a general power of appointment conferred by a disentailing assurance, A. B. and his eldest son C. D. appointed an estate to the use of A. B. during his life, with remainders over; but the life estate of A. B. was not expressed to be in continuation, restoration, or confirmation of any estate in him. On summons taken out under the Vendor and Purchaser Act, 1874,

Held, that this was a new settlement and not a compound settlement; the tenant for life, therefore, could not sell under the Settled Land Acts free from a jointure and portions charged on the estate by previous settlements.

In re Lord Ailesbury and Lord Iveagh, [1893] 2 Ch. 345, distinguished.—MUNDY AND ROPER, RE, *Ch.D. Kekewich, J.*

5. *Compound settlement—Trustees for the purposes of the Settled Land Act—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 13), *ss.* 2 (1) (5) (8), 3, 20, 38, 50 (3)—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 4.—Where land is subject to a settlement created by an instrument, and there are trustees of that instrument for the purposes of the Settled Land Acts, it is not as a general rule necessary that they should be appointed trustees of every subsequent deed which affects the interests under the original settlement so that it is no longer the only instrument under which the land stands limited to persons by way of succession.

The effect of section 50 (3) of the Settled Land Act, 1882, is to impose on the tenant for life the obligation of obtaining the consent of his assignee for value whenever he exercises any power under the Act; but an assignment does not affect in any way the powers of trustees for the purposes of the Acts.

The object of section 4 of the Settled Land Act, 1890, is merely to exclude the operation of section 50 (3) of the Settled Land Act, 1882, in the case of assignments by way of family arrangement, and the instruments creating such assignments are not instruments creating the settlement for all the purposes of the Settled Land Acts.—DU CANE AND NETTLEFOLD'S CONTRACT, RE, *Ch.D. Stirling, J.*, 523.

6. *Estates settled in strict settlement—Incumbered estates settled on identical limitations—Discharge of incumbrances by a mortgage of both estates—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* 1—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 11.—Certain lands forming estate A. were settled in strict settlement. Later, by a separate instrument, the equity of redemption in estate B. was settled on similar trusts, and, owing to subsequent events, came, subject to the mortgage, to be settled in identically the same way as estate A.

Held, that, under the powers conferred by the Settled Land Acts, the tenant for life could pay off the mortgage on estate B. by money raised on a mortgage of estates A. and B., it being to the advantage of all persons interested in the estates to do so.

In re Mundy's Settled Estates, 39 W. R. 288, [1891] 1 Ch. 399, and *In re Byng's Settled Estates*, 40 W. R. 457, [1892] 2 Ch. 219, discussed.—MOSSON'S (LORD) SETTLED ESTATES, RE, *Ch.D. Romer, J.*, 330.

7. *Improvement rent-charges—Reduction of interest—Redemption—Application of capital money—Authorized improvements—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 25 (6) (20)—*Settled Land Act*, 1887 (50 & 51 *Vict. c.* 30), *s.* 1.—The trustees of a settled estate are not authorized under the Settled Land Act, 1887, s. 1, to apply capital money in

recouping a tenant for life a sum of money paid by him to the holders of improvement rent-charges in order to obtain a transfer of the charges, by which a reduction of interest upon the charges was effected.

The replacing of thatch with galvanized iron roofing, and, *Semble*, the erection of new fences partly in place of old fences and partly to divide a park, are improvements with the Settled Land Act, 1882, s. 25, sub-sections 6, 20, upon which capital money may be expended.—VERNEY'S SETTLED ESTATES, RE, *Ch.D. Kekewich, J.*, 348.

SETTLEMENT:—

1. *Construction—Appointment of stock sufficient to raise net sum—Succession duty.*—The donee of a power of appointment under a settlement appointed so much of the stock, &c., as should be sufficient to raise "the net sum of £2,000" to an object of the power.

Held, that the appointee was entitled to receive the full sum of £2,000 free from succession duty.

Decision of Stirling, J. (45 W. R. 456, [1897] 1 Ch. 888), reversed.

Banks v. *Braithwaite*, 32 L. J. Ch. 35, doubted. —SAUNDERS, RE, SAUNDERS *v.* GORE, *C.A.*, 180.

2. *Covenant to settle wife's after-acquired property—Husband's covenant only—Effect of.*—By a marriage settlement the husband alone covenanted to settle any after-acquired property (real or personal) which the wife, or the husband in her right, should by any means acquire during the coverture. The wife did not enter into this covenant, but she was a party to and executed the settlement. During the coverture the wife became entitled under her father's will to certain real estate.

Held, that this real estate was bound by the covenant and was subject to the settlement.—HADEN, RE, COLING *v.* HADEN, *Ch.D. Stirling, J.*

3. *Tenant for life and remainderman—Repairs.*—Where by a settlement of personalty, real estate was directed to be bought and to be held as personalty,

Held, that necessary repairs on such real estate were chargable to capital.—FREMAN, RE, DIMOND *v.* NEWBURN, *Ch.D. North, J.*

4. *Voluntary settlement—Construction—Estoppel.*—By a post-nuptial settlement in 1892 the plaintiff, who was the only child of her parents, conveyed to the trustees property to which it was expressed she was entitled under her parents' settlement. At that time her only interest was a vested interest in reversion expectant on her mother's decease, liable to be divested by the exercise of her mother's power of appointment as the surviving life tenant under the parents' settlement.

In 1897 the mother exercised her power in favour of the plaintiff absolutely.

Held, that the property the plaintiff thus took was not bound by her post-nuptial settlement.—LOVETT *v.* LOVETT, *Ch.D. Romer, J.*, 105.

See also Bankruptcy, 27; Inland Revenue, 4, 5; Trustee, 7.

SHERIFF:—

Execution—Fieri facias—*Abandonment of possession of goods—Temporary withdrawal from premises.* —The question whether a sheriff by withdrawing for a time from premises on which he has seized goods under a writ of *fieri facias* has abandoned possession of the goods is a question of fact.—BAGSHAWES *v.* DEACON, *C.A.*, 618.

See also Bankruptcy, 1, 24; Bill of Sale, 2; Company, 9; Lunacy, 2; Practice 21.

SHIP:—

1. *Advance notes to seamen—Assignment—Condition—Non-fulfilment—Payment of note by owner's agent—Liability of owner.*—An advance note was given to A., a seaman, for a half-month's wages. The note was in this form: "Five days after the ship *W.* leaves P. pay to the order of A. (provided he sails in the said ship and is duly earning his wages, according to his agreement)," &c. It was directed to B. & Co., the shipowners' agents at P., and there was a note upon it that it should at once be presented to B. & Co. for acceptance. A. transferred the note to C., who presented it to B. & Co., by whom it was duly accepted. Four days after *The W.* left P. A. was discharged. The master of *The W.* informed B. & Co. that A. had been discharged within five days of sailing, and directed them not to pay the note. B. & Co. paid the note.

On action by B. & Co. against the shipowners for the amount of the note,

Held, that as A. was not earning his wages at the end of five days after *The W.* left P., the condition of the note was not fulfilled, and that neither the shipowners nor B. & Co. as acceptors were liable upon it.—BELLAMY *v.* LUNN, *Q.B.D.*

2. *Bill of lading—Damage to cargo by heat—Exemption—"Any other accidents of the seas"—Closing of ventilators during bad weather.*—The owners of a steamship on board of which cargo is shipped under a bill of lading containing the following exemption: "Fire at sea, accidents from machinery, boilers, steam, or any other accidents of the seas," are not, if the steamship be seaworthy and the cargo properly stowed, liable for damage to the cargo caused during the voyage by heat proceeding from the bulkheads surrounding the engine and boiler space at a time when the ventilators provided for sufficiently ventilating such space had necessarily to be closed for the safety of the steamship.—"THRUNSCOE," THE, *P.D. & Ad.D.*, 175.

3. *Bill of lading—Exception—Negligence of master—Ship navigated by owner—Liability of owner for negligence in navigation.*—A bill of lading contained an exception of "the neglect and default of pilot, master, or crew in the navigation of the ship." The goods carried under the bill of lading were lost in consequence of the stranding of the ship, which was brought about by the negligence of the master, who was one of the owners of the ship.

Held, that the owner who was master was as much entitled as the other owners to rely on the exception.—WESTPORT COAL CO. *v.* MCPHAIL, *C.A.*, 566.

4. *Bill of lading—Exemption of shipowner from liability—"Defects latent on beginning voyage or otherwise."*—A bill of lading contained among other exemptions one by which the shipowner was not to be liable for loss or damage arising from "defects latent on beginning voyage or otherwise."

Held, that, although this would cover latent defects which might either exist at the commencement of the voyage or occur during the course of the voyage, it would not cover defects which were obvious at the commencement of the voyage.—WAIKATO *v.* NEW ZEALAND SHIPPING CO., *Q.B.D.*

5. *Bill of lading—Implied warranty—Fitness to carry particular cargo—Specie placed in bullion-room.* —Gold was shipped under a bill of lading which contained exceptions from liability for loss by robbers or thieves, or from any act, neglect, or default of the master and crew. The parties entered into the contract upon the footing that the

ship was provided with a bullion-room for the safe carriage of the gold. During the voyage the bullion-room was broken open and the gold was stolen.

Held, that there was an implied warranty in the bill of lading that the bullion-room was so constructed as to be reasonably fit to resist thieves.—QUEENSLAND NATIONAL BANK *v.* PENINSULAR AND ORIENTAL CO., *C.A.*, 324.

6. *Bottomry—Necessaries—Bond on ship, freight, and cargo paid out of proceeds of ship and freight in priority to necessaries.*—The master of an Italian vessel obtained in 1896 at an English port necessaries for the ship, and in 1897, being in distress for want of funds at a British Colonial port, there executed a valid bottomry bond on ship, freight, and cargo, binding himself personally by the bond. The vessel arrived in safety at her port of destination in England, but the bond not being paid, the assignees thereof instituted an action of bottomry against the vessel, her freight, and cargo, and an action of necessaries was on the same day instituted by the suppliers of the necessaries against the vessel and her freight in respect of the necessaries supplied as above mentioned. The proceeds of the ship and freight were insufficient to pay the wages of the crew, the master's wages, the bondholder's claim, and the claims in respect of necessaries.

Held, that, after payment of the sums due for the wages of the crew and master, the bondholder had a right to exhaust the proceeds of the ship and freight in paying his claim in priority to the claims of the suppliers of the necessaries, and that the latter could not require the ship, freight, and cargo to be marshalled for their benefit.—"CHIOGGIA," THE, *P.D. & Ad.D.*, 253.

7. *Charter-party—Berth for loading—Order by charterers—Tides.*—By a charter-party a ship was to proceed to a certain dock, or so near thereunto as she could safely get, and there load always afloat as and where ordered by the charterers a cargo of rails. The ship proceeded to the named dock, and was ordered by the charterers to a berth. The depth of the water in the dock was such that it was impossible, as the parties knew, for the ship to leave the dock, after being loaded, till the next spring tides, which would be in about a fortnight's time.

Held, that the order given by the charterers was not unreasonable and that they were not liable for the detention of the ship. Decision of the Court of Appeal (*ante*, p. 68) affirmed.—CARLTON STEAMSHIP CO. *v.* CASTLE MAIL PACKETS CO., *H.L.*

8. *Charter-party—Bill of lading—Condition in charter-party not incorporated in bill of lading—"Freight and all other conditions as per charter-party."*—Goods were shipped under a charter-party and bill of lading. The charter-party provided that the ship was to load and deliver a cargo including a deck cargo "at merchant's risk." Under the bill of lading the goods were to be delivered in good order and condition, "freight and all other conditions as per charter-party." On the voyage the deck cargo was damaged without negligence on the part of the shipowner.

Held, by A. L. Smith and Collins, L.JJ., affirming the Divisional Court (Rigby, L.J., dissenting), that the condition in the charter-party as to the carriage of the deck cargo at merchants' risk was not incorporated in the bill of lading, and that the shipowner was liable to the indorsees of the bill of lading for the damage to the deck cargo.—DIEDERICHSEN *v.* FARQUHARSON, *C.A.*, 162.

9. *Charter-party—Construction—Balance of freight—Construction of charty-party—"Consignee to effect the discharge of the cargo, steamer paying one franc per ton.*—Case of construction of a charter-party where the words "consignee to effect the discharge of the cargo, steamer paying one franc per ton," were construed by the court as providing that the owners of the steamer—the consignees having elected, according to an option given them by a previous clause of the charter-party, to pay freight, not on the weight of cargo delivered, but on the bill of lading quantity less 2 per cent.—were to pay in respect of the cost of discharging, one franc per ton of the same conventional quantity—that is, one franc per ton of the bill of lading quantity less 2 per cent.—"HOLLINSIDE," THE, *P.D. & Ad.D.*, 639.

10. *Charter-party—Exceptions—Delay—Lock-out—Accident to railway—Other clauses beyond charterer's control—Causes* ejusdem generis *with antecedent exceptions.*—A ship was chartered to proceed to Batoum, and there load with oil from a named factory, and at a specified rate per day. The charter-party excepted, among other things, "strikes, lock-outs, accident to railway," and also "other causes beyond charterer's control." Oil is brought to Batoum by a railway, which was injured by floods so that no oil could be sent down, and the workmen of the factory were discharged, there being no employment for them. Subsequently to the arrival of the ship in port the railway was repaired, and oil arrived in sufficient quantity to load her; but there was delay in doing so, because the workmen who had been discharged could not be got together in sufficient numbers, and such men as were there were employed in loading other vessels according to the order of their arrival, as was the practice of shippers at that port. On a claim for damages for detention of the ship,

Held, that the general clause excepting "other causes beyond charterer's control" referred to matters *ejusdem generis* with the antecedent exceptions, and that the delay in loading the ship after the arrival of the oil could not be attributed to accident to the railway, or to anything *ejusdem generis* with a lock-out, which was confined to the dismissal of workmen arising out of a trade dispute.—RICHARDSONS AND SAMUELS' ARBITRATION, RE, *C.A.*

11. *Charter-party—Freight payable in advance.*—By a charter-party it was provided that the charterer should pay freight "at the rate of £709 per calendar month . . . and at and after the same rate for any part of a month, hire to continue until her re-delivery to the owner, payment for the said hire to be made in cash monthly in advance." It was also provided that the owner should have a lien upon cargoes and sub-freight for any amount due to him under the charter, and that the charterer should have a lien on the ship for all moneys paid in advance and not earned.

Held, that the charterer was bound to pay the full freight in advance at the beginning of each month, although it might be probable that the hire would not continue for the whole month.—TONNELIER *v.* SMITH, *C.A.*

12. *Collision—Crossing vessels in rivers—Regulations for Preventing Collisions at Sea*, 1884, *art.* 22.—Article 22 of the maritime rules, which relates to vessels "crossing so as to involve risk of collision," must be distinguished in its application, (1) as

regards vessels navigating the open sea; (2) as regards vessels passing along the winding channels of rivers. In the latter case the vessels must follow, and must be known to intend to follow, the curves of the river bank.

Held, in this case, that the defendant vessel, though she ported her helm, kept the course prescribed by the nature of the locality; and that at the moment of porting the vessels were not crossing vessels within the meaning of article 22, since the reasonable inference, having regard to the locality and their previous courses, was that they would avoid collision.

The Leverington, [1866] 11 P. D. 117. distinguished. — "NORMANDIE," THE *v.* "PEKIN," THE, *P.C.*

13. *Collision—Damage by—Loss of use of dredger Remoteness of damage—Mersey Harbour Trustees.*—Owing to a collision with a ship (the ship being in fault) a steam dredger was injured and the owners were deprived of the use of it for some weeks and the dredging works were delayed. The dredger belonged to trustees charged with the duty of maintaining a harbour and waterway, deriving their funds from rates and not entitled to distribute profits. The trustees having brought a collision suit in the Admiralty against the shipowners,

Held (Lord Morris dissenting), reversing the decision on this point of the Court of Appeal, [1896] P. 192, that though the trustees were not out of pocket in any definite sum they were entitled to recover damages for the loss of the use of the dredger.—"GRETA HOLME," THE, *H.L.*

14. *Collision—Harbour—Damage—Duty of harbour authority—Tug—Ribble Navigation Act*, 1883 (46 & 47 *Vict. c. cxv.*).—By the Ribble Navigation Act, 1883, the mayor and corporation of Preston are constituted the port and harbour authority, and as such authority levy tolls in respect of all vessels using the port, and make a charge for towage, and licence tugs to tow within the port and harbour.

A ship of the respondents arrived at the mouth of the Ribble with a cargo for Preston, and was lightened under the direction of the harbour-master and then proceeded up the river in tow of a tug belonging to the appellants, in charge of a pilot, preceded by two other vessels each in tow of a tug, and in charge of a pilot, on the flood tide. One of the tugs preceding the respondents' ship went at such a slow rate of speed that the respondents' ship could not pass a shoal in the river before the tide turned, and sustained damage.

Held, that the corporation, as harbour authority, were liable for the damage so caused.

Decision of the Court of Appeal ([1897] P. 118) affirmed.—PRESTON (MAYOR) *v.* BIORNSTAD, "RATATA," THE, *H.L.*

15. *Collision—Incoming and outcoming ship—Order of harbour-master.—The T.*, a screw steamer, was approaching a lock leading from a basin into a dock at the time when two paddle tugs were coming out. The first tug passed out safely. The master of the second thought that there was not room to pass between *The T.* and the lock wall and stopped. The harbour-master, whose orders he was bound to obey, ordered him to go ahead, and at the same time ordered *The T.* to go astern. *The T.* reversed her engines, but only sufficiently to keep her stationary, as the wind and tide were drifting her towards the lock. A collision took place between the port sponson of the tug and the port bow of *The T.*

Held, that the tug was not to blame, because (1) an incoming ship should give way to an outgoing ship; (2) the master of the tug was bound to obey the order of the harbour-master to go ahead; (3) *The T.* had disobeyed the order to go astern.—TAYLOR *v.* BURGER, *Q.B.D.*

16. *Dock rates—Goods imported from "parts beyond the seas"—Goods transhipped at English port—Mersey Dock Act*, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 234; *Schedule C.*—Goods shipped from a foreign port under a through bill of lading to Liverpool, landed in London, and sent thence to Liverpool in another ship, are imported into Liverpool "from parts beyond the seas" within the meaning of section 234 of the Mersey Dock Act, 1858.—MERSEY DOCKS BOARD *v.* TWIGGE, *Q.B.D.*

17. *Pilotage—Damage—Tyne Pilotage Order Confirmation Act*, 1865 (28 *Vict. c.* 44), *Schedule, ss.* 16-22—*Home trade passenger ship—Employment of pilot in Tyne Pilotage District—Compulsory pilotage—Merchant Shipping Act*, 1894, *s.* 604, *sub-section* 1.—The master of a ship carrying passengers between any place in the British Islands and any other place so situate is, if neither he nor the mate of his ship has a pilotage certificate, bound by compulsion of law to employ a licensed pilot whilst navigating within the Tyne Pilotage District.—"WARSAW," THE, *P.D. & Ad.D.*, 638.

18. *Pilotage—London district—Vessel navigating within her own port not having passengers on board—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 191, 192, 625—*Distressed seamen not passengers.*—The 625th section of the Merchant Shipping Act, 1894, provides (*inter alia*) that the following ships, when not carrying passengers, shall, without prejudice to any general exemption under this part of the Act, be exempted from compulsory pilotage in the London district (that is to say): "(5) Ships navigating within the limits of the port to which they belong."

The term "passengers" in this section does not include "distressed seamen" for whom a passage home has been required to be provided under the sections of the above Act relating to distressed seamen; and the master of a ship belonging to the port of London, when navigating within the limits of that port, and only carrying, in addition to himself, his officers, pilot, and crew, "distressed seamen" placed on board in accordance with the last-mentioned sections, is not bound by compulsion of law to employ a pilot.—"CLYMENE," THE, *P.D. & Ad.D.*, 109.

19. *Pilotage—Recovery of agreed remuneration for services not contemplated by statute under which pilots appointed—Mersey Docks Acts Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*).—There is nothing in the Mersey Docks Acts Consolidation Act, 1858—the existing Act regulating pilotage in the River Mersey—rendering it obligatory on a shipmaster to employ a pilot to pilot a ship when she is being navigated in the port of Liverpool when not outward or inward bound; but the pilots licensed by the Mersey Docks and Harbour Board may agree with shipmasters to perform for them within the port of Liverpool extra services in the nature of pilotage services which they are not bound to perform under the provisions of the above-mentioned Act. Among such extra services for which by agreement the pilots may so become entitled to be paid are the following: Navigating a ship from an anchorage in the River Mersey to and alongside a landing-stage for the purpose of embarking passengers, mails, or cargo to be carried by her on her intended voyage outwards. Navigating a ship,

after she had been brought as far up the River Mersey as the dock where it was intended she should unload her cargo, to and alongside landing-stages farther up the river for the purposes of discharging cattle.

Observations as to whether, in case of a collision occurring to a ship at a time when the pilot was performing these extra services, the shipowners would be liable for damage occasioned by his sole fault or default.—"SERVIA," THE, AND "CARINTHIA," THE, *P.D. & Ad.D.*, 492.

20. *Possession—Sale of ship by majority owners—Judgment by consent—Agreed damages—Meaning of "such deductions as the interveners may be able in law to establish as proper from the respective shares and interests of the plaintiffs."*—The owners of fifty-two sixty-fourth shares in a ship—the ship having been arrested in an action *in rem* for master's wages and disbursements—put in bail in the action and paid the amount found due by the court.

They subsequently, without the consent of the owners or mortgagees of the remaining shares in the ship, entered into a contract for the sale of the whole ship to a foreign purchaser, and delivered her to him, receiving the total purchase-money. The mortgagees of eight of the remaining twelve sixty-fourth shares in the ship and the sequestrator of the mortgagee of those shares then arrested the ship in an action of possession, and the owners of the fifty-two sixty-fourth shares having intervened in that action, agreed to settle the suit by paying to the plaintiffs eight sixty-fourth parts of the purchase-money they had received for the ship, less such deductions as the interveners might be able to establish as proper from the respective shares and interests of the plaintiffs.

Held, that a sum paid by the interveners for brokerage at 2½ per cent. was a deduction to be allowed within these words, but that the amount paid for wages and disbursements, and sums paid for cancelling an onerous charter-party entered into for the ship and for repairs to her not required by the purchasers, were not allowable deductions.—"RIPON CITY," THE, OR "SILVIA" THE, *P.D. & Ad.D.*, 586.

21. *Salvage — Life salvage — Jurisdiction — Life salvage services "rendered to foreign vessel wholly or in part within British waters"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 544.—An English vessel fell in with a Norwegian vessel in the North Sea, more than three miles from the coasts of the United Kingdom, flying signals of distress, water-logged and unmanageable, in want of immediate assistance for herself and her crew, and rendered life salvage services to the crew of the distressed vessel by taking them off their vessel and bringing them into an English port in safety.

Held, that the English court had jurisdiction under section 544 of the Merchant Shipping Act, 1894, to make an award of life salvage remuneration to the owners, master, and crew of the salving vessel; such services having in fact been rendered in part within British waters.—"PACIFIC," THE, *P.D. & Ad.D.*, 686.

22. *Salvage—Receiver of wreck—Arrest and detention of salved property before action—Merchant Shipping Act*, 1894, *s.* 552.—The words "due under this Act" in section 552 of the Merchant Shipping Act, 1894, refer to all cases of salvage which may become payable by the decree of any court having jurisdiction under the Act to determine salvage disputes; and the powers given by that section to receivers of wreck are not confined to those cases where the right to claim salvage is given by the Act.—"FULHAM," THE, *P.D. & Ad.D.*

23. *Salvage—Service rendered by salvage vessels—Assessment of remuneration.*—In assessing the amount payable for salvage services rendered by salvage steamers, the court can take into account, as enhancing the amount of the award, the fact that the salvage steamers are equipped and maintained at considerable expense for the sole purpose of rendering salvage services.

Decision of the Court of Appeal (*ante*, p. 308) affirmed.—"GLENGYLE," THE, *H.L.*

24. *Towage—Construction of contract—Complete performance prevented by a misfortune beyond the control of either party—Subsequent salvage.*—The plaintiffs, tug-owners, contracted to tow the defendant's vessel from Kingroad in the River Severn to Sharpness Dock for a fixed sum, but when near their destination, owing to a fog, and without anybody being in fault, the vessel stranded on a rock and could not be got off.

Held, by Jeune, P., that the contract was indivisible, and, not having been fulfilled, the plaintiffs were not entitled to recover on a *quantum meruit* for any portion of the towage.

Appleby v. *Myers*, (1867) L. R. 2 C. P. 651, followed.

After the stranding and failure of the attempt to get the vessel off, the tugs were ordered by the master of the vessel to keep her where she was so as to prevent her drifting up the river and sinking in deep water or doing damage. These orders the tugs obeyed; and in the result the vessel was sold where she lay, but the greater part of the cargo of timber being taken off in lighters, the freight was earned by the shipowner.

Held, that this was a salvage service, and on a total value of £2,724 the owners, masters, and crews of the three tugs engaged were awarded £370.—"MADRAS," THE, *P.D. & Ad.D.*

See also Admiralty, 1-3; Criminal Law, 5; Insurance, 4-15.

SHOP.—See Factory, 1-3.

SOLICITOR:—

1. *Costs—Charging order—"Property recovered or preserved" — Bankruptcy — Criminal proceedings under the Debtors Act*, 1869—*Order to trustee to prosecute bankrupt—Money found on bankrupt at time of arrest—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.—The words "property recovered or preserved" in section 28 of the Solicitors Act, 1860, means property recovered or preserved in a suit, matter, or proceeding in a court of justice.

The appellants acted as solicitors for a trustee in bankruptcy who, in the course of the bankruptcy proceedings, was directed by the court to prosecute the bankrupt for an offence under the Debtors Act, 1869. The bankrupt, who had left the country, taking with him a sum of money, was arrested abroad, and the money found upon him at the time of arrest was taken possession of by the police, and remitted to the appellants by virtue of a power of attorney prepared by them on behalf of the trustee in bankruptcy. The appellants claimed a charging order upon this sum under section 28 of the Solicitors Act, 1860, for their costs and expenses of and incidental to the recovery thereof, including the costs and expenses of procuring the arrest of the bankrupt and of the proceedings consequent thereon, as money recovered by them in the proceedings.

Held, that the appellants were not entitled to a

charging order, as the money was not recovered in the proceedings in bankruptcy, but by virtue of the power of attorney.—HUMPHREYS, RE, LLOYD-GEORGE, EX PARTE, *C.A.*, 322.

2. *Costs—Country solicitor—Attendance at hearing in London—Originating summons—R. S. C.*, 1883, *App. N., Nos.* 173, 174.—The taxing officer has a discretion, in rare and exceptional cases, to allow the costs of the attendance of a country solicitor at the hearing of a cause tried in London even where all the evidence is taken by affidavit.

Per Byrne, J.—The principles upon which taxation should proceed in a district registry are the same as those acted upon in cases commenced in London.—DIXON, RE, TOUSEY *v.* SHEFFIELD, *C.A.*, 677.

3. *Costs—Security taken — Waiver of lien.* — A solicitor who takes from his client a declaration charging the client's reversionary interest with payment of the solicitor's costs of negotiating a loan, is not entitled to a lien upon the client's documents in his possession for that purpose, in the absence of explanation to the client that he intended to assert his lien, notwithstanding the security given by the client.

In re Taylor, Stileman, & Underwood, 39 W. R. 417, [1891] 1 Ch. 590, followed.—DOUGLAS NORMAN & CO., RE, *Ch.D. North, J.*, 421.

4. *Costs—Solicitors Act*, 1874 (37 & 38 *Vict. c.* 68), *s.* 12.—In taxing a solicitor's bill of costs, items in respect of business done while the solicitor had no certificate should be disallowed.

In re Jones, 18 W. R. 159, L. R. 9 Eq. 63, is now obsolete, as the wording of 37 & 38 Vict. c. 68, s. 12, differs from that of 6 & 7 Vict. c. 73, s. 26.—SWEETING, RE, *Ch.D. North, J.*, 242.

5. *Executor-trustee — Will — Power to solicitor to make professional charges — Insolvent estate — Creditors' action.* — A professional trustee or executor is not entitled to charge profit-costs under a power in a will, if the testator's estate is insolvent.

Decision of Kekewich, J. (*ante*, p. 247, [1898] 1 Ch. 297), affirmed.—WHITE, RE, PENNELL *v.* FRANKLIN, *C.A.*, 679.

6. *Lien—Administration action—Lien acquired before action—Order for production of documents for purposes of action.*—The existence of a solicitor's lien does not give the solicitor any greater right to refuse production of the documents subject thereto than his client would have. Where, therefore, in an action to which the client is a party, production of documents subject to a lien is necessary for the purpose of doing justice to parties other than the client, production will be ordered.

A solicitor had acquired a lien on papers of a client who afterwards died; the solicitor was employed by the client's executors to bring an action for administration of the client's estate; the conduct of the action was subsequently given to a creditor, but the executors still remained parties and still retained the solicitor.

Held, upon an interlocutory application made by the creditor, that the solicitor was bound to produce papers covered by the lien, their production being material for the conduct of the administration proceedings.—HAWKES, RE, ACKERMAN *v.* LOCKHART, *C.A.*, 445.

6A. *Misconduct—Striking off rolls—Non-pecuniary offence—Attempt at murder and suicide.*—Where a solicitor lent sums of money belonging to his clients to a third person for speculative purposes, and in consequence of the loss of the money became so depressed that he attempted to murder his wife and to commit suicide, for which offences he was sentenced to penal servitude,

Held, that he should be struck off the rolls.—COOPER, RE, *Q.B.D.*

7. *Striking off rolls—Colonial court—Production of order of Colonial court—Sufficiency for striking off in this country.*—The court will not strike a solicitor off the roll of solicitors in England merely upon the production before it, without more, of the order of a Colonial court striking off the same solicitor from the rolls in the colony, for professional misconduct in his practice as a solicitor in the colony.—INCORPORATED LAW SOCIETY, EX PARTE, *Q.B.D.*, 303.

8. *Trustee—Mortgage—Breach of trust—Fiduciary relationship—Guarantee.*— A sum of £6,000 was advanced jointly on the security of a mortgage by the trustees of a will and a firm of solicitors. The investment was a breach of trust on the part of the trustees, and the solicitors, who were their legal advisers, failed to advise them that this was the case. The mortgage was taken in the names of one of the firm of solicitors and one of the trustees, and a memorandum was executed by the mortgagees to the effect that £3,000 belonged to the trustees and £3,000, the residue of the £6,000, to the solicitors. The solicitors also gave the trustees a guarantee of the sufficiency of the security. The solicitors subsequently went bankrupt, and an action was brought by the trustees claiming to be paid their £3,000 out of the mortgage security in priority to the solicitors or to any persons claiming under them.

Held, that the trustees were not entitled to any priority upon the construction of either the memorandum or the guarantee; that the investment by the trustees was a breach of trust on the part of the trustees; and that the solicitors, by failing to advise their clients that this was so, were guilty of a breach of trust towards them. Though the law imposes considerable disabilities on solicitors in dealing with their clients, yet, in the present instance, the solicitors were not seeking any benefit which was not in contemplation at the time of the transaction, and their only breach of duty was that they permitted their clients to invest trust money on insufficient security. Under these circumstances, though the solicitors might be answerable in damages, the clients were not entitled to any priority of payment out of the solicitors' security.—STOKES *v.* PRANCE, *Ch.D. Stirling, J.*, 183.

See also County Court, 7; Justices, 1, 2; Mortgage, 7.

SPECIFIC PERFORMANCE.—See Company, 5; Vendor and Purchaser, 5, 6, 12-14.

STAMP ACTS.—See Inland Revenue, 1, 15-23; Insurance, 14.

TELEGRAPH.—See Post Office.

THEATRE.—See Licensing Law, 8.

TITHE.—See Local Government, 8.

TOLLS:—

Prescriptive right—Extinguishment of old franchise by statute—Merger—Lost grant.—A municipal corporation had in the year 1734 a prescriptive right to take certain customary tolls for the passage of carriages, cattle, &c., over a bridge belonging to

them. From one only of these tolls—namely, a toll in respect of hackney carriages, freemen of the borough were exempt. In 1734 the corporation obtained a local Act, which, after reciting the existence of their right to take the customary tolls and enumerating those tolls, provided that the said customary tolls should be and remain vested in them. The Act further provided that it should be lawful for the collectors appointed by the corporation to demand the respective tolls before mentioned from all persons other than freemen of the borough. In the year 1819 the corporation obtained another local Act, by which the former Act was repealed, and they were empowered to take down the old and build a new bridge, and to take tolls for passage over it which exceeded in amount the old tolls and included additional subject-matters. There was no exemption in this Act in favour of freemen. This last-mentioned Act was a temporary Act, and its provisions had been allowed to expire.

Held, that the prescriptive right of the corporation to take tolls had been extinguished, and a statutory right substituted for it, by the local Act of 1734, or, if not by that Act, then by the local Act of 1819.

By Rigby and Collins, L.JJ.—The Act of 1734 having given a statutory title to the tolls which had been previously taken by virtue of a prescriptive right, the title by prescription was merged in and extinguished by the statutory right.—TAYLOR *v.* NEW WINDSOR CORPORATION, *C.A.*

TRADE-MARK:—

1. *False trade description — Oral statement — Description in invoice written at purchaser's request—Merchandise Marks Act*, 1887 (50 & 51 *Vict.* c. 28), *s.* 2 (2).—Respondent asked a salesman in appellant's shop for a small English ham; the salesman pointed to some American hams on a shelf, and said, "These are Scotch hams"; the respondent chose one; an invoice which did not contain the word "Scotch" was handed to the respondent by another assistant, but the respondent asked that the word "Scotch" should be inserted as he had bought the ham as such, and the assistant accordingly inserted the word in the invoice.

Held, that the description in the invoice was a false trade description within section 2, sub-section 2, of the Merchandise Marks Act, 1887.

Held, also, that where the description was entirely oral that section was not applicable.—COPPEN *v.* MOORE, *Q.B.D.*

2. *Merchandise marks—False trade description—Application to goods—Goods supplied equal in quality to goods described—Absence of fraudulent intent—Offence—Merchandise Marks Act*, 1887 (50 & 51 *Vict.* c. 28), *ss.* 2, 3.—By section 3 of the Merchandise Marks Act, 1887, a false trade description is defined as "a trade description which is false in a material respect as regards the goods to which it is applied."

Held, that a trade description which is false in point of fact as a description of the goods is "false in a material respect as regards the goods to which it is applied," and is therefore a false trade description within the meaning of the section, although the goods supplied are of as good a quality as the goods described, and although there is no intention to deceive or defraud the buyer; and, consequently, that a person who sells cigarettes to which a label is attached describing them as hand-made when in fact they are machine-made, is guilty of an offence under the Act, although he shows that the cigarettes actually sold were of as good a quality in all respects as if they had been made by hand, and that he had no intention to deceive the buyer.—KIRSHENBOIM *v.* SALMON & GLUCKSTEIN, *Q.B.D.*, 573.

3. *Registration*—Bonâ fide *intention of user, necessity for—Non-user—Rectification.*—If persons register new trade-marks which they say they intend to use, they must at the date of registration have a *bonâ fide* intention of using these trade-marks in respect of the goods for which they register them.

On motion to expunge two marks from the register, the court, finding as facts that there had been no real user before registration, and no real user since registration in respect of the articles in the class in which the applicants sought registration of an identical mark, and that at the date of the registration there was no *bonâ fide* intention to use these marks for any of the goods in that class.

Held, that the registration of the marks was wrong, and must be expunged.—BATT'S TRADE-MARK, *Ch.D. Romer, J.*, 459.

4. *Registration—Invented word—Similar sound to word which cannot be registered—Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict.* c. 50), *s.* 10 (1) (*d*) (*e*).—Where a particular word cannot be registered as a trade-mark, another word sounding exactly like it, but spelt differently, cannot be registered.—RIPLEY'S TRADE-MARK, RE, *C.A.*

TRADE NAME:—

1. *Change of name—Injunction restraining use of name altogether in connection with a particular trade.*—A person taking the name of another in order to pass off and sell goods under the name of that other will be absolutely restrained by injunction from using that name in carrying on a business similar to that other's business.—PINET ET CIE. *v.* MAISON LOUIS PINET, *Ch.D. North, J.*, 506.

2. *Common law right—Name indicating manufacturer—Injunction—Fraud.*—The respondent had for years manufactured and sold under the name "Yorkshire Relish" a sauce made according to a secret recipe, and the term "Yorkshire" had come to mean that particular manufacture. The appellants began to make a sauce nearly resembling the respondent's sauce, which they sold as Yorkshire Relish so as to induce purchasers to believe that it was the respondent's "Yorkshire Relish," although the purchasers did not in fact know the name of the respondent in connection with the sauce.

Held, that the respondent was entitled to an injunction restraining the appellants from using the words "Yorkshire Relish" in connection with their sauce without clearly distinguishing it from the respondent's sauce.

The decision of the Court of Appeal ([1896] 2 Ch. 54) affirmed.—BIRMINGHAM BREWERY CO. *v.* POWELL, *H.L.*

3. *Common law right—Similar name—True name—Tendency to deceive—Form of injunction.*—L. M. Pinet (trading as Maison Pinet), who carried on a small and recently established business in boots and shoes made for a special purpose, sold that business to the defendant company. One of the objects of the company was, by its memorandum of association, stated to be "to carry on business in England and elsewhere as bootmakers and shoemakers." The plaintiffs had for over forty years carried on business in the manufacture and sale of boots and shoes, their goods being commonly known as "Pinet's."

They accordingly applied for an interlocutory injunction to restrain the defendant company from carrying on business as manufacturers or vendors of boots or shoes under the name of "Maison Pinet, Limited," or under any other name or description of which the name "Pinet" formed part, and which was so arranged or contrived as by colourable imitation of the plaintiffs' trading style or otherwise, to be calculated to represent or lead to the belief that the defendant company were carrying on plaintiffs' business, and from in any other manner representing or acting so as to lead to such belief as aforesaid.

Held, that, although the business of L. M. Pinet was not the same as the plaintiffs' yet the company formed to acquire it had no intention of restricting their operations in any way, and would probably develop that business as far as possible, and develop it at the expense of the plaintiffs; that, therefore, a case had been made out justifying the interference of the court at the present stage of the proceedings; but that the interlocutory injunction claimed went beyond what the plaintiffs required for their protection; and that it must be limited as in the form in *Montgomery* v. *Thompson*, [1891] A. C. 217.—PINET ET CIE. *v.* MAISON PINET (No. 2), *C.A.*

4. "*Flaked Oatmeal*"—*Term of ordinary description—Identification of name with goods by user—Injunction.*—Where the plaintiffs without relying on their registered trade-mark, which consisted in part of the term "Flaked Oatmeal," claimed that they had by user so intimately identified the term with their goods that the use of it by the defendants in their trade-mark had the effect of passing off their goods as the plaintiffs' goods,

Held, that the term being one of ordinary and not exclusive description, and being applicable to the defendants' goods as well as the plaintiffs', and the defendants' user thereof not having been proved to have had or to be calculated to have the above effect, the suit must be dismissed with damages resulting from the grant of an *interim* injunction.

Reddaway v. *Banham*, [1896] A. C. 199, approved. —PARSONS *v.* GILLESPIE, *P.C.*

5. *Former concurrent user by two firms—Discontinuance of user by one for several years.*—Where there has been a concurrent user of a trade name by A. and B., but the user thereof by B. has practically ceased for some years, and A. has in the meantime acquired a large sale for his goods and a reputation in the market under the trade name, so that the name has become associated solely with the goods of A., B. may not afterwards revive the use of the name in his business in such a way as to pass off his goods of those of A.—DANIEL & ARTER *v.* WHITEHOUSE, *Ch.D. Barnes, J.*

See also Company, 20.

TRADE UNION:—

Strike—"Watching and besetting"—Conspiracy and Protection to Property Act, 1875 (38 & 39 *Vict. c.* 86), *s.* 71—*Registered society—Conspiracy—Trade union funds.*—Watching or besetting the works or place of business of an employer, for the purpose of persuading or otherwise preventing persons from working for him, or for any purpose except merely to obtain or communicate information, is illegal within the meaning of section 7 of the Conspiracy and Protection to Property Act, 1875, and will be restrained by injunction.

A trade union, although registered under the Trade Union Act, 1871, cannot be made a party to an action for an injunction against "watching and besetting."

The trustees of a registered trade union, made defendants in their capacity as trustees to an action against themselves and others for "watching and besetting" the premises of the plaintiff, will not be restrained from allowing the funds of the union to be employed for the furtherance of the wrongful acts against which an injunction is obtained.—LYONS *v.* WILKINS, *Ch.D. Byrne, J.*, 461.

See also Master and Servant, 4.

TRAMWAY.—See Master and Servant, 5.

TRUSTEE:—

1. *Administration action—Account—Limitations, Statute of—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.—Form of order for account to be rendered by trustees who are entitled to the protection given by section 8 of the Trustee Act, 1888, against liability to account for a period beyond six years from the commencement of the action.—DAVIES, RE, ELLIS *v.* ROBERTS, *Ch.D. Kekewich, J.*

2. *Breach of trust—Conversion of improper investments—Judicial Trustee Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.—A trustee, to be entitled to relief under section 3 of the Judicial Trustee Act, 1896, must act both honestly and reasonably; the mere fact that he acted honestly is not sufficient.—BARKER *v.* RAVENSHAW, BARKER, RE, *Ch.D. North, J.*, 296.

3. *Breach of trust—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3—*Trustee Act*, 1888 (56 & 57 *Vict.* 53), *s.* 8.—An inquiry having been directed and a certificate made thereunder before the passing of the Judicial Trustees Act, 1896, a trustee who had by such certificate been found liable to make good a loss caused by an improper investment, on the matter coming on for further consideration, claimed relief under the Act.

Held, that, as attention had not been directed to the circumstances which would afford relief under the Act, the trustee was not too late in making his application, and ought to be afforded an opportunity of producing any fresh evidence he might desire to put in.

A trustee seeking relief under the Judicial Trustees Act, 1896, must show that he has acted, not only honestly, but also in a reasonable manner, and the burden of proof lies on the trustee.

Barker v. *Ivimey*, 45 W. R. 495, [1897] 1 Ch. 536, followed.—STUART, RE, SMITH *v.* STUART, *Ch.D. Stirling, J.*, 41.

4. *Breach of trust—Liability of retired trustees for breach committed by new trustees—Right of trustees to return of unauthorized investment on making good loss.*—Retiring trustees cannot be held liable for a breach of trust by their successors unless the actual breach committed is not merely the outcome of the retirement and new appointment, but is contemplated by the retiring trustees when the retirement and new appointment takes place.

A trustee who makes an unauthorized investment is not entitled to a return of the investment on making good the loss of the trust estate as against a *cestui que trust* incompetent to assent to such investment.—HEAD *v.* GOULD, *Ch.D. Kekewich, J.*, 597.

5. *Breach of trust—Mortgage of trust estate along with trustee's own property.*—The Court of Appeal in 1896 (45 W. R. 272) declared B. to have purchased certain Ceylon estates as a trustee for R..

subject to B.'s lien for the purchase-money and other advances for the purposes of the estates, and an account was directed of all sums of money received by B. in respect of any sale, mortgage, or other disposition of the estates or any of them. In July, 1876, B., who had previously obtained from C. & Co. two advances of £20,000 and £25,000 on the security of his own estates in Cumberland, had obtained from them £20,000 more, and signed this memorandum: "Messrs. C. & Co.,—You have now advanced to me £20,000, £25,000, and £20,000 on security of my Cumberland estates. If required by you at any time, I undertake by way of further security to execute to you a valid charge on my Ceylon estates." In July, 1879, by a memorandum indorsed on this memorandum, B. stated to C. & Co. that he had directed his agent to execute to them, in pursuance of the former memorandum, a formal charge on the D. and D. estates (two of the estates to which R. afterwards established his title) for £35,000, the balance then due from him to C. & Co. A mortgage in Ceylon was executed accordingly. C. & Co. never resorted to the D. and D. estates. The official referee in taking the accounts charged B. with £20,000 as money received by him in respect of a mortgage on part of the trust estate. Kekewich, J., struck out this sum altogether.

Held, on appeal, that as B. had received £20,000 on a charge on the Cumberland estates, and a promise to give a charge on the D. and D. estates, which promise was afterwards followed by an actual charge, he must be treated as having raised that sum rateably out of the Cumberland estates and the D. and D. estates according to their respective values after deducting the prior incumbrances upon them, and must be debited with the share attributable to the D. and D. estates.—ROCHEFOUCAULD *v.* BOUSTEAD, *C.A.*

6. *Breach of trust—Sale of leaseholds—No power of sale—Court's power to excuse—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.—Where leaseholds were held upon trust for certain persons for life, and after the death of the survivor of them upon trust for their children, and the trustees of the settlement, which did not contain a power of sale, acting *bonâ fide*, and, as they believed, in the best interests of the trust estate, sold the leaseholds, they were held to be entitled, under section 3 of the Judicial Trustees Act, 1896, to be relieved from personal liability on the ground that they had acted "honestly and reasonably, and ought fairly to be excused for the breach of trust."

Section 3 of the Judicial Trustees Act, 1896, discussed.—PERRINS *v.* BELLAMY, *Ch.D. Kekewich, J.*, 682.

7. Cestuis que trustent—*Unnecessary or improper parties—Costs—Settlement—Void limitations—Action to set aside—Parties.*—Where a settlement has been set aside by the court, and there is no property left out of which the trustees can claim their costs as a matter of right, nevertheless, if they have acted properly, the court has power to allow them their costs, and the strict rule based on the assumption that the fund is gone does not apply.

Accordingly, where the trustee in bankruptcy of a settlor has succeeded, in an action against the trustees of a settlement of the settlor's own property, in setting aside limitations providing for the determination of the settlor's life interest upon bankruptcy, the court, being of opinion that the trustees had acted properly, directed them to retain their costs out of the accrued income in their hands before handing it over to the plaintiff under the judgment.

The beneficiaries, however, under the discretionary trust arising on such determination of the settlor's life interest, who were added as defendants upon the application of the plaintiff at the suggestion of the trustees, and who appeared at the trial separately from their co-defendants, were not allowed their costs out of the fund recovered by the plaintiff, on the ground that they were unnecessary, though not improper, parties.—MERRY *v.* POWNALL, *Ch.D. Kekewich, J.*, 487.

8. *Constructive trust—Trustee beneficiary for life—Improvements—Purchase of adjoining land under right of pre-emption—Addition to settled estate—Expenditure by tenant for life—Permanent improvements—Remaindermen—Recouping expenditure.*—Where a constructive trustee of property in which he was also beneficially interested as life tenant has expended money thereon in permanent improvements, he is *primâ facie* entitled to be recouped his expenditure to the extent of the improved value; and the fact that he is beneficially entitled as tenant for life under the constructive trust does not displace his right to recoupment.—ROWLEY *v.* GINNEVER, *Ch.D. Kekewich, J.*

9. *Executor—Appropriation of trust estate—Infant beneficiaries—No express power to appropriate.*—Executors and trustees can, even where there is no express power enabling them to do so, make an effectual appropriation of a testator's estate, if such appropriation be made *bonâ fide*, though it is safer for them to make the appropriation only with the sanction of the court.—NICKELS, RE, NICKELS *v.* NICKELS, *Ch.D. Stirling, J.*, 422.

10. *Executor—Devise of real estate upon trust to trustees, their heirs and assigns—Power of sale to the "trustees for the time being" under a will—Executors of surviving trustee—Conveyancing Act*, 1881, *s.* 30.—A testator devised his real estate to certain trustees, their heirs and assigns, upon certain trusts, and the will contained a power of sale of real estate exercisable "by the trustees for the time being" under the will.

Held, that the power of sale was exercisable by the executors of the last surviving trustee.—PIXTON AND TONG'S CONTRACT, RE, *Ch.D. Byrne, J.*, 187

11. *Factor*—Curator bonis—*Liability—Real or heritable security—Debenture—Municipal corporation rates—Harbour rates—Trusts (Scotland) Amendment Act*, 1884 (47 & 48 *Vict. c.* 63), *s.* 3, *sub-sections* 10, 12—*Judicial Factors Act*, 1849 (12 & 13 *Vict. c.* 51), *ss.* 4, 13.—The accountant of court, Scotland, who, as to this matter, fills a similar position to that of a Master in Chancery under the Judicial Trustee Rules, 1897, has no power to approve of an improper investment.

By section 3, sub-section 10, of the Trusts (Scotland) Amendment Act, 1884, trustees, including judicial factors and *curators bonis*, are authorised to lend trust money in loans on real or heritable security; and by sub-section 12, in loans on debentures secured on rates or taxes levied under statutory power by municipal corporations.

A *curator bonis* invested his ward's money on a bond of the Greenock Harbour Trustees, a corporation consisting of the magistrates, the council, and elected trustees. As security the trustees assigned to the *curator bonis* the "rates and duties and other revenues of the harbour," but no right of obtaining possession of the works on default of payment was given. The accounts of the *curator bonis* were audited by the accountant of court and passed without comment. The harbour trustees made default in payment of interest.

Held, (1) that the investment was not a real or heritable security; (2) that it was not a debenture created by a municipal corporation; (3) that, looking to the previous statement of accounts of the harbour trust, it was not a security a prudent trustee ought to have invested his ward's money in; and (4) that the annual audit of the accountant of the court did not exonerate the *curator bonis* from liability.—HUTTON *v.* ANNAN, *H.L.*

12. *Judicial trustee—Sole executor—Reversioner—Judicial Trustee Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 1, *sub-sections* 2 *and* 4—*Judicial Trustee Rules*, 1897, *rr.* 2, 4, *and* 5.—By the express terms of the Judicial Trustee Act, 1896, it is entirely in the discretion of the court whether a judicial trustee shall be appointed or not; in the absence of misconduct on the part of a sole executrix the court refused to appoint a judicial trustee on the application of the residuary legatee against the wish of the tenant for life and sole executrix, but remitted the summons to chambers to appoint an ordinary trustee under the Trustee Act, 1893, to act with the executrix, such trustee to be nominated by her.—RATCLIFF, RE, *Ch.D. Kekewich, J.*

See also Appointment, 3; Executor, 3; Lunacy, 4; Mortgage, 2; Practice, 39; Settled Land, 1, 3, 5, 7; Solicitor, 5, 8.

VACCINATION.—See Justices, 14.

VENDOR and PURCHASER:—

1. *Building scheme—Restrictive condition—Implied negative covenant—Injunction.*—The vendor sold by auction land in lots, and the contract described the lands as adapted for the erection of shops and business premises, and stipulated that the purchasers of certain specified lots should covenant with the vendors to erect on those lots shops and dwelling-houses of a given minimum value each. These specified lots, however, were not sold and the vendors afterwards began to erect a fire-house station on these unsold lots. A purchaser of one of the lots that were sold brought an action for an injunction against the vendors to restrain the erection of the fire-house station,

Held, that no negative stipulation ought to be implied that nothing but shops and dwelling-houses should be erected on the lots in question, and that consequently the application for an injunction failed.—HOLFORD *v.* ACTON LOCAL BOARD, *Ch.D. Stirling, J.*

2. *Completion—Agreement to accept "best title the vendors can give"—Deeds deposited with mortgagees—Vendor's duty to hand over—Expense of obtaining—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-section* 6.—The Conveyancing and Law of Property Act, 1881, s. 3, sub-section 6, concerns the expenses of "production and inspection" of documents, but does not affect the ordinary right of a purchaser on completion to have the title-deeds handed over to him.

A special contract that the purchaser is to accept the best title that the vendor can give does not take away this right, and the mere fact that obtaining the deeds for the purpose of handing them over on completion may cause the vendor trouble and expense is no answer to a requisition founded on this right.

Held, accordingly, that the vendors of a house under such a special contract were not in a position under such contract or otherwise to refuse compliance with a requisition that certain title-deeds in the possession of solicitors who had acted for the mortgagees of a former owner should be handed over to the purchaser on completion.—DUTHY AND JESSON'S CONTRACT, RE, *Ch.D. Romer, J.*, 300.

3. *Conditions of sale—Notice to rescind—Misrepresentation—Leasehold described as freehold—Effect of commencing litigation.*—Property was sold by auction under particulars of sale describing it as "freehold," but with an appended note and condition, in ambiguous terms, purporting to qualify the previous description by explaining that the title was "held on an underlease" which for certain reasons was probably void, and that "the purchaser would therefore probably acquire an absolute freehold title." Another condition provided that "if any objection or requisition not precluded by these conditions should be made and insisted on which the vendor shall be unable or (on the score of expense or otherwise) unwilling to remove or comply with, the vendor shall be at liberty, notwithstanding any intermediate negotiation in respect thereof or attempt to remove or comply with the same, by notice in writing to the purchaser . . . to rescind the sale, in which case the purchaser shall receive back his deposit without interest or costs." The abstract, delivered on the 5th of November, 1896, disclosed what, on the face of it, the purchaser contended was merely a title by way of underlease for the residue of a term of about thirty-seven years. Requisitions were put on the 11th of November to the effect that no freehold title had been shown, and that the purchaser had been misled by the misrepresentation in the particulars. After some negotiation and threats of litigation, the purchaser on the 30th of November issued a writ claiming rescission and the expenses of investigating the title. The vendor on the 3rd of December served on the purchaser a notice to rescind.

It appeared from the evidence that the alleged misrepresentation was established.

Held, that the vendor's notice to rescind was in time, and that the purchaser was only entitled to a return of the deposit without interest, and to costs of the action up to the date of the receipt by him of the vendor's notice to rescind; and that he must pay the vendor's costs of the action after that date.—ISAACS *v.* TOWELL, *Ch.D. Byrne, J.*

4. *Conditions of sale—Right to rescind—Validity of vendor's notice to rescind—Matters of title—Matters of conveyance—Waiver of right to rescind.*—A vendor who is unable to make a good title to the land sold because he cannot get in a small interest outstanding in a third person cannot be treated as having no title to the property. The rule in *Bowman* v. *Hyland*, 26 W. R. 877, 8 Ch. D. 588, does not, therefore, apply to such a case, and the vendor may exercise a power given to him by the conditions of sale to rescind the contract if the purchaser insists upon an objection or requisition which the vendor is unable or unwilling to comply with.

Matters of conveyance, as well as matters of title, are, for the purposes of such a condition, included in the words "any matter or thing relating or incidental to the sale."

A mere threat to take proceedings to enforce the contract, though made after the purchaser's requisitions have been sent in, does not necessarily amount to a waiver of the vendor's right to rescind.

Gardom v. *Lee*, 13 W. R. 719, 3 H. & C. 651, distinguished.—DEIGHTON AND HARRIS CONTRACT, RE, *C.A.*, 341.

5. *Contract—Person contracted with—Agent—Mis-*

representation—Specific performance.—In 1895 the defendants, who were trustees of a Congregational chapel, put up for sale by public auction a building, which had formerly been used as their chapel. The conditions of sale imposed no restrictions on the user of the building. After the sale C. made an offer for the building, but the defendants declined to accept it, on the ground that it was made on behalf of a committee of Roman Catholics, who intended to use the building as a Roman Catholic place of worship, and the defendants objected to sell for that purpose. The committee then told the plaintiff, who was the manager of a mineral water company, that if he could get the property they would buy it of him at £100 profit. The plaintiff's solicitors wrote to the defendants' agent, making an offer for the property "on behalf of our client, the manager of the E. Mineral Water Co." After some negotiations, a contract was signed by the defendants for sale of the building to the plaintiff at £1,025, a price less than C.'s offer. No direct statement was made that the plaintiff was buying for the company, but it was admitted that the defendants, during the negotiations, believed that he was, and that the plaintiff knew it. The plaintiff signed the contract as principal without protest from the defendants' agent. The defendants refused to complete on the ground that the plaintiff was buying, as agent, for the Roman Catholic committee, to whom he knew they would not sell, and had obtained the contract by misrepresentation.

Held, on the evidence, that the plaintiff was not buying as agent for the Roman Catholic committee, but for himself with a view to resell to them at a profit; that the misrepresentation as to the mineral water company was immaterial because the vendors did not care whether they sold to the company or the plaintiff, and as between them no consideration of the person with whom they were contracting entered as an element into the contract.

Smith v. *Wheatcroft* (9 Ch. Div. 223, 230) followed. —NASH *v.* DIX, *Ch.D. North, J.*

6. *Contract—Specific performance—Identity of parcels—Uncertainty—Statute of Frauds—Admissibility of extrinsic evidence.*—By agreement in writing P. agreed to sell and B. to purchase "twenty-four acres of land freehold, and all appurtenances thereto, at T., in the parish of D., in the county of S." In an action for specific performance of the contract the plaintiff proposed to call evidence to show that the land intended to be sold was the land of that acreage belonging to the plaintiff at the place named.

Held (reversing Byrne, J., 45 W. R. 498), that, on the authority of *Ogilvie* v. *Foljambe*, 3 Mer. 53, and *Shardlow* v. *Cotterell*, 30 W. R. 143, 20 Ch. D. 90, parol evidence was admissible to show what land formed the subject-matter of the contract.—PLANT *v.* BOURNE, *C.A.*, 59.

7. *Interest on purchase-money—Conditions of sale—"Default" of vendor—Delay caused by trifling technical defect in title.*—Where the conditions of sale provided that interest on the purchase-money should not be payable during delay caused by the vendor's "default," and delay resulted from a requisition made by the purchaser in respect of a very slight technical defect in the title, not known to the vendor, discoverable only by extraordinary care, and involving no real risk to a purchaser.

Held, that the existence of such a defect did not establish "default" on the vendor's part, and that interest was, notwithstanding, payable during the delay.

Decision of Romer, J. (*ante*, p. 373), affirmed.—WOODS AND LEWIS'S CONTRACT, RE, *C.A.*, 643.

8. *Mortgage—Sale by mortgagee under statutory power—Requisition by purchaser as to whether power exercisable—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 21), *ss.* 19, 20, 21 (2).—The protection conferred on a purchaser from a mortgagee selling under his statutory power of sale by section 21 (2) of the Conveyancing Act, 1881, is given only to a purchaser who has obtained a conveyance, and accrues only after a conveyance has been made. Consequently a purchaser is not precluded from requiring such a mortgagee-vendor to show that his power of sale is exercisable, and the vendor is bound to answer such a requisition.

Dicker v. *Angerstein*, 24 W. R. 844, 3 Ch. D. 600, distinguished.—LIFE INTERESTS CORPORATION *v.* HAND-IN-HAND LIFE INSURANCE SOCIETY, *Ch.D. Stirling, J.*, 668.

9. *Restrictive covenant—Conveyance of freehold—Restriction against user otherwise than as a private residence—Boarding-house.*—The use of a house as a boarding-house where pupils attending a school in the neighbourhood may be taken in as paying boarders is—though such user is in no way advertised—a breach of a covenant not to use the premises otherwise than as a private residence.—HOBSON *v.* TULLOCH, *Ch.D. Romer, J.*, 331.

10. *Sale by purchaser under original contract subject "to the same terms as to title, &c.," as in such original contract—Time fixed for completion—Interest.*—In May, 1897, B. contracted to sell to K. certain lands, the purchase to be completed on the 11th of October, and, failing completion on that date, interest to be paid by the purchaser at £5 per cent. on the balance of purchase-money then due.

In June, 1897, K. contracted to sell the same premises to S., subject "to the same terms as to title, &c.," as in the original contract. S. eventually refused to complete until January.

On a summons by K. asking for a declaration that the 11th of October was, by reference to the original contract, the time fixed for completion, and that the defendant might be ordered to pay interest from that date,

Held, that a clause of this kind which might possibly involve serious liability on the purchaser could not be read into the agreement of June, 1897, and that the contract was therefore an open one. But that, as interest was payable from the time when the purchaser could prudently have taken possession and the abstract was delivered on the 22nd of October, interest should run from the 1st of November, 1897.—KEEBLE FLETTON BRICK CO., RE, *Ch.D. Stirling, J.*

11. *Soil of highway—Conveyance of adjacent land—Presumption of highway passing* ad medium filium viae—*Street in town—Rent-charge issuing out of—Liability—Charitable Trusts Recovery Act*, 1891 (54 & 55 *Vict. c.* 17), *s.* 3.—The rule of construction—that where there is a conveyance of land (even although it is described by reference to a plan, and by colour, and by quantity), if it is said to be bounded by a public thoroughfare, half of the road passes in the absence of expressions or circumstances indicating a contrary intention—applies to conveyances of land adjacent to streets in towns.

Where the conveyance is of land belonging to the corporation of the town, the rights of the public over the highway are not a reason for presuming a contrary intention on the part of the corporation.

The rule applies, where the conveying party owns the soil beyond the *medium filium viae* (and, *semble*, where his ownership does not extend thereto), to pass whatever interest he has in the soil of the highway.

Dictum of Cockburn, C.J., in *Leigh* v. *Jack*, 28 W. R. 452, 5 Ex. D. 264, at p. 270, disapproved of. —WHITE'S CHARITIES, RE, CHARITY COMMISSIONERS *v.* LONDON CORPORATION, *Ch.D. Romer, J.*, 479.

12. *Specific performance—Contract—Agent—False representation as to principal.*—If, in negotiations for a contract, an agent make a false representation as to the name of his principal, knowing that if he disclosed the true name the other party would not enter into the contract, the court will not order specific performance of the contract.

A. signed a contract for the sale of a house to B. Before signing, he asked, "Are you buying for C. or his nominees?" B. answered "No." He was, in fact, buying for nominees of C., to whom he afterwards assigned his contract. He and they brought an action for specific performance.

Held, that the contract could not be specifically performed.—ARCHER *v.* STONE, *Ch.D. North, J.*

13. *Specific performance — Delay — Lien for deposit.*—In 1886 a vendor contracted in writing to sell free from incumbrances a contingent reversionary interest in personalty to a purchaser who paid a deposit on the purchase-money. The reversion proved to be incumbered, and the purchaser insisted on a conveyance free from incumbrances but was told that the incumbrances would be paid off, which was never done. The vendor afterwards created further charges on the reversionary interest to persons who had notice of the contract, and was adjudicated a bankrupt in 1888. In the same year the bankruptcy was annulled, upon the acceptance of a composition by his creditors, and under the scheme of arrangement the whole of his property was sold by his trustee. In 1891 the purchaser became bankrupt, having previously assigned his interest under the contract to P., who subsequently assigned the same to B. No attempt having been made to enforce the contract, the reversion fell into possession in 1895, and B. shortly afterwards claimed specific performance, or in the alternative a lien for the deposit paid by the purchaser,

Held, (1) that the delay was a bar to any claim for specific performance; (2) that the purchaser was a secured creditor of the vendor in respect of the deposit, and that the purchaser must under the circumstances be treated as having elected to rely on his security; and as no Statute of Limitations applied B. was entitled to enforce his lien.—LEVY *v.* STOGDON, *Ch.D. Stirling, J.*

14. *Specific performance—Mistake—Condition precedent to complete contract—Repudiation by vendor—Wilful default — Interest — Form of order.* — By certain heads of agreement it was agreed that thirty-six acres of land—to be measured, as the boundary on one side was unmarked—should be sold for £3,600, the purchase-money to bear interest at 4 per cent. from a fixed day until completion. A proviso was also inserted—"subject to approval of conditions and form of agreement by purchaser's solicitor." The vendors, by a mistake on their part, required the purchaser to take forty-two acres at £100 per acre. The purchaser refused, and brought an action to enforce specific performance of the contract for the sale of thirty-six acres, which contract the vendors repudiated.

Held, that the mistake did not go to the root of the contract; that the proviso was not a condition precedent to a complete contract; and that the purchaser was therefore entitled to the specific performance he asked.

Held, also, that the repudiation of the contract by the vendors did not amount to "wilful default" on their part so as to deprive them of interest on the purchase-money. — NORTH *v.* PERCIVAL, *Ch.D. Kekewich, J.*, 552.

15. *Title—Notice to rescind—Validity of—Rescission.*—A contract was entered into at an auction on the 7th of December, 1896, subject to particulars and conditions of sale.

The property passed under the will of M. A. R. in 1856 to J. J. W. and another, as tenants in common, in equal moieties, and the difficulty arose as to the moiety which passed to J. J. W. He by his will gave his property to trustees upon trust for sale and payment of debts, &c., and then to lay aside £12,000, which was to be invested for the benefit of his daughters and their children, and subject thereto to hold the residue for his son.

J. J. W. died in 1876, and in 1880 two deeds were executed by which part of the property was mortgaged to the amount of £12,000 to two persons who were not trustees of the will. Later one of these persons was appointed a trustee of the will. These two persons purported to sell the property. Objection was taken on the requisitions that they could not give a good title, and notice to rescind was given.

On a summons taken out by the purchaser claiming rescission,

Held, that the defect could only be removed (1) by procuring the trustees of the will to be parties; (2) by obtaining the sanction of the court; and (3) by showing that the £12,000 had been properly invested; that, as to (1) and (2), neither on the day of the notice to rescind, nor on that fixed for completion, were the vendors in a position to remove the defect; that, as to (3), there was no evidence that the £12,000 could be so invested; and that, in the absence of any such evidence, the notice to rescind must be deemed effectual.—COOKE AND HOLLAND'S CONTRACT, RE, *Ch.D. Stirling, J.*

See also Local Government, 37; Married Woman, 8.

WATER.—See Local Government, 28; Poor Law, 10, 10A.

WATERMENS ACT, 1859:—

Thames navigation—Lightermen and watermen—Steamboat employed in towing barges — Bye-law requiring licensed waterman on steamboat—Validity of—Watermen and Lightermen Amendment Act, 1859 (22 & 23 *Vict. c. cxxxiii.*), *s.* 80.—Bye-law 60 of the bye-laws made by the Company of Watermen and Lightermen of the River Thames provided that "every steamboat navigated on the river within the limits of the Act, in the towing of barges, lighters, vessels, and craft, shall have one licensed waterman on board such steamboat, for the purpose of assisting in the management and navigation thereof"; and the bye-law was made under section 80 of the Watermen and Lightermen Amendment Act, 1859, which gave power to make bye-laws "for the government of the company, and for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of the Act and the several powers and authorities thereby vested in the company."

Held, that the bye-law was not one that could be made under section 80, as it was not a bye-law "for the government of the company," or "for

the government and regulation of lightermen and watermen," or "for carrying into effect the purposes of the Act and the powers vested in the company"; that the bye-law was therefore *ultra vires* and bad, and that it was bad also as being unreasonable.—KENNAIRD *v.* CORY, *Q.B.D.*

WEIGHTS and MEASURES:—

Coal—Sale—Ticket—"Correct weight"—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 22, *sub-sections* 1 *and* 2.—Section 22 of the Weights and Measures Act, 1889, provides that, where coal exceeding two-hundredweight is conveyed for delivery on sale in a vehicle not belonging to the purchaser, the "correct weight" of the vehicle and of the coal shall be inserted in the ticket which is to be given by the seller to the purchaser.

Held, that the "correct weight" means the correct weight as previously ascertained at the place from which the coal is brought, and not the weight at the time of the delivery of the coal.—KNOWLES *v.* SINCLAIR, *Q.B.D.*, 188.

WILL:—

1. *Absolute gift—Gift over of what is not disposed of—Construction—Repugnancy.*—Testator gave his real and personal estate to his wife for her absolute use, "so that during her lifetime, for the purpose of her maintenance and support, she shall have the fullest power to sell and dispose of my said estate absolutely. After her death, as to such parts of my real and personal estate as she shall not have sold or disposed of as aforesaid, subject to the payment of my wife's funeral expenses," he gave the same to trustees upon trusts mentioned. The widow entered into possession of the estate, of which there was a considerable part undisposed of at her death. She left a will disposing of her property.

Held, that the widow took an absolute interest, and that the words following were not sufficient to cut it down to a life interest; and that the gift over of what was undisposed of was void.

In re Pounder, 35 W. R. 226, 56 L. J. Ch. 113, distinguished.—JONES, RE, RICHARDS *v.* JONES, *Ch.D. Byrne, J.*, 313.

2. *Absolute gift of share of personalty—Share settled by codicil "instead of" gift by will—No revocation.*—A father by will gave his personal estate to his two daughters, S. and H., equally. By a codicil he directed that "instead of such bequests in the manner expressed in my said will to such daughter absolutely," his executors were to hold the income of the proceeds of his personal estate, after sale and conversion, on trust to pay one moiety to each daughter for life, and on their respective deaths to pay the respective moieties of the fund to their respective children as they should by deed or will appoint, and, in default, to such children equally. There was no gift over in the event of a daughter dying without issue. H. died without ever having had any issue, leaving a will by which she disposed of all her real and personal property.

Held, that there was no intestacy in the event which had happened as to the share in which H. took a life interest by the codicil, as there had been no revocation of the absolute gift in the will.

Doe d. Murch v. *Marchant*, 6 Man. & G. 813, discussed.—WILCOCK, RE, KAY *v.* DEWHIRST, *Ch.D. Romer, J.*, 153.

3. *Advancement clause—Power*—Bonâ fide *exercise of.*—A testator bequeathed his real and personal estate to trustees upon trust to pay the income to his children in equal shares. The will contained a proviso authorizing the trustees to apply a certain sum of each child's "presumptive share" towards the "advancement in life" of such child, the trustees to be sole judges of the advisability of such payment, and of what the term "advancement in life" might signify. After the share of one of the children, a married daughter, had become vested, the trustees advanced £250 to her at her request. This sum was intended, as the trustees knew, to be used in discharging a debt owed by the daughter's husband to one of the trustees.

Held, that the power to advance had not been exercised *bonâ fide*, and was a breach of trust.—MOLYNEUX *v.* FLETCHER, *Q.B.D.*, 576.

4. *Apportionment—Income or capital—Construction of will—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *ss.* 5, 7.—A bequest of shares in a limited company, coupled with a declaration that the shares so bequeathed shall carry the dividend accruing thereon at the testator's death, operates as an exclusion of the Apportionment Act.

A testator bequeathed certain shares in a limited company to trustees upon trust to sell, with a power of postponement, and stand possessed of the proceeds and the shares remaining unsold upon trust to receive the annual produce thereof and hold the same in trust for the testator's children and remoter issue in succession, and declared that every share bequeathed by his will should carry the dividend accruing thereon at his death. The dividends were payable annually.

Held, that the trustees took the whole of the dividend for the year in which the testator died without apportionment, and that such dividend was payable as income to the tenants for life under the will.—LYSAGHT *v.* LYSAGHT, *C.A.*

5. *Apportionment—Gift of "the whole of the income" for life—Express stipulation against apportionment—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 5, 7.—A testator, who was in receipt of the balance of the income from shares in a public trading company which were comprised in a deed of separation, after his wife had been paid an annual sum out of such income, by his will made in 1895 directed that "the whole of the income derived under the said indenture" should after his decease be paid to his wife for life, and gave the residue of his estate to trustees upon trust for other beneficiaries. Upon an originating summons taken out by the trustees of the will,

Held, that the gift to the wife of "the whole of the income derived under the said indenture" amounted to an express stipulation that no apportionment should take place, within the meaning of section 7 of the Apportionment Act, 1870, and that she was entitled to the whole income without any apportionment.—MEREDITH, RE, STONE *v.* MEREDITH, *Ch.D. North, J.*

6. *Charitable gift—Administration of estate—Mixed fund—Pure and impure personalty—Discretion of trustees—Mortmain*—9 *Geo.* 2, *c.* 36.—P. by his will directed his trustees to apply one-tenth of his estate over and above £110,000 "to such charitable institutions and objects as my trustees may determine."

Held (affirming North, J.), that the gift extended not only to the pure personal estate, but also to the impure personal estate and to the proceeds of sale of the real estate.

Lewis v. *Allenby*, 18 W. R. 1127, L. R. 10 Eq. 668, approved.

The principle on which such gifts are construed by the court is correctly stated in *Mayor and*

Aldermen of Faversham v. *Ryder*, 2 W. R. 573, 5 De G. M. & G. 350; *University of London* v. *Yarrow*, 5 W. R. 543, 1 De G. & J. 72; and *Carter* v. *Green*, 5 W. R. 856, 3 K. & J. 591.—PIERCY, RE, WHITWHAM *v.* PIERCY, *C.A.*, 503.

7. *Charitable gift—Conditional gift—Perpetuity.*—G., by will, gave £10,000 to his trustees upon trust so soon as any land should at any time be given or obtained for the purpose, to employ the same in erecting almshouses for the poor of the parish of P., and in making weekly and other allowances to the inmates, and he gave all the residue of his personal estate to his trustees upon trust, so soon as any land should at any time be given or obtained for the purpose, to erect and maintain thereon an orphanage.

Held, that both gifts were void for remoteness, and not well given to charity.—GYDE, RE, WARD *v.* LITTLE, *Ch.D. North, J.*

8. *Class gift—Mistake as to number—Practice—Costs—Ascertainment of persons entitled to legacy—Construction of will—Costs out of residue—Rules of Supreme Court, ord.* 65, *r.* 14 (*b*).—A testator bequeathed the residue of his estate to his trustees, and directed that out of the proceeds they should pay his funeral and testamentary expenses, debts, and legacies. By a codicil he bequeathed £4,000 to his trustees, on trust to pay the annual income thereof to his son R., who was in his uncontrolled discretion to apply the same for the benefit of the testator's son W. and his two children by his late wife. And, after the death of W., the trustees were to stand possessed of the capital and income of the £4,000 in trust for "the said two children of W. in equal shares as tenants in common, to be paid to them on their respectively attaining the age of twenty-one years or marrying under that age." At the date of the codicil there were living four children of W. by his late wife. In an action by the trustees after W.'s death to determine which of his four children were entitled to the £4,000,

Held, that the four children were entitled to the £4,000 in equal shares:

Held, also, that the costs of the action ought to be paid out of the residue of the estate, and not out of the £4,000, and that, if rule 14 (*b*) of order 65, applied, a direction should be given for the payment of the costs out of the residue.—GROOM, RE, BOOTY *v.* GROOM, *Ch.D. North, J.*

9. *Construction—Cross remainders implied—Undisposed-of income—Survivor.*—A gift of property to take effect "After the death of my son C. and my daughters E. and S. A." as to one-third thereof to the children of C., another third to the children of E., and the remaining third to the children of S. A. must not be construed to mean upon their respective deaths or after the decease of each of them, according to the rule referred to in *In re Hutchinson's Trusts*, 21 Ch. D. 811, when the application of the rule (having regard to the context of the will) might have the effect of cutting down by one-third a clear gift of the income in favour of tenants in common for life manifest in the earlier part of the will.

Upon the death of a tenant for life of a share in income before the period of distribution, the accumulations of income of such share follow the destination of the *corpus*, provided the time prescribed by statute for accumulations of income is not exceeded.

A testator, after making certain provisions for his widow and children during their respective lives out of the income of his estate, continued his will as follows: "In case of the death of my son C. leaving children, then one-third . . . of such annual income to such children as hereinafter mentioned . . . and upon the death of my son C. and my said daughters E. and S. A." he gave one-third part of his property to the children of C. in equal shares, and as to the two remaining one-third parts respectively to the children of E. and S. A. respectively in equal shares, "Provided nevertheless that in case of the death of any of my said children without leaving lawful issue the share . . . so given . . . to his or her issue shall go and be divided by and between the issue of the survivor or survivors of my said children in the same manner and proportions, and under the same trusts as hereinbefore given and bequeathed *per stirpes*." E. died in 1879 leaving issue. The widow died in 1887. C. died in 1893 without issue.

Held, (1) that, "upon the death of my said son C. and my said daughters E. and S. A." must be construed to mean upon the death of the survivor of them; and (2) that the *corpus* was distributable as to one-third among the children of E. and as to two-thirds among the children of S. A., and, distinguishing *In re Bowman*, *Whytehead* v. *Boulton*, 41 Ch. D. 525, that the word "survivor" must be read in its natural sense.—RUBBINS, GILL *v.* WORRALL, *Ch.D. Stirling, J.*

10. *Construction—Erroneous recital of indebtedness—Legacy "in addition to sums owing."*—A testatrix, who was sole devisee and legatee of her husband, bequeathed to her grandniece "the sum of £300 in addition to the sums owing to her from my late husband's estate." In fact there were no "sums owing" by the husband other than two sums represented by an I O U and a promissory note, which, as the testatrix knew, he had given to the grandniece without consideration.

Held, that having regard to the fact that the testatrix was the universal legatee of her husband, the words of her will amounted to an additional bequest of those two sums.

Construction of wills containing an erroneous recital of indebtedness discussed.—ROWE, RE, PIKE *v.* HAMLYN, *C.A.*, 357.

11. *Construction—Estate* pur autre vie—*Special occupant.*—A lessee of lands which had been demised to him, his heirs, executors, administrators, and assigns for lives and thirty-one years concurrently, by his will devised the same to trustees in trust for A. B. without any words of limitation in relation to either the legal or the equitable interest. A. B. died intestate. One of the lives in the lease was still in existence, but the thirty-one years had expired.

Held, that the heir-at-law and not the personal representative of A. B. was entitled to the estate *pur autre vie.*—KING *v.* KING, *M.R.* (*Ir.*).

12. *Construction—Estate tail—Fee simple expectant on—Rule in* Shelley's case.—The testator, W. Harris, by his will devised lands to trustees upon trust to allow his child to have the profits for her sole use and benefit for her life, and after her death to the use of the heirs of her body, "such freehold lands . . . and premises to be legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever."

W. Harris died in 1815 leaving one child, Mary, who in 1819 married W. Hartley, and by him had one son, W. H. H., who died in 1894 intestate without any heirs of his body.

The plaintiffs are the heirs of W. Harris and Mary H., and the defendant pleaded possession.

Held, that the fee simple expectant upon the estate tail given to Mary was disposed of by the will of W. Harris to W. H. H., whose heirs the plaintiffs were not.

Further, that W. H. H. did not take as heir, but as purchaser, for the rule in *Shelley's case* would not apply and vest his reversion in Mary H., because the devise was an executory devise, and not a remainder, for it was to take effect during the continuance of an estate tail, and also the beneficiaries under the devise were not the heirs of the body at large, but designated persons of that class.—FOXWELL *v.* VAN GRUTTEN (No. 2), *Q.B.D.*

13. *Construction—Perpetuity—Gift of income to the children of A.—Gift over of capital to the children's children—Period of ascertaining class.*—Under a bequest to the children of a person *simpliciter*, only those children in existence at the testator's death will take. Accordingly, where a testator directs the income of a fund to be paid to his sister's children during their lives, and after their death gives the capital of the fund equally between their children, the class of children to take the gift of income will be ascertained at the testator's death, and will consist of his sister's children then in existence; and therefore the gift over to their children will not be too remote.

In re Wenmoth's Estate, 36 W. R. 409, 37 Ch. D. 266, distinguished.—POWELL, RE, CROSLAND *v.* HOLLIDAY, *Ch.D. Kekewich, J.*, 231.

14. *Contingent remainders—Infants—Intermediate rents—Equitable limitation.*—A. by his will, dated in 1876, devised certain real property to the use of trustees in fee simple upon trust for B. for life, and after her death, in the events which had happened, for her children who should attain twenty-one, or, if daughters, should marry, as tenants in common. A. died in 1881. B. died in 1885, leaving six children, infants and unmarried. The eldest child, E., attained twenty-one in March, 1897; none of the other children had attained twenty-one or married.

Held, that E. was entitled, on attaining twenty-one, to the entirety of the rents until the next child attained a vested interest, and so on.—AVERILL, RE, SALSBURY *v.* BUCKLE, *Ch.D. Romer, J.*, 460.

15. *Election—Heir-at-law—Devise of real estate—Subsequent conveyance to testator—Revocation of devise by operation of law.*—By a will, made in 1832, a testator, who died in 1835, devised certain freehold property which at the date of his will he had contracted to purchase but the purchase of which had not been completed, and all other his messuages and real estate whatsoever and wheresoever, to his three sons in manner therein mentioned; and directed that if the purchase had not been completed in his lifetime his executrix should complete same out of his personal estate, and cause such property to be assured and limited to the uses therein expressed concerning the same.

In 1834 the freehold property above mentioned was conveyed to the testator in fee to uses to bar dower.

Held, that the devise of the freehold property was revoked by the form of the conveyance of 1834.

Held also, that the heir-at-law of the testator (his eldest son) was not bound to elect between taking such property as heir and taking the benefits given to him by the will.

Rawlins v. *Burgis*, 2 V. & B. 382, and *Plowden* v. *Hyde*, 2 Sim. N. S. 171, 2 De G. M. & G. 687, followed.

Decision of Stirling, J., affirmed.—JACOB *v.* JACOB, *C.A.*

16. *Hotchpot clause—Reversionary interest.*—Where a testator directs by a hotchpot clause that a fund in which he himself has an interest is to be taken by a residuary legatee as part of his share of the residue under the will, the hotchpot clause operates as a gift to the legatee of the testator's interest in the fund.

A father on his son's marriage covenanted with the trustees of the marriage settlement that his executors should within six months after his death pay a sum to be held in trust for the son for life, with remainder to his wife for life, and after the death of the survivor for the issue of the marriage, and in default of issue in trust for himself absolutely. By his will he provided that all sums which he had given, or had covenanted to give, to a child on marriage should be taken in or towards satisfaction of that child's share under his will, and be brought into hotchpot accordingly. He left the residue of his estate to his son and daughter in equal shares. After his death the executors divided the residue equally, treating the sum settled as part of the son's share. The son died without issue.

Held, that subject to the widow's life interest the son's executors were entitled to the whole of the settled fund.

Decision of the Court of Appeal in *In re Cosier, Humphreys* v. *Gadsden*, [1897] 1 Ch. 335, affirmed.—WHEELER *v.* HUMPHREYS, *H.L.*

17. *Lease—"Lessees or holders of the present leases."*—A testator by his will left his real estate to the lessees or holders of the present leases in the quantities, dimensions, and measurements set forth in their respective leases."

Held that the words should not be confined to the original lessees, but included the assignees of the original leases.—KING *v.* RYMILL, *P.C.*

18. *Leaseholds—Legal tenant for life—Remaindermen—Liability for rent and repairs.*—The legal tenant for life of a leasehold house, which was bequeathed directly (without the intervention of trustees) to one for life and then over, is not, in the absence of further provision, liable to pay the rent reserved by or perform the covenants contained in the lease by which the house was demised to the testator.

In re Courtier, 35 W. R. 85, 34 Ch. D. 136; *In re Baring*, 41 W. R. 87, [1893] 1 Ch. 61; and *In re Redding*, 45 W. R. 457, [1897] 1 Ch. 876, discussed.—TOMLINSON, RE, TOMLINSON *v.* ANDREW, *Ch.D. Kekewich, J.*, 299.

19. *Legacy, pecuniary—Charge on real estate if personalty not sufficient—Subsequent specific devise—Legal presumption rebutted.*—A testator bequeathed pecuniary legacies to be charged in the first place upon his personalty and if the same should be insufficient to be charged upon his real estate. He then specifically devised certain lands. There was no residuary devise. The lands specifically devised formed the whole of the testator's realty. The personalty being insufficient, the pecuniary legatees claimed a charge upon the specifically-devised lands.

Held, that the testator had shown an intention to charge the specifically-devised lands with the pecuniary legacies, and that the presumption of law to the contrary was therefore rebutted.—BANK OF IRELAND *v.* MCCARTHY, *H.L.*

20. *Legacy, pecuniary—Residue.*—A testator bequeathed pecuniary legacies to four persons, and

left the residue of his property to one of the four and another person and their children in equal shares. He added certain directions with reference to the legacies as to investment, accumulation, and survivorship.

Held, that the word "legacies" could not be extended so as to include the residue, and that, therefore, the directions as to accumulation, investment, and survivorship applied only to the pecuniary legacies.—BOLON *v.* GILLILAND, *V.C.* (*Ir.*).

21. *Legacy in trust for A. for life, and afterwards, if he shall have two children who attain twenty-one, as to a moiety for his executors or administrators—Whether A. absolutely entitled to such moiety on two children attaining that age.*—Where a testator bequeathed a legacy to trustees upon trust to pay the income to A. for life, and after his decease if A. should have three or more children who should attain twenty-one, for his executors or administrators; and if he should have two such children, as to a moiety for his executors or administrators, and as to the other moiety for the sister of A. and her children: it was

Held, that A. having had two children he was absolutely entitled, on their attaining twenty-one years, to a moiety of the fund.—BOGLE *v.* YORSTOUN, *Ch.D. North, J.*

22. *Portions—Uncertainty—Amount to be fixed by trustees.*—Testator directed that the remainder of his farm and goods should be divided equally among his two sons subject to the payment of a portion to each of his five daughters, to be determined by his wife and executors according to the value of their portions of the farm and the services the daughters might have rendered to the family.

Held, that the gift of portions to the daughters was not void for uncertainty.—CONN *v.* BURNS, *V.C.* (*Ir.*).

23. *Power of appointment — Exercise of general power—Wills Act, s.* 27.—Section 27 of the Wills Act, while making a general gift of property operate as an execution of a power, is confined to property already in existence and does not operate to create the fund that is to be the object of the power of appointment.—WALLINGER'S ESTATE, RE, *C.A.* (*Ir.*).

24. *Specific bequest—"Other articles of household or domestic use and ornament"—Words* ejusdem generis—*Cultivation and use for ornamentation.*—A testator by his will bequeathed "All my household furniture, plate, linen, china, glass, printed books, musical instruments, wines, liquors, horses, carriages, and other articles of household or domestic use or ornament" to his widow; he gave the residue of his property to trustees upon trust for sale and conversion, and to hold the proceeds of sale upon trust to provide an annuity for his widow, and subject to such annuity to divide the same among certain children of his deceased sisters. The testator died possessed of a large and valuable collection of orchids, which were kept outside the curtilage of his dwelling-house. It was proved that from time to time some of the plants were brought into the dwelling-house for ornament, and such plants were from time to time replaced by others. The orchids were sold for £3,271.

Held, that an inquiry must be directed as to what plants were from time to time used for ornament, and that the testator's widow was entitled to the proceeds of the sale of such plants.—OWEN, RE, PEAT *v.* OWEN, *Ch.D. Stirling, J.*

25. *Real estate—Devise—Rule in* Shelley's case—*Heirs taking by descent or purchase—Equitable or legal estate—Execution of disentailing deed by person afterwards found lunatic by inquisition.*—A testator devised real estate to trustees in trust to receive the rents and profits to and for the use and benefit of such of his child or children as should be living at the time of his death, and to pay and apply such rents and profits, or so much thereof as the trustees should deem right and proper, in and about the maintenance and education of such child or children until majority or marriage, and in trust to permit such child or children, as they should severally attain the age of twenty-one or be married, to receive and take the rents and profits, if more than one, in equal shares and proportions, for her, his, and their own use and benefit, and for the term of her, his, and their life or lives; and if he left only one child, then to permit and suffer such one child to receive the rents and profits for her sole use and benefit for the term of her life. The testator declared that his will was that, from and after the death of such child or children, the trustees should stand seised of the lands devised to them in trust unto and to the use of the heirs of the body and bodies of such child or children, if more than one, to be equally divided among them, such lands to be legally conveyed and assured unto such heirs of any child or children, if more than one, to be equally divided among them, such lands be legally conveyed and assured unto such heirs of any child or children in equal shares, as they should severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever. And the ultimate gift over was introduced in these terms: "And if it shall happen that I shall depart this life leaving no child or children, or issue of any child or children as I shall leave, and the issue of such child or children shall die before he, she, or they shall attain the age of twenty-one years or be married"; then over.

The testator died in 1815, leaving an only child, a daughter, who married and had an only child, a son, who survived her.

Held, that the legal estate remained in the trustees, and that the life estate of the testator's daughter, as well as the estate limited to the heirs of her body, were both equitable estates; that there was nothing in the context to indicate that the words "heirs of the body" were used in any sense different from their ordinary legal meaning of a line of descent; and that consequently the rule in *Shelley's case* applied, and the testator's daughter took an estate tail.

Harton v. *Harton*, 7 T. R. 652, approved.

The rule in *Shelley's case* considered.

A deed executed by a married woman, who was certified at the time to be of competent understanding, will not be invalidated because a jury some years afterwards find that her insanity dated from a time prior to the execution.—VAN GRUTTEN *v.* FOXWELL, *H.L.*, 426.

26. *Signature—Position of signature*—15 *Vict. c.* 24.—Though certain pages of a testamentary document are materially subsequent to the signatures of the testator and witnesses, it may be held that the other pages of the document are substantially a part of the will and that they can be construed for purposes of probate as anterior to the signatures. —GILBERT, IN GOODS OF, *P.D. & Ad.D.*

See also Appointment, 1; Executor, 1, 4, 5; Landlord and Tenant, 8; Probate, 20-28; Solicitor, 5.

[THE END.]

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